No. ______

In the
Supreme Court of the United States

DOUGLAS COUNTY SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Douglas County School District created a program that provides parents of qualifying students with monetary scholarships, which are then used to offset tuition at participating private schools, some of which are religiously affiliated. Under *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), this neutral and generally available aid program involving genuine and independent private choice is clearly permissible under the federal Constitution. The Supreme Court of Colorado nevertheless struck down the program, with a dispositive plurality doing so on the ground that a provision of the Colorado state constitution—a notorious "Blaine Amendment" enacted in 1876 amidst anti-Catholic fervor—broadly prohibits the State from "mak[ing] any appropriation, or pay[ing] from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose."

The question presented is: Can Colorado's Blaine Amendment, which the unrebutted record plainly demonstrates was born of religious bigotry, be used to force state and local governments to discriminate against religious institutions without violating the Religion Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners are the Douglas County School District and the Douglas County School Board.

Respondents are Taxpayers for Public Education; Cindra S. Barnard; Mason S. Barnard; James LaRue; Suzanne T. LaRue; Interfaith Alliance of Colorado; Rabbi Joel R. Schwartzman; Rev. Malcolm Himschoot; Kevin Leung; Christian Moreau; Maritza Carrera; and Susan McMahon.

Other parties in the proceedings below were defendant-appellees Colorado State Board of Education and Colorado Department of Education, and intervenor-defendant-appellees Florence and Derrick Doyle, on their own behalf and as next friends of their children, A.D. and D.D.; Diana and Mark Oakley, on their own behalf and as next friends of their child, N.O.; and Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, M.A.

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PETITION FOR WRIT OF CERTIORARI

In 2011, petitioner Douglas County School District, in an effort to provide families with additional educational options, created a pilot scholarship program that allowed qualifying children to attend private schools. The program provided scholarship money to parents, who could use the funds at either secular or religious private schools. Participation in the program—by families and by private schools—was entirely voluntary. The program was designed to provide a wealth of opportunities for Douglas County students to attend schools that could meet their individualized needs, while improving the quality of the public schools by empowering parents with competing alternatives.

Although the program was modeled on the school choice program deemed neutral and constitutional by this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the program was soon challenged by a group of taxpayers. In implicit recognition that the constitutionality and neutrality of such programs as a federal matter was settled in *Zelman*, plaintiffs focused their challenge on state constitutional provisions, including as relevant here, Article IX, §7 of the Colorado Constitution, which prohibits funding "in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school … controlled by any church or sectarian denomination whatsoever." Plaintiffs argued that despite the Scholarship Program's neutrality, it violated §7 because some of the private schools participating in it are religiously affiliated.

The history of §7 is sordid. In 1875, at the insistence of Representative James Blaine, Congress attempted to amend the federal Constitution to flatly forbid the states from providing any funding to "sectarian" schools. As this Court has noted, "sectarian" did not mean "religious" when this provision was introduced; "sectarian" was a not-so-subtle euphemism for Catholicism at a time when public institutions readily embraced Protestantism, and many public officials practiced a brand of nativist, anti-Catholic politics. Although the federal Blaine Amendment failed, similar provisions entered state constitutions across the continent. Section 7 is a quintessential Blaine Amendment, enacted nearly contemporaneously with the federal Blaine Amendment debates, by a convention infected with its own Colorado-specific variant of anti-Catholic animus.

Notwithstanding this shameful pedigree and the obvious alternative of interpreting §7 as coextensive with the federal Constitution, the Colorado Supreme Court struck down the program, with a dispositive plurality holding that §7 precluded the District from including religious schools in its neutral program of school choice. Three Justices dissented and claimed that the plurality's expansive reading of §7 put that provision on a collision course with the federal Constitution.

This Court should grant certiorari to resolve the exceptionally important question whether §7, which was plainly the product of animus toward a particular religious group, can be used to force local and state governments to discriminate against religious institutions. This Court's precedents make clear that the government cannot disadvantage unpopular groups on the basis of animus. If §7 were enacted by a governmental body infected with blatant and undisguised animus today, its unconstitutionality would be beyond serious debate. The mere passage of time since §7's enactment cannot launder the blatantly anti-Catholic animus that produced §7, especially when it is deployed to compel the District to discriminate against religious schools today.

Even putting aside §7's disreputable origin, however, the Constitution does not permit the use of §7 to require a government to discriminate based on religion. *Zelman* not only settled the federal constitutional question concerning school choice, but it did so precisely because such programs are neutral and aid flows to schools—religious and non-religious—only by virtue of the intervening choices of parents. Forcing school districts to deviate from that neutrality is nothing less than unconstitutional discrimination against religion. While this Court held in *Locke v. Davey*, 540 U.S. 712 (2004), that state law can deny funding for university devotional theology degrees without violating the Constitution, this Court has never held that discriminatorily prohibiting *all* otherwise neutral and generally available aid on the basis of religion is consistent with the Constitution. The lower courts are divided on that question and on how to interpret *Locke*.

The issue presented here could hardly be more pressing. The Colorado Supreme Court has required petitioners to exclude religious schools in order to save a program that is neutral and constitutional under the federal Constitution. Petitioners believe that such compelled religious discrimination—forcing them to abandon their school program entirely or to deviate from neutrality and discriminate against religion—violates the federal Constitution. And petitioners are joined by both the State and the affected parents in seeking this Court's review. Before an 1876 provision, "born of bigotry," *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality), is used to compel discrimination against religion in 2015, this Court should intervene to determine whether that result can be squared with the First and Fourteenth Amendments.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado (App.1-58) is reported at 351 P.3d 461. The opinion of the Colorado Court of Appeals (App.59-153) is reported at 356 P.3d 833. The opinion of the District Court of Denver County (App.154-244) is unreported.

JURISDICTION

The Supreme Court of Colorado issued its opinion on June 29, 2015. On September 15, 2015, Justice Sotomayor extended the time for filing a certiorari petition to October 28, 2015. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution and Article IX, §7 of the Colorado Constitution are reproduced at App.245-48.

STATEMENT OF THE CASE

A. The Federal Blaine Amendment and Colorado's Blaine Amendment

From the Nation's founding until the mid-nineteenth century, Protestantism enjoyed unrivaled dominance over the nation's religious and civic landscape. "Many people viewed Protestantism as inseparable from the American republican idea," Stephen Macedo, *Diversity and Distrust: Civic Education in a Multi-cultural Democracy* 57 (2000), even as synonymous with "Americanism," John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297 (2001) (quotation marks omitted).

Protestant hegemony was particularly evident in American education. The first publicly funded school systems—the common schools—served as important tools for inculcating civic Protestant values in their students. Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 72 (2002). These public schools' curricula "evidenced a 'pan-Protestant compromise, a vague and inclusive Protestantism' designed to tranquilize conflict among Protestant denominations." Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 503 (2003) (quoting Jeffries & Ryan, *supra*, at 299). They "had Bible readings, prayers, and hymns, but simultaneously refused to allow more particularized kinds of religious instruction." Christopher C. Lund, *The New Victims of the Old Anti-Catholicism*, 44 Conn. L. Rev. 1001, 1006 (2012). By the mid-nineteenth century, "[t]his became known as 'nonsectarianism,'" which "satisfied Protestants of all stripes." *Id.*

But there was no room for Catholicism in this homogenized form of "nonsectarian" Protestantism. Many Protestant Americans viewed their new nation as a rejection of the customs and traditions of the Old World. *See* Macedo, *supra*, at 59-61. Catholicism was regarded as part of that discarded history, and the Catholic Church a corrupt and fearful foreign power. *See* Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 First Amend. L. Rev. 46, 63 (2003); Philip C. Hamburger, *Separation of Church and State*, 232-36, 436 n.112 (2002).

The wave of Catholic immigration beginning in the mid-nineteenth century brought these prejudices to the fore. *See* Hamburger, *supra*, at 201-02. Protestants saw the Catholic refusal to participate in "nonsectarian" public school practices like Bible reading, hymn singing, and prayer as a refusal to assimilate into American civic life. *See id.* at 211; Charles L. Glenn, *The American Model of State and School* 154-60 (2012). Catholics in turn established their own parochial schools and tried to break the monopoly on state funding for Protestant education by lobbying for a share of common school funds. *See* Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 42 (1993). Although initially rebuffed, in some cities, Catholics were gradually able to gain access to funding for parochial schools or excise Protestant practices from public schools. *Id.* at 44-47.

These efforts were met with a decidedly prejudiced and nativist response reflecting the broader anti-Catholic brand of politics that had emerged in response to swelling Catholic numbers. *See, e.g.*, Hamburger, *supra*, at 201-34; Jeffries & Ryan, *supra*, at 301. In 1875, President Grant delivered an address denouncing the forces of "superstition" and calling for citizens to "resolve that not one dollar … be appropriated to the support of any sectarian schools." Duncan, *supra*, at 507 (quotation marks omitted). The reference to "sectarian schools" had an unmistakable public meaning to Grant's audience. It meant Catholic—the antithesis of the "nonsectarian" Protestant public schools of the era. *See* Jeffries & Ryan, *supra*, at 301; Hamburger, *supra*, at 298-99, 307; *cf. Mitchell*, 530 U.S. at 828 (plurality); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting). The "not one dollar" position did not reflect any interest in a high wall of separation between church and state—its proponents were only too happy to maintain funding for "nonsectarian" (*i.e.*, Protestant) public schools—but simply reflected an interest in discriminating against Catholic practices and institutions.

Grant also called for a constitutional amendment forbidding funding for "sectarian" schools. Stephen K. Green, *The Bible, the School, and the Constitution* 192-93 (2012). Shortly thereafter, Representative James Blaine of Maine obliged and introduced an amendment, which read in relevant part:

> [N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any

> money so raised or lands so devoted be divided between religious sects or denominations.

4 Cong. Rec. 205 (1875). The amendment passed easily in the House but narrowly failed in the Senate, with opposing Senators assailing its patently anti-Catholic purpose and effect. Green, *Blaine Reconsidered*, at 39.

The failed amendment's supporters found greater success in the states. Within a year of the federal effort's defeat, fourteen states adopted measures forbidding public funding for "sectarian" schools. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 573 (2003). Colorado was one of the fourteen.

Colorado's constitutional convention opened in December 1875, the same month that President Grant called for a constitutional amendment and Representative Blaine answered his call. Tr. 670:23-671:05; Green, *Blaine Reconsidered*, at 52-53.[1] The state's Catholic population—which, unlike the Protestant majority, was heavily Mexican-American—was wildly underrepresented at the convention, which was held in the Denver lodge of a secret society that refused to admit Catholics. *See Proceedings of the Constitutional Convention: Colorado 1875-1876* at 15 (1907); Glenn, *supra*, at 170-71; Tr. 671:17-21, 676:7-677:8.

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[1] "Tr." refers to the transcript of the evidentiary hearing before the district court in this case.

The school funding issue featured prominently at the convention. *See* Tr. 672:10-14. Delegates expressed concern that Congress might not admit Colorado to the union if the convention failed to prohibit funding of "sectarian" schools. *Proceedings*, *supra*, at 278; Tr. at 691:6-16. Stark lines were quickly drawn. On behalf of a group of Protestant churches, former territorial governor John Evans petitioned the convention to include provisions that would keep public schools "free from sectarian" influence, prohibit diversion of funds to Catholic schools, and allow Bible reading in public schools. *See Proceedings*, *supra*, at 87, 111-13, 277; Tr. 679:5-680:25.

The future first Bishop of Denver, Apostolic Vicar Joseph Machebeuf, opposed these measures. *See* Tr. 671:17-672:8, 681:5-683:23; Glenn, *supra*, at 172-73; *Proceedings*, *supra*, at 235, 329-32. Father Machebeuf stressed that Catholic Coloradans were loyal American citizens who wanted nothing more than the protection of their basic rights. *Proceedings*, *supra*, at 235; Tr. 681:15-682:4. He decried "the absence of "full[] and dispassionate[] discuss[ion]" of the school funding issue and implored simply that the "question of separate schools and denominational education" be left to future legislative judgment, "when the passions of th[e] hour will have subsided." *Proceedings*, *supra*, at 235, 330-31; *see also* Glenn, *supra* at 172-73.

The Apostolic Vicar's comments—hardly unreasonable—sparked furious reaction and laid bare the virulent strain of anti-Catholicism pervading the convention. *See* Glenn, *supra*, at 170 ("That prejudice existed among the Protestant majority there can be no doubt."). Former governor Evans noted privately that the remarks gave him an opening to "stir … up" the anti-Catholic elements of the majority. Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History 349, 352 (1961). A leading Denver newspaper railed against the "'antagonism of a certain church towards our American public school system'" that threatened to "'lay our vigorous young republic … bound with the iron fetters of superstition at the feet of a foreign despot.'" Glenn, *supra*, at 171 (quoting *Rocky Mountain News*, Jan. 11, 1876). Another asked whether it were "'not enough that Rome dominates in Mexico and all of South America?'" *Id.* at 172 (quoting *Boulder County News*, Jan. 21, 1876). And a noted Protestant minister stated that "if the Romanists have their way, Colorado would have no part in the presidential election of 1876," but "the people could feel right in voting up a constitution which the Pope of Rome had ordered voted down." Hensel, *supra*, at 356 (quotation marks and alterations omitted).

Ultimately, the convention adopted the Blaine Amendment language in Article IX, §7 of the Colorado Constitution, which states in full:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or

> scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Colo. Const. art. IX, §7. A Denver newspaper commended the delegates for their "'wisdom,'" noting that, "'the president's … speech and Mr. Blaine's amendment … struck a chord in the average American breast that has not yet ceased vibrating'" such that "'far more protestants can be got to vote for the constitution on account of this very clause than catholics for the same reason to vote against it.'" Glenn, *supra*, at 173 (quoting *Rocky Mountain News*, Mar. 17, 1876).

B. The Choice Scholarship Program

In June 2010, petitioner Douglas County School District formed a community task force to discuss options for "improv[ing] choice for parents and students in the district." App.155-56. One of the approximately 30 strategies the task force proposed was the Choice Scholarship Program. App.156. In March 2011, petitioner Douglas County School Board approved the Scholarship Program on a "pilot program basis for the 2011-2012 year, limited to 500 students." App.61.

The Scholarship Program was enacted for three purposes: to "provide greater educational choice for students and parents to meet individualized needs, improve educational performance through competition, and obtain a high return on investment of [Douglas County School District] educational spending." App.157. The Program was inspired by the school choice program upheld in *Zelman*, and further emphasized introducing competition to all aspects of the County's school system in order to make the County's already excellent public schools even better—thereby improving educational outcomes for all Douglas County students and strengthening the county as a whole. *See, e.g.*, Tr. 493:9-21; George F. Will, *School Choice in Colorado*, Wash. Post, Aug. 26, 2011.

The Program sought to achieve these goals by providing monetary scholarships to the parents of qualifying students. Those scholarships are then used by the parents to offset tuition at participating private schools, deemed "Private School Partners." App.2, 4. To participate in the Program, a student must have resided in the District for at least a year and been enrolled in a District public school the previous year. App.160. A student must submit an application to the District and independently apply for, and be admitted to, a Private School Partner. App.64.

If a student is selected for the Program and accepted to a Private School Partner, the District issues a restricted check payable to the student's parents that must be signed over to the Private School Partner. App.65, 157, 158. For the 2011-2012 school year, the Program provided families a scholarship of up to $4,575. *Id.*[2]

[2] Students participating in the Scholarship Program are also nominally enrolled in the District's Choice Scholarship Charter

A private school must apply to participate in the Scholarship Program. It must disclose a variety of information, satisfy certain eligibility requirements, and allow the District to administer assessment tests to Program students. App.61-62. The District oversees private schools' compliance with program requirements and reserves the right to terminate participation for violating the requirements. App.62.

For the 2011-2012 pilot year, thirty-four private schools applied to participate in the Scholarship Program. The District accepted twenty-three as Private School Partners. App.62. Of those twenty-three schools, sixteen have some affiliation with a religious organization; seven do not. *Id.* The Program's materials expressly inform families that they should investigate a Private School Partner's "admission criteria, dress codes and expectations of participation in school programs, be they religious or nonreligious" before applying or enrolling. App.64.

No one is required to apply to or attend any particular private school or even to apply to the Scholarship Program; participation is wholly voluntary. Those who choose not to participate receive a free education at a District public school. *See* App.79-80.

C. Proceedings Below

1. Respondents are taxpayers residing in Douglas County. App.6 n.7. In June 2011, respondents filed suit against petitioners, the Colorado Board of Education, and the Colorado Department of

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School, a legal entity established to assist in administering the Program. App.162.

Education. App.6. As relevant here, respondents alleged that the Scholarship Program violates Colorado's Public School Finance Act of 1994 and Article IX, §7 of the Colorado Constitution. Three sets of parents whose children received scholarships intervened as defendants. App.154-55.

Respondents moved for a preliminary injunction, and the district court held a three-day evidentiary hearing. App.155. Among other evidence, the District introduced unrebutted expert testimony regarding the anti-Catholic origins of the federal Blaine Amendment and its Colorado counterpart. App.57. And it expressly argued that using the Colorado Constitution to require it to discriminate on the basis of religion would violate the federal Constitution. App.201-04.

The district court found that the Program is "a well-intentioned effort … to aid students and parents, not sectarian institutions" and that its purpose is "for the benefit of the students, not the benefit of the private religious schools." App.209, 215. It nevertheless held that the Program violates the Public School Finance Act and Article IX, §7. In determining that the Program violates §7, the district court deemed some of the Private School Partners "sectarian or religious" by exhaustively combing through their curricula, governing bodies, funding sources, and admission criteria for signs that they "tend to indoctrinate and proselytize" according to "religious beliefs or practices." App.167-75. The court concluded that "any funding" of those schools would violate §7. App.[dct40]. And it rejected petitioners' contention that striking down the Scholarship Program on the basis of §7 would violate the federal Constitution. App.201-04.

2. A divided Colorado Court of Appeals reversed. App.59-153. The majority held that respondents lacked standing to bring their Public School Finance Act challenge. App.68. It further held that the Scholarship Program does not violate Article IX, §7.

The majority explained that the district court had "extensively scrutiniz[ed] the nature of the education provided by certain participating private schools" in the Program and "the degree to which those schools 'infuse religious teachings into the curriculum.'" App.90 (quoting App.216). Citing this Court's precedents, it held that this inquiry into "the degree to which religious tenets and beliefs are included in participating private schools' educational programs," in order to "assess facially neutral student aid laws," is "no longer constitutionally permissible." App.92.

The majority also cited the Tenth Circuit's decision in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (McConnell, J.), providing that "the State's latitude to discriminate against religion … does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* at 1255; App.94-95. Because the Choice Scholarship Program "is neutral toward religion generally and toward religion-affiliated schools specifically," construing the Colorado Constitution to require exclusion of religiously affiliated schools from such "otherwise neutral and generally available government support" was "forbidden by the First Amendment." App.94-95.

The dissenting judge would have held that the Scholarship Program violates §7, App.108, and that using §7 to prohibit aid to "sectarian" schools "does not offend" the federal Constitution, App.109.

3. The Supreme Court of Colorado granted review and, in a deeply divided decision, reversed. App.1-58. Six of the Court's seven Justices held that respondents lacked standing to bring their Public School Finance Act challenge. App.8-16, 42n.1. Three of those Justices further held that the Scholarship Program violates Article IX, §7 and that invalidating the Program on that basis does not violate the federal Constitution. App.16-30. The other three Justices concluded that the Program does not violate Article IX, §7 and that construing §7 to conclude otherwise raises grave concerns under the federal Constitution. App.42-58. The seventh Justice believed that respondents had standing under the Public School Finance Act claim, found for respondents on the merits of that claim, and did not reach the constitutional question. App.30-42. Consequently, the Program was struck down.

In its dispositive constitutional holding, the three-Justice plurality first concluded that, although §7 "uses the term 'sectarian' rather than 'religious,' the two words are synonymous." App.18 (citing *Black's Law Dictionary* 1557 (10th ed. 2014)). Accordingly, §7 "makes one thing clear: A school district may not aid religious schools." *Id.* And contrary to the district court's finding that the Program "aid[s] students and parents, not sectarian institutions," the plurality stated that "aiding religious schools is exactly what the [Program] does." *Id.* The plurality grudgingly conceded that the Program "does not *only* partner with religious schools." App.19. But because the Program "awards public money to students who may then use that money" at religiously affiliated schools, the Program violated §7. *Id.*

The plurality then held that construing §7 to require the District to discriminate against religiously affiliated schools does not violate the federal Constitution. It held that there were no Establishment Clause concerns because §7 is "far more restrictive than the Establishment Clause regarding governmental aid to religion." App.27. In a footnote, it rejected petitioners' claim that invalidating the program under §7 violates the Free Exercise Clause. App.27 n.21. And it concluded that *Colorado Christian* "is simply inconsequential to the legality of the [Program]." App.28.

The plurality refused to consider whether §7 was "bigoted in origin" due to anti-Catholic animus. App.20-21. Instead, citing a modern-day dictionary, the plurality baldly declared that "the term 'sectarian' plainly means 'religious.'" App.21. Thus, it concluded, the language of §7 was "plain" and it would "enforce section 7 as it is written." *Id.*

The three dissenting Justices concluded that the plurality erred in its "breathtakingly broad" construction of Article IX, §7. App.42-43 (Eid, J., dissenting). But a "more serious error" for the dissenting Justices was the plurality's failure to consider whether, under the federal Constitution, §7 as applied to the Program is "unenforceable due to possible anti-Catholic bias." App.43. Citing this Court's decisions, the dissenting Justices observed that "courts must look behind the text to discover any religious animus." App.54. They further noted that a four-Justice plurality of this Court has referred to the "shameful pedigree" of anti-Catholic animus that gave rise to historical "[o]pposition to aid to 'sectarian' schools" in provisions like §7, *Mitchell*, 530 U.S. at 828—a view, they added, shared by other Justices, *see Zelman*, 536 U.S. at 720 (Breyer, J., dissenting). App.56-57. The dissenters faulted the plurality's "adamant … refusal to consider the possibility of anti-Catholic animus," App.57, and criticized the plurality's "head-in-the-sand approach" to "allegations of such animus" raised by §7, App.58.

REASONS FOR GRANTING THE PETITION

The decision below employs a provision enacted in 1876 for the express purpose of discriminating against Catholics to compel a school district in 2015 to discriminate against religious schools and against parents who want to use a neutral scholarship to attend those schools. Thus, a provision "born of bigotry," *Mitchell*, 530 U.S. at 829 (plurality), continues to have unconstitutional consequences over a century later. The time to end this discrimination is now, and only this Court can stop it. The Colorado Supreme Court has the final word on the scope of Colorado's Blaine Amendment, but this Court has the final word on whether a discriminatory application of a designedly discriminatory provision can be squared with the federal Constitution. It plainly cannot.

Multiple members of this Court have recognized the "shameful pedigree" of laws like §7, *id.* at 828; *accord Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting), but the Court has not squarely confronted the compatibility of those provisions with the federal Constitution. This case provides an ideal vehicle. The issue has been raised throughout the litigation and a factual record of the anti-Catholic bias that animated §7 is fully developed. What is more, §7 has been used to invalidate a program indistinguishable from those this Court has found both constitutional and neutral. But where this Court authorized neutral school choice, §7 as construed below demands discrimination. Petitioners can have their Scholarship Program, but only if religious schools are removed from the neutral menu of options available to parents.

This Court should grant review not just to correct that constitutional wrong, but also to resolve uncertainty in the lower courts over the states' ability to discriminate against religious schools in the wake of *Locke v. Davey*. *Locke* upheld a state decision to refuse to fund college degrees in devotional theology. Since then, however, the lower federal and state courts have taken starkly opposing views of the scope of that decision. Some have read the decision narrowly, noting its focus on the distinct context of government funding for training of ministers, while others have read it as giving States *carte blanche* to withhold otherwise neutral and generally available aid on the basis of religion. The narrower view is clearly the correct view, but the issue is too fundamental to our constitutional republic to leave the lower courts divided and the issue unresolved.

This Court seemingly settled the constitutionality of school choice initiatives by holding that neutral programs that allow parents to decide whether government funding finds its way to any religious school offend no principle of the federal Constitution. The decision below unsettles the issue by reading a provision with a discriminatory purpose and effect to require discrimination. That decision is simply too important and too incompatible with our federal Constitution to leave unreviewed.

I. Laws Born of Religious Bigotry Like Article IX, §7 Cannot Be Used To Require Discrimination Based On Religion.

This Court's precedents recognize the illegitimacy of laws premised on treating one group differently from others on the basis of animus. This principle is well-established in the equal protection context. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (provision of Colorado Constitution "inexplicable by anything but animus toward the class it affects" lacks a rational basis); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes, or fear" cannot justify legislation targeting a particular group); *cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). The prohibition against singling out "a politically unpopular group," *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), on the basis of bias and animus thus forms an important thread in our constitutional tapestry.

The anti-animus principle is also a ground for applying strict scrutiny in this Court's free exercise jurisprudence. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the city enacted an ordinance forbidding "the ritual sacrifices of animals." *Id.* at 527-28. The statute was passed in response to plans by a Santeria religious community to construct a church in the city. *Id.* at 525-26. The Court held that the statute was neither neutral nor generally applicable and could not satisfy constitutional scrutiny. *See id.* at 546-47. In so holding, the Court noted that "*[a]t a minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532 (emphasis added). And in applying this standard, "[f]acial neutrality is not determinative." *Id.* at 534. The Court therefore considered the anti-Santeria panic leading up to the statute's enactment, as well as secular exceptions and other indicia of objectively unequal treatment in the text of the ordinances and related state law, in holding that the ordinances were a "religious gerrymander" that subjected Santeria practices to disfavored treatment. *Id.* at 534 (quotation marks omitted).

Most recently, in *Locke v. Davey*, the Court reiterated that "hostility toward religion" renders a refusal to fund constitutionally suspect. 540 U.S. at 724. The respondent argued that Washington's refusal to fund the religious training of clergy was infected by the animus prohibited by *Lukumi*. The Court rejected that contention because the "entirety" of the program containing the carve-out for funding devotional theology degrees went "a long way toward including religion in its benefits," by permitting students to attend religiously affiliated schools, take religion courses, and even take devotional theology courses, so long as they did not major in devotional theology. *Id.* at 724-25. *Locke* thus affirmed *Lukumi*'s holding that religious animus renders a law unconstitutional, and invoked that holding in the funding context.

Multiple members of this Court have already recognized the sordid, animus-driven origins of the federal Blaine Amendment and its state counterparts. In *Mitchell v. Helms*, the Court held that a federal program that aids local school systems, including those containing many religiously affiliated schools, does not violate the Establishment Clause. 530 U.S. at 801. A four-Justice plurality strongly condemned the inquiry employed by the district court into whether the recipient of the aid was "pervasively sectarian." *Id.* at 826 (plurality). The plurality stated that this approach "has a shameful pedigree that we do not hesitate to disavow." *Id.* at 828. Reflecting the history recounted above, *see* pp. 5-8, *supra*, it explained that measures enacted to deprive "sectarian" schools of public aid "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general" and reached their "prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment." *Id.* at 828. At that time, the Court noted, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.*

Similarly, in his dissent in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Justice Breyer observed that, during this period, "Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools," but Protestants insisted "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Id.* at 721 (Breyer J., dissenting). Justice Breyer acknowledged that "this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children." *Id.*

In *Locke*, the Court declined the invitation of *amici* supporting the respondent to address whether state Blaine Amendments are constitutionally suspect, because both sides stated that the specific provision under challenge was "not a Blaine Amendment." 540 U.S. at 723 n.7. But if any provision is a state Blaine Amendment—of the kind that multiple Justices of this Court have already identified as animated by anti-Catholic bigotry—it is Article IX, §7. As the historical record demonstrates, *see* pp. 5-11, *supra*, and the District's unrebutted expert testimony proved on the record, §7 not only piggybacked on the anti-Catholic sentiment fomenting the federal Blaine Amendment but was also based on its own Colorado-specific form of anti-Catholic animus.

Section 7 should thus suffer the same fate as the Alabama constitutional provision this Court invalidated in *Hunter v. Underwood*, 471 U.S. 222 (1985). That facially neutral provision disenfranchised persons convicted of "any crime … involving moral turpitude." *Id.* at 223 (quotation marks omitted). But the evidence demonstrated that it was enacted "with the intent of disenfranchising blacks" as "part of a movement that swept the post-Reconstruction South." *Id.* at 229. The Court refused to let the passage of 80 years "legitimate[] the provision." *Id.* Section 7 shares the same defects and cannot make a comparable claim to facial neutrality; it was born of a repugnant "movement that swept" numerous States, and the passage of time cannot launder the blatantly anti-Catholic intent that produced it.

Section 7 is not just a product of anti-Catholic animus; it is also expressly discriminatory if interpreted using customary tools of constitutional interpretation. As the *Mitchell* plurality explained, while the word "sectarian" may to the modern observer appear synonymous with "religious," its original public meaning was quite different. In 1876, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828 (plurality). Thus, when the people of Colorado voted to ratify §7, they would have understood it to forbid public support for Catholic schools, while permitting full funding for public schools that conducted Protestant religious exercises and readings from the Protestant Bible. If §7 had prohibited government aid to Catholic institutions in so many words, its incompatibility with the federal Constitution would be undeniable. And if §7 is construed to reflect its original public meaning, *see generally District of Columbia v. Heller*, 554 U.S. 570 (2008), it is no more compatible with our national charter.

Given the religious animus giving rise to §7's passage and the discrimination embodied in §7's text, it is inconceivable to think that the federal

Constitution permits §7 to be used in 2015 to *require* state and local governments to discriminate against religiously affiliated institutions. Yet that is precisely the result of the decision below. Indeed, in its dispositive constitutional holding, the plurality could not even muster a principled response to the dissent's emphasis of §7's troubling origins. Instead, it dodged the issue by invoking §7's "plain language"—defined by a twenty-first-century dictionary. That approach to interpretation may be binding for state-law purposes, but for the federal question presented here, this Court has instructed that courts must look both to the original public meaning of the text and "behind the text to discover any religious animus." App.54 (Eid, J., dissenting) (citing *Lukumi* and *Locke*).

It may well be time to invalidate state Blaine Amendments *in toto* given their discriminatory meaning and origins. But at a bare minimum, this Court should make clear that the current use of these provisions to discriminate against religious institutions is plainly unconstitutional.

II. The Discriminatory Prohibition Of All Neutral And Generally Available Aid On The Basis Of Religion Violates The Constitution.

Even if §7's sordid origins could be put to the side, requiring state and local governments to discriminate based on religion still would violate the Constitution. Yet that is exactly what occurred here when the plurality below interpreted §7 to categorically prohibit the District from providing otherwise neutral and generally available aid—through a program materially indistinguishable from that found neutral and constitutional by this Court in *Zelman*—to religious institutions. The decision adds to a growing divide among lower courts and judges over the extent to which, following *Locke v. Davey*, the Constitution permits such wholesale exclusion of neutrally provided public benefits based solely on religion. The Court should grant certiorari to provide much-needed guidance on this important but unsettled issue.

A. In *Locke*, the State of Washington provided college scholarships to qualifying students, but prohibited using the scholarships for theology degrees. 540 U.S. at 715-17. The Court acknowledged that Washington could allow scholarship recipients to use the funds for theology degrees without violating the Establishment Clause. *Id.* at 718-19. But the Free Exercise Clause did not compel it do so; the State's interest in "not funding the pursuit of devotional degrees" was compelling given Founding-era history against supporting clergy with public funds, and excluding such funding placed a "relatively minor burden on" scholarship recipients, who could still use the scholarships to attend religiously affiliated schools and take theology courses. *Id.* at 724-25.

Justice Scalia dissented, observing that the Court's decision "has no logical limit" and "can justify the singling out of religion for exclusion from public programs in virtually any context." *Id.* at 730 (Scalia, J., dissenting). In response, Chief Justice Rehnquist, writing for the Court, stated that the decision was limited to the use of scholarships toward theology degrees, explaining, "[T]he *only* interest at issue here is the State's interest in not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5 (emphasis added).

Notwithstanding this exchange, the "precise bounds of the *Locke* holding … are far from clear," *Colo. Christian*, 534 F.3d at 1254, and judges in the lower federal and state courts have since taken starkly different views of *Locke*'s scope. In *Colorado Christian*, for example, the Tenth Circuit observed that *Locke* "indicated that the State's latitude with respect to funding decisions has limits." 534 F.3d at 1255. In particular, *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion … does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* The Tenth Circuit rejected the argument that, following *Locke*, "all state decisions about funding religious education" are permissible so long as they are rational. *Id.* at 1254-55. And it went on to hold that Colorado could not bar "pervasively sectarian" institutions from receiving aid under a neutral and generally available college scholarship program. *Id.* at 1250.

By contrast, the Eighth Circuit has—by the thinnest of margins—construed *Locke* more broadly. In *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015), *reh'g en banc denied by equally divided vote*, a divided panel held that Missouri could prohibit a church-run daycare from receiving a grant to replace its playground surface with a safer material under an otherwise generally-applicable program. *Id.* at 781. The majority relied on a provision of the Missouri Constitution stating that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion."

Id. at 783 (quoting Mo. Const. art. I, §7). The majority held that *Locke* posed no barrier to using this provision to prohibit the daycare from receiving any funds. *Id.* at 785 & n.3. At the same time, it acknowledged that "there is active academic and judicial debate about the breadth of the decision," and it conceded that "the direction the [Supreme] Court recently seems to be going" is toward holding that a government may not categorically bar the distribution of public aid based solely on religion. *Id.* at 785.

Judge Gruender dissented, observing that *Locke* "did not leave states with unfettered discretion to exclude the religious from generally available public benefits." *Id.* at 791. Rather, *Locke* "was careful to acknowledge its parameters." *Id.* Citing *Colorado Christian*, Judge Gruender would have held that, by denying the grant based solely on "the fact that the [daycare] was run by a church," the State violated the federal Constitution. *Id.* at 790. The daycare's petition for *en banc* rehearing was denied by an equally divided court.

Other decisions reflect similar disarray over the scope of *Locke*. In *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), the Seventh Circuit rejected a state's invocation of *Locke* in defending its religion-based refusal to fund a university group. Adopting the narrower view of *Locke*, the court noted that in *Locke*, the state funds "could be used at pervasively sectarian colleges, where prayer and devotion were part of the instructional program; only training to become a minister was off limits." *Id.* at 780. In the case before it, however, the state "does not support programs that include prayer or religious instruction," thus "evinc[ing] hostility to religion." *Id.*

By contrast, in *Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344 (1st Cir. 2004), which involved a challenge by parents to the denial of educational aid based solely on religion, the First Circuit rejected the parents' attempt "to cabin *Davey* … to the context of funding instruction for those training to enter religious ministries." *Id.* at 355. The First Circuit "read *Davey* more broadly" and declined to read the decision as "applicable to certain education funding decisions but not others." *Id.*; *accord Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (striking down a neutral and generally available scholarship program as providing impermissible aid to religious schools), *aff'd on other grounds*, 919 So. 2d 392, 398 (Fla. 2006). *But see id.* at 388 (Polston, J., dissenting).

Many scholars have noted *Locke*'s unclear scope. *See, e.g.,* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 183-95 (2004). Others have emphasized that different passages of *Locke* can be read to support either the broad or narrow view of its holding. While the "first part of the Court's opinion did broadly state that the withdrawal of a theology student's scholarship imposed only a minor burden on religion," the "much longer part" of the opinion "focused on features limited to the training of students for the ministry," which "have little application to general funding of students in religious colleges or K-12 schools." Thomas C. Berg, *Religious Choice and Exclusions of Religion*, 157 U. Pa. L. Rev.

PENNumbra 100, 108 (2008); *see also* Cleland B. Welton II, Note, *The Future of* Locke v. Davey, 96 Va. L. Rev. 1453, 1469 (2010) ("The Court's scattershot opinion leaves the future of the doctrine uncertain.").

B. Under a correct reading of *Locke* and this Court's other precedents, the decision below must be reversed. The Religion Clauses and the Equal Protection Clause all demand neutrality and non-discrimination, and when a neutral program facilitates secular goals by attempting to maximize the participation of qualified schools, the restriction of available schools to those without religious affiliations is not just artificial and counterproductive, but unconstitutional.

Locke, properly read, was quite clearly cabined to a particular context: "funding the religious training of clergy." 540 U.S. at 722 n.5. That was the "only interest at issue," as the Court specifically explained in response to the dissent. *Id.* Indeed, the decision refers over twenty times to some variant of funding the religious training of clergy. *Locke* merely rejected the proposition that "denial of funding for vocational religious instruction alone" is "inherently constitutionally suspect." *Id.* at 725. And it expressly declined to "venture further into this difficult area." *Id.* at 725; *see also* Frank S. Ravitch, Locke v. Davey *and the Lose-Lose Scenario: What* Davey *Could Have Said, But Didn't*, 40 Tulsa L. Rev. 255, 257 (2004) ("*Davey* is a decision quite limited in scope.").

In confining its decision to funding the religious training of clergy, the Court emphasized the distinct concerns with public funding of such training. "Training someone to lead a congregation is an essentially religious endeavor," a "distinct category of instruction" that is "akin to a religious calling" and different from "education for other callings." 540 U.S. at 721. The Court also placed the funding of religious training of clergy in historical context, noting that, at the Founding, "[m]ost States" had "formal prohibitions against using tax funds to support the ministry." *Id.* at 723. Finally, the Court observed that the Washington provision did not evince "hostility toward religion"; rather, the program at issue went "a long way toward including religion in its benefits," including allowing public funding for different courses of study at religious schools. *Id.* at 724.

This reasoning plainly does not apply to the forced denial of *all* aid to *all* religious schools based solely on religion, as occurred here. Such "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support," *Colorado Christian*, 534 F.3d at 1255, is far different from *Locke*'s prohibition on funding theology degrees. To begin with, religiously affiliated schools do not only or even primarily provide religious instruction. They teach a full secular curriculum and satisfy the state's compulsory education requirements, which is precisely why they have been included in a neutral government program. *See, e.g.*, *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245-47 (1968). Support for the training of clergy could be viewed as exclusively or primarily funding a religious function. But the Scholarship Program funds the education of children in state-mandated secular subjects, in either a secular or religious environment, as the children and their parents choose. The decision below discriminates between those two environments on the basis of each school's views about religion.

The distinct Founding-era history of opposition to funding clergy cited by *Locke* likewise does not justify the exclusion of religious schools from a neutral government program. And here the Colorado Supreme Court has invalidated the precise kind of neutral educational funding that *Locke* pointed to as demonstrating that the Washington program did not violate the Free Exercise Clause. *Locke* relied heavily on the fact that scholarship students could still attend religiously affiliated institutions and receive devotional theology instruction. 540 U.S. at 725 & n.9. By contrast, the plurality's construction of §7 does not place a "relatively minor burden on" Scholarship Program recipients by preventing them from pursuing a particular course of theology study; *id.* at 725; it *eliminates* their scholarships entirely, and all because of religion.

Thus, the far better reading of *Locke* is the narrow one embraced by the Tenth and Seventh Circuits, but rejected by the Eighth and First Circuits. And under that proper construction, the Colorado Supreme Court's requirement that petitioner exclude religious schools from the Scholarship Program plainly violates the Free Exercise Clause. Indeed, the violation is particularly plain because this Court has already upheld a comparable school choice program as neutral and constitutional. *See Zelman*, 536 U.S. at 653. Here, petitioner sought to build on *Zelman* and authorize a scholarship program that empowered parents to send their children to a wide variety of private schools. The neutral objective of the program was manifest on its face. Petitioners' objectives were accomplished without regard to whether parents chose a religious or non-religious school. In the context of such a manifestly neutral program, in which local officials have concluded that including private religious schools on a neutral basis advances purely secular educational objectives, an interpretation of §7 demanding that religious schools be excluded is a deviation from neutrality that the Free Exercise Clause will not tolerate.

That result is only strengthened by parallel requirements of the Establishment and Equal Protection Clauses. The Establishment Clause not only prohibits discrimination among religions, *see Larsen v. Valente*, 456 U.S. 228, 244 (1982), but also guards against "trolling through a person's or institution's religious beliefs," *Mitchell*, 530 U.S. at 828 (plurality); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 844 (1995); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). The federal circuits have thus repeatedly held that the Establishment Clause "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices" in connection with "exclusion from benefits." *Colo. Christian*, 534 F.3d at 1261; *see also Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-42 (D.C. Cir. 2002); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 501-04 (4th Cir. 2001). But this prohibited inquiry is just what participating schools were subjected to here. *See* p. 14, *supra*; App.95 (court of appeals concluding that trial court's inquiry was "precisely the type of inquiry forbidden by the First Amendment").

Even apart from the protections of the Religion Clauses, laws "involving discrimination on the basis of religion … are subject to heightened scrutiny" under the Equal Protection Clause. *Colo. Christian*, 534 F.3d at 1266; *see also Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992). They are permissible only if narrowly tailored to further a compelling governmental interest. *E.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005). Interpreting §7 to require the denial of all otherwise neutral and generally available aid solely due to religion plainly constitutes "discrimination on the basis of religion" that is not narrowly tailored to further any compelling governmental interest. The only possible interest is an antiestablishment interest, but the plurality's construction of §7 both *engenders* establishment concerns and departs from the neutrality principles underlying the federal Establishment Clause. And interpreting §7 to bar *all* neutral and generally available aid based on whatever the State deems "religion" is the antithesis of a narrowly tailored measure.

III. The Question Presented Is Exceptionally Important, Frequently Recurring, And Should Be Resolved In This Case.

Whether the discriminatory spirit of 1876 can be used to force state and local governments to discriminate against religious institutions in 2015 consistent with the federal Constitution is undeniably a question of paramount national importance. State Blaine Amendments like §7 are present in the constitutions of at least 30 States, *see* Douglas Laycock, *Religious Liberty as Liberty*, J. Contemp.

Legal Issues 313, 342 (1996), and they have been used not only to require discrimination against religion but also to effectively nullify decisions by this Court. The decision below, for example, effectively invalidates *Zelman*'s conclusion that school choice programs are neutral and constitutional. Instead, the decision forces petitioner to abandon its school choice program entirely or to deviate from neutrality and discriminate against religion.

Other courts have employed state Blaine Amendments to eliminate school choice programs and similar neutral educational initiatives. *See, e.g.*, *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009) (enjoining program providing vouchers for use at private schools, including religiously affiliated schools); *Holmes*, 886 So. 2d at 366 (invalidating Florida scholarship program), *aff'd on other grounds*, 919 So. 2d 392, 398 (Fla. 2006). But still other courts have construed Blaine Amendments narrowly or consistent with federal constitutional principles to uphold materially similar programs. *See, e.g.*, *Magee v. Boyd*, ___ So. 3d ___, 2015 WL 867926, at *43-49 (Ala. Mar. 2, 2015); *Meredith v. Pence*, 984 N.E.2d 1213, 1225-30 (Ind. 2013); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211-13 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 620-23 (Wisc. 1998). Additional cases are pending in Nevada, Oklahoma, Florida, and Georgia. *See* Compl., *Duncan v. State*, No. A-15-723703-C (Nev. Super. Ct. Aug. 27, 2015); *Oliver v. Hofmeister*, No. CV-2013-2072, slip. op. (Okla. Super. Ct. Sept. 10, 2014), *appeal docketed*, No. 113,267 (Okla. Oct. 6, 2014); *McCall v. Scott*, No. 2014-CA-2282, slip. op. (Fla. Super. Ct. May 18, 2015), *appeal docketed*, No. 1D15-2752 (Fla. Ct. App. June 16, 2015); Compl., *Gaddy v. Ga. Dep't of*

Revenue, No. 2014-CV-244538 (Ga. Super. Ct. Apr. 3, 2014). Each of these cases involves challenges to programs like the District's based on provisions like §7. Likewise, each involves defenses like the District's that the federal Constitution precludes interpreting those provisions to demand discrimination against religious schools.

The Colorado Supreme Court's interpretation of §7 also creates the prospect of mandatory discrimination against religion in a variety of neutral government programs beyond education. In *Trinity Lutheran*, for example, a provision strikingly similar to §7 was construed to prohibit a daycare from receiving state Department of Natural Resources funds to install a safer playground surface, simply because the daycare was run by a church. 788 F.3d at 781. If these provisions ban safety expenditures for small children, it is hard to imagine any limits to their sweep. Indeed, when confronted with the dissent's concern about the sweeping implications of the decision here, the plurality below could not articulate any principled limit to its reasoning, tepidly responding that the "constitutionality of [other] programs is not at issue here." App.19 n.15.

This case is also an ideal vehicle for considering both the anti-Catholic origins of Blaine Amendments and the extent to which they can be used to require government discrimination against religion today. Not only does §7 share the history of the federal Blaine Amendment, it was the product of its own well-documented, Colorado-specific, anti-Catholic animus. It has been neither amended, reenacted, nor reauthorized since 1876; thus, the taint of animus is unmitigated. Moreover, the incompatibily of §7 and the federal Constitution was raised throughout this litigation, a record of the sordid history of §7 was established in the trial court, and the plurality's dispositive constitutional holding below relied solely on §7. Accordingly, this case cleanly presents the pressing question whether neutral educational initiatives already found constitutional by this Court can be undone by state constitutional provisions that were discriminatory in their origins and are discriminatory in their current application.

* * *

The continued existence of state Blaine Amendments puts the state courts in an untenable position. Faithful application of the drafters' intent or the original public meaning of those amendments demands discrimination against Catholics. Faithful application of the text, based on modern dictionaries, demands discrimination against religion. Fortunately, faithful application of the federal Constitution forbids both forms of discrimination and protects a wholesome neutrality. Only this Court, however, is in a position to right the wrong of 1876 and make plain that the law of the land in 2015 calls for neutrality, not discrimination born of bigotry.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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October 28, 2015

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Appendix A

SUPREME COURT OF COLORADO

No. 13-SC-233

TAXPAYERS FOR PUBLIC EDUCATION; CINDRA S. BARNARD; MASON S. BARNARD; JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; and SUSAN MCMAHON,

Petitioners,

v.

DOUGLAS COUNTY SCHOOL DISTRICT, DOUGLAS COUNTY BOARD OF EDUCATION, COLORADO STATE BOARD OF EDUCATION, and COLORADO DEPARTMENT OF EDUCATION,

Respondents,

and

FLORENCE and DERRICK DOYLE, on their own behalf and as next friends of their children, A.D. and D.D.; DIANA OAKLEY and MARK OAKLEY, on their own behalf and as next friends of their child, N.O.; and JEANETTE STROHM–ANDERSON and MARK ANDERSON, on their own behalf and as next friends of their child, M.A.,

Intervenors-Respondents.

Filed: June 29, 2015

En Banc.

OPINION

CHIEF JUSTICE RICE announced the judgment of the Court.

Four years ago, the Douglas County School District ("the District") implemented its Choice Scholarship Pilot Program ("the CSP"), a grant mechanism that awarded taxpayer-funded scholarships to qualifying elementary, middle, and high school students. Those students could use their scholarships to help pay their tuition at partnering private schools, including religious schools. Following a lawsuit from Douglas County taxpayers, the trial court found that the CSP violated the Public School Finance Act of 1994, §§ 22-54-101 to –135, C.R.S. (2014) ("the Act"), as well as various provisions of the Colorado Constitution. The trial court thus permanently enjoined implementation of the CSP. The court of appeals reversed, holding that (1) Petitioners lacked standing to sue under the Act, and (2) the CSP did not violate the Colorado Constitution. *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 2013 COA 20, ¶4, —P.3d—. We granted certiorari to determine whether the CSP comports with both the Act and the Colorado Constitution.[1]

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[1] Specifically, we granted certiorari on the following issues:

1. [REFRAMED] Whether the court of appeals erred by restricting Colorado's standing doctrine when it held that the Public School Finance Act of 1994's ("the Act") mere grant of authority to the State Board to issue rules and regulations necessarily deprives [Petitioners] of standing and precludes any private action to enjoin [the District] from violating the Act.

We first hold that Petitioners lack standing to challenge the CSP under the Act. We further hold, however, that the CSP violates article IX, section 7 of the Colorado Constitution.[2] Accordingly, we reverse the judgment of the court of appeals and remand the

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2. [REFRAMED] Whether the [CSP] violates the Act by including 500 Program students "enrolled" in an illusory Charter School who actually attend private schools in the District and elsewhere in the District's student count for funding.

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

4. Whether the [CSP] violates article IX, section 7, of the Colorado Constitution by diverting state educational funds intended for Douglas County public school students to private elementary and secondary schools controlled by churches and religious organizations.

5. Whether the [CSP] violates the compelled-support and compelled-attendance clauses of article II, section 4, of the Colorado Constitution by directing taxpayer funds to churches and religious organizations, and by compelling students enrolled in a public charter school to attend religious services.

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

[2] Because we conclude that the CSP violates section 7, we need not consider whether it complies with the other constitutional provisions at issue.

case to that court with instructions to return the case to the trial court so that the trial court may reinstate its order permanently enjoining the CSP.

I. Facts and Procedural History

A. Background and Logistics of the CSP

The facts of this case, as found by the trial court following a three-day injunction hearing, are largely undisputed. In March of2011, the Douglas County School Board approved the CSP for the 2011-12 school year. The CSP operates on parallel tracks: In order to receive scholarship funds, students must not only apply for a scholarship through the District, but they must also gain admittance to a participating private school, labeled a "Private School Partner." In order to qualify as a Private School Partner, the private school must satisfy certain requirements and must allow Douglas County to administer various assessment tests. The private school need not, however, modify its admission criteria, and the CSP explicitly authorizes Private School Partners to make "enrollment decisions based upon religious beliefs."

The CSP funds itself through education revenue that it receives from the State. To accomplish this, the CSP requires scholarship recipients to enroll in the District's Choice Scholarship Charter School ("the Charter School"), even though they in fact attend private schools. The Charter School is not actually a school in any meaningful sense; the trial court found that it "has no buildings, employs no teachers, requires no supplies or books, and has no curriculum." But because the Charter School is nominally a public school, the District includes all students "enrolled" at the school as pupils in its report to the State, which then provides education funding to the District on a per-pupil basis.[3] For the 2011-12 school year (the year at issue when the trial court conducted the injunction hearing), this per-pupil revenue was estimated at $6,100.

For each scholarship recipient enrolled at the Charter School, the District retains 25% of the per-pupil revenue to cover the CSP's administrative costs. The District then sends the remaining 75% of the per-pupil revenue ($4,575 for the 2011-12 school year) to the student's chosen Private School Partner in the form of a restrictively endorsed check made out to the student's parent.[4] The parent must then endorse the check "for the sole purpose of paying for tuition at the Private School Partner."

In theory, then, the CSP operates as a simple tuition offset. The District awards money to the parent of a qualifying student, and the parent then uses this money to pay a portion of the student's tuition. The trial court found, however, that the CSP "does not prohibit participating private schools from raising tuition after being approved to participate in the [CSP], or from reducing financial aid for students who participate in the [CSP]." And in fact, the trial court cited one instance where a Private School Partner slashed a recipient's financial aid in the amount of the scholarship.[5]

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[3] See, e.g., §§ 22–54–103 to –104, C.R.S. (2014).

[4] If the Private School Partner's tuition is less than 75% of the per-pupil revenue, the District sends a check for the lesser amount.

[5] The District's Assistant Superintendent of Elementary Education testified that he was unaware of this incident. He

In the CSP's pilot phase, up to 500 Douglas County students were eligible to receive scholarships. At the time of the injunction hearing, 271 scholarship recipients had been accepted to one of twenty-three different Private School Partners. The trial court found sixteen of those twenty-three schools to be religious in character. At the time of the hearing, roughly 93% of scholarship recipients had enrolled in religious schools; of the 120 high school students, all but one chose to attend a religious school.[6]

B. The Litigation

In June of 2011, three months after the Douglas County School Board approved the CSP, Petitioners[7] filed suit against the Colorado Board of Education ("the State Board"), the Colorado Department of Education, the Douglas County Board of Education, and the District (collectively, "Respondents"). Petitioners sought a declaratory judgment that the CSP violated both the Act and the Colorado Constitution, as well as a permanent injunction prohibiting Respondents from "taking any actions to fund, implement or enforce" the CSP. Following a

further asserted that if a Private School Partner reduced a recipient's scholarship amount in such a manner, such an action would "go against the intended contract" of the CSP.

[6] The trial court found that "virtually all high school students" who received scholarships could only attend religious schools, as the only two non-religious Private School Partners serving high school students were restricted to either gifted or special-needs students.

[7] Petitioners include Taxpayers for Public Education, a nonprofit organization focused on public education; several Douglas County taxpayers and their children; and various other interested parties.

three-day hearing, the trial court issued a sixty-eight-page order granting Petitioners' desired relief. The trial court first found that Petitioners had standing to sue under the Act and that the CSP violated the Act. It further found that the CSP violated the following provisions of the Colorado Constitution: article II, section 4; article V, section 34;[8] article IX, section 3; article IX, section 7; and article IX, section 8.

Respondents appealed, and in a split decision, the court of appeals reversed. *Taxpayers for Pub. Educ.*, ¶4. The court of appeals first determined that Petitioners lacked standing to sue under the Act. *Id.* at ¶22. It then held that the CSP violated none of the pertinent provisions of the Colorado Constitution. *Id.* at ¶¶48, 55, 58, 76, 89, 94, 103. The court of appeals thus directed the trial court to enter judgment in favor of Respondents. *Id.* at ¶107.

Judge Bernard dissented. In a lengthy opinion, he asserted that article IX, section 7 of the Colorado Constitution "prohibits public school districts from channeling public money to private religious schools." *Id.* at ¶110 (Bernard, J., dissenting). Judge Bernard then analogized the CSP to "a pipeline that violates this direct and clear constitutional command." *Id.* at ¶111. Therefore, he concluded that section 7 renders the CSP unconstitutional. *Id.*

We granted certiorari review on six distinct issues. *See supra*, ¶1 n. 1. In essence, however, this dispute revolves around two central questions. First, do Petitioners have standing under the Act to

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[8] Petitioners did not seek review of whether the CSP violates article V, section 34.

challenge the validity of the CSP (and, if so, does the CSP in fact violate the Act)? Second, does the CSP violate the Colorado Constitution? As a matter of jurisprudential policy, we first address the statutory issue rather than the constitutional issue. *See Developmental Pathways v. Ritter,* 178 P.3d 524, 535 (Colo.2008) ("[T]he principle of judicial restraint requires us to 'avoid reaching constitutional questions in advance of the necessity of deciding them.'" (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988))). Accordingly, we now consider whether Petitioners have standing under the Act.

II. Standing Under the Act

Petitioners argue that the CSP fails to comport with the Act because it uses public funds to finance private education. *See* § 22-54-104(1)(a), C.R.S. (2014) (devising a formula to calculate the amount of money awarded to a school district "to fund the costs of providing *public* education" (emphasis added)). In order to mount this challenge, Petitioners must first establish that they have standing to sue under the Act. *See Ainscough v. Owens*, 90 P.3d 851, 855 (Colo.2004) ("Standing is a threshold issue that must be satisfied in order to decide a case on the merits."). After scrutinizing the Act and reviewing our case law, we conclude that Petitioners lack such standing.

A. Standard of Review

Standing is a question of law that we review de novo. *Id.* at 856.

B. The Test for Standing

In order to establish standing to sue, a plaintiff must satisfy two elements. First, he must show that he suffered an *injury in fact*; second, he must demonstrate that his injury pertains to a *legally protected interest*. *Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535, 539 (1977). Assuming, without deciding, that Petitioners here have alleged an injury in fact, we consider whether that injury implicates a legally protected interest.

In the statutory context, whether the plaintiff's alleged injury involves a legally protected interest turns on "whether the plaintiff has a claim for relief under" the statute at issue. *Ainscough,* 90 P.3d at 856. Generally, if the legislature "enact[s] a particular administrative remedy to redress a statutory violation," that decision "is consistent with a legislative intent to preclude a private civil remedy for breach of the statutory duty." *Allstate Ins. Co. v. Parfrey,* 830 P.2d 905, 910 (Colo.1992). But if the statute "is totally silent on the matter of remedy," then the court "must determine whether a private civil remedy reasonably may be implied." *Id.* To answer this question, the court must examine three factors: (1) "whether the plaintiff is within the class of persons intended to be benefitted by the legislative enactment"; (2) "whether the legislature intended to create, albeit implicitly, a private right of action"; and (3) "whether an implied civil remedy would be consistent with the purposes of the legislative scheme." *Id.* at 911.[9]

With these principles in mind, we now address whether the Act confers a legally protected interest upon Petitioners.

C. The Act Does Not Confer a Legally Protected Interest upon Petitioners

In order for the Act to confer a legally protected interest, it must authorize a claim for relief, either expressly or impliedly. Petitioners concede that the Act does not explicitly permit a private right of action. The question, then, is whether we can infer such a right from the legislature's intent. We conclude that we cannot.

At the outset, we reject Respondents' contention that the Act houses an "extensive remedial system" that automatically forecloses a private right of action.

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[9] We recognize that *Parfrey*'s three-factor test applies nominally to suits against private parties, *see* 830 P.2d at 911, and that we have never formally announced a test to determine whether a statute impliedly authorizes a claim for relief against a public entity. Our court of appeals, however, has repeatedly used a virtually identical test in the governmental context. *See, e.g., Macurdy v. Faure,* 176 P.3d 880, 882 (Colo.App.2007) (examining the *Parfrey* factors in holding that the plaintiff could not sue a county coroner for failing to perform a statutorily required autopsy); *Olson v. City of Golden,* 53 P.3d 747, 752 (Colo.App.2002) (examining three criteria indistinguishable from the *Parfrey* factors in holding that the plaintiff could not sue the city for violating an urban renewal law). Because the *Parfrey* factors revolve around the touchstone of legislative intent–and because they make no qualitative distinction regarding the character of the defendant in a particular suit–they are applicable to the facts of this case.

It is true that, where a statute features particular remedies, we will not imply additional remedies. *See, e.g., Capital Sec. of Am., Inc. v. Griffin,* 2012 CO 39, ¶¶2–3, 278 P.3d 342, 343 (holding that the legislature did not intend to imply a disgorgement remedy for violation of a securities statute because the "statutory scheme adopted by the General Assembly expressly sets forth a number of [other] remedies"); *Gerrity Oil & Gas Corp. v. Magness,* 946 P.2d 913, 925 (Colo.1997) (holding that, because an oil and gas statute only authorized suits for injunctive relief, the legislature affirmatively "chose not to include a private remedy in damages" and that "we will not infer such a remedy"); *Bd. of Cnty. Comm'rs v. Moreland,* 764 P.2d 812, 818 (Colo.1988) (holding that the plaintiff could not sue for violation of a building code in part because different remedies were "specifically provided by the statute authorizing enactment of" the code). But here, the Act features no such explicit remedies. The only language in the Act tangentially relating to the subject of remedy appears in section 22–54–120(1), C.R.S. (2014), which provides that the State Board "shall make reasonable rules and regulations necessary for the administration and enforcement" of the Act. This is generalized language that in no way articulates a particularized enforcement scheme. As such, the Act is materially different from, for example, a statute that authorizes a public entity that purchased unlawful securities to "force the seller to repurchase the securities," *Griffin,* ¶ 22, 278 P.3d at 346, or a statute that "clearly permits a private party to seek injunctive relief" for violation of an oil and gas statute, *Gerrity Oil,* 946 P.2d at 925.[10]

Because the Act features no explicit remedies, we must turn to the three *Parfrey* factors. *Supra* ¶ 15. First, it is clear that Petitioners are "within the class of persons intended to be benefitted" by the Act. *See Parfrey,* 830 P.2d at 911. The Act formally declares that it is designed "to provide for a thorough and uniform system of public schools throughout the state" in accordance with article IX, section 2 of the Colorado Constitution. § 22–54–102(1), C.R.S. (2014). That constitutional provision guarantees that "all [school-age] residents of the state ... may be educated gratuitously." Colo. Const. art. IX, § 2. Petitioners are school-age Douglas County children (and their parents), and the Act operates to ensure that they may receive a free public education. Thus, they are the Act's intended beneficiaries.

But the second factor—"whether the legislature intended to create, albeit implicitly, a private right of action," *Parfrey,* 830 P.2d at 911—is where Petitioners' claim falters. As we have made clear, "we will not infer a private right of action based on a statutory violation unless we discern a *clear legislative intent* to create such a cause of action." *Gerrity Oil,* 946

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[10] Respondents point out that, pursuant to section 22–54–120(1), the State Board enacted a number of regulations, *see* 1 CCR 301–39:2254–R–1.00 to –20.00, and they argue that these regulations house exclusive administrative remedies. But regulations are not statutes—they are not crafted by the General Assembly. Thus, that the State Board possessed legislative authority to enact regulations does not transform those regulations into a Rosetta stone that allows us to decipher the General Assembly's intent.

P.2d at 923 (emphasis added). Here, nothing in the Act suggests that the General Assembly intended to allow private parties to redress violations of the statute in court. To the contrary, the Act instructs the State Board to "make reasonable rules and regulations" to enforce its provisions. § 22–54–120(1). Although this language does not affirmatively create an administrative remedy, *see supra* ¶18, it nevertheless indicates that the General Assembly contemplated providing a private remedy but ultimately refused to do so, choosing instead to entrust enforcement to the State Board. *Cf. Gerrity Oil,* 946 P.2d at 925 n. 6 ("Inferring a private cause of action ... every time a person violates the [Oil and Gas Conservation] Act or rules issued thereunder would also be inconsistent with the *clear legislative intent* that the [Oil and Gas Conservation] [C]ommission have *primary responsibility* for enforcing the Act's provisions." (emphasis added)). Therefore, the Act manifests the General Assembly's intent that the State Board—not private citizens—be responsible for ensuring its lawful implementation.[11]

Similarly, the third factor—"whether an implied civil remedy would be consistent with the purposes of the legislative scheme," *Parfrey,* 830 P.2d at 911—also

[11] Petitioners assert that the State Board in fact colluded with Douglas County in implementing the CSP. Thus, in Petitioners' view, the State Board abdicated its statutorily delegated responsibility to enforce the Act, meaning it now falls to them to force the Board to properly execute its duties. Putting aside the veracity of Petitioners' collusion claim (which Respondents naturally dispute), Petitioners cite no authority suggesting that the State Board's hypothetical failure would automatically confer standing on private parties.

militates against inferring a private right of action. Again, the overarching purpose of the Act is to fulfill Colorado's constitutional mandate to provide free public education to school-age children. *See* Colo. Const. art. IX, § 2; § 22–54–102(1). This is a duty of obvious importance, and its execution necessarily requires both the State Board and the Colorado Department of Education ("the Department") to craft complicated procedures and devise detailed funding formulae. *See, e.g.,* § 22–54–106.5(2), C.R.S. (2014) (directing the Department to calculate an amount to be kept in "fiscal emergency restricted reserve"); § 22–54–114(2), C.R.S. (2014) (requiring the Department to determine funding requirements for each school district); § 22–54–117(1)(a), C.R.S. (2014) (authorizing the State Board to approve payments from the "contingency reserve"); § 22–54–129(6)(a), C.R.S. (2014) (instructing the State Board to "promulgate rules" to effectuate the funding of facility schools). Because both agencies must engage in myriad tasks, they require a degree of flexibility for the Act to function properly. Allowing citizen suits would severely impede this complex process, thereby thwarting the purpose of the legislative scheme. It is inevitable that some members of the public will disapprove of any given government action. But that disapproval does not justify allowing private parties to sue the State Board and the Department for every perceived violation of the Act. Were that the case, these agencies would be paralyzed with litigation from dissatisfied constituents, crippling their effectiveness.

Finally, we reject Petitioners' argument that they have taxpayer standing. Generally speaking, taxpayer standing "flows from an 'economic interest in having [the taxpayer's] tax dollars spent in a constitutional manner.'" *Hickenlooper v. Freedom from Religion Found., Inc.,* 2014 CO 77, ¶ 11 n. 10, 338 P.3d 1002, 1007 n. 10 (alteration in original) (quoting *Conrad v. City & Cnty. of Denver,* 656 P.2d 662, 668 (Colo.1982)). Thus, although we have recognized that Colorado permits "broad taxpayer standing," *Ainscough,* 90 P.3d at 856, the doctrine typically applies when plaintiffs allege *constitutional* violations. *See, e.g., Barber v. Ritter,* 196 P.3d 238, 247 (Colo.2008) (holding that the plaintiffs had "taxpayer standing to challenge *the constitutionality* of [governmental] transfers of money" (emphasis added)); *Conrad,* 656 P.2d at 668 (recognizing taxpayer standing because "the plaintiffs [have] alleged injury flowing from governmental violations of *constitutional* provisions that specifically protect the legal interests involved" (emphasis added)).[12] Expanding taxpayer standing to cases where a plaintiff alleges that the government violated *a statute*—as Petitioners seek to do here—would effectively nullify the enduring requirement that the statute actually authorizes a claim for relief. *See Ainscough,* 90 P.3d at 856. This in turn would render superfluous *Parfrey*'s well-settled three-factor test for divining whether the General Assembly intended to imply a private right of action into a statute. We thus decline to endorse Petitioners' broad and novel conception of taxpayer standing.[13]

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[12] For this reason, Respondents do not dispute that Petitioners have standing to assert their claims that the CSP violates the Colorado Constitution.

[13] Despite Petitioners' insistence, our analysis here in no way conflicts with our opinion in *Dodge v. Department of Social*

In sum, we conclude that the General Assembly did not intend to imply a private right of action into the Act and that such a remedy would be inconsistent with the Act's legislative scheme. Therefore, Petitioners cannot state a claim for relief under the Act, meaning it does not furnish them with a legally protected interest, one of the two prerequisites for standing. *See Wimberly,* 570 P.2d at 539. Accordingly, we hold that Petitioners lack standing to challenge the CSP under the Act.

Because Petitioners lack standing, we need not consider whether the CSP in fact fails to comply with the Act. Instead, we now turn to whether the CSP violates article IX, section 7 of the Colorado Constitution.

III. Article IX, Section 7 of the Colorado Constitution

To resolve whether or not the CSP violates the Colorado Constitution, we first consider the CSP as a whole and conclude that it conflicts with the plain language of article IX, section 7. We then examine our prior decision in *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1074–75 (Colo.1982)—in which we held that a grant

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Services, 198 Colo. 379, 600 P.2d 70 (1979). In that case, we held that the plaintiffs had "standing to litigate the issue of whether ... [the government has] the *statutory authority* to use public funds for nontherapeutic abortions." *Id.* at 72 (emphasis added). But the plaintiffs in *Dodge* did not argue that the government had *violated* a particular statute; rather, they claimed that *no* statute authorized the government's behavior. *See id.* at 71. Thus, *Dodge* has no bearing on the issue of whether a plaintiff has a claim for relief under a particular statute.

program that awarded money to students attending religious universities did *not* run afoul of section 7—and we determine that the CSP is distinguishable from the grant program at issue in that case. Finally, we reject Respondents' argument that striking down the CSP under the Colorado Constitution in fact violates the First Amendment to the United States Constitution. Accordingly, we hold that the CSP violates section 7 and is thus unconstitutional.

A. Standard of Review

We review the trial court's determination of the CSP's constitutionality de novo. *See Justus v. State*, 2014 CO 75, ¶ 17, 336 P.3d 202, 208. When reviewing a statute, we presume that the statute is constitutional, and we will only void it if we deem it to be unconstitutional beyond a reasonable doubt. *Id.*[14]

B. The CSP Conflicts with the Plain Language of Section 7

The Colorado Constitution features broad, unequivocal language forbidding the State from using public money to fund religious schools. Specifically, article IX, section 7— entitled "Aid to private schools, churches, sectarian purpose, forbidden"—includes the following proscriptive language:

> Neither the general assembly, nor any *county,* city, town, township, *school district* or

[14] Petitioners argue that this presumption of constitutionality should not apply here because the CSP is a creation of a local school board rather than a statute passed by the General Assembly. Because we conclude that the CSP is unconstitutional even in light of the presumption, we need not consider this argument.

> 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….*

(Emphasis added.) Although this provision uses the term "sectarian" rather than "religious," the two words are synonymous. *See Black's Law Dictionary* 1557 (10th ed. 2014) (defining "sectarian" as "[o]f, relating to, or involving a particular religious sect; esp., supporting a particular religious group and its beliefs"). That section 7 twice equates the term "sectarian" with the word "church" only reinforces this point. Therefore, this stark constitutional provision makes one thing clear: A school district may not aid religious schools.

Yet aiding religious schools is exactly what the CSP does. The CSP essentially functions as a recruitment program, teaming with various religious schools (i.e., the Private School Partners) and encouraging students to attend those schools via the inducement of scholarships. To be sure, the CSP does not explicitly funnel money directly to religious schools, instead providing financial aid to students. But section 7's prohibitions are not limited to direct funding. Rather, section 7 bars school districts from "pay[ing] from any public fund or moneys *whatever, anything* in aid of any" religious institution, and from "help[ing] *support or sustain* any school ... controlled by any church or sectarian denomination *whatsoever*" (emphasis added). Given that private religious schools rely on students' attendance (and their corresponding tuition payments) for their ongoing survival, the CSP's facilitation of such attendance necessarily constitutes aid to "support or sustain" those schools. Section 7 precludes school districts from providing such aid.

Respondents point out that the CSP does not *require* scholarship recipients to enroll in a religious school, nor does it force participating Private School Partners to be religious. Respondents thus suggest that the CSP features an element of private choice that severs the link between the District's aid to the student and the student's ultimate attendance at a (potentially) religious school. It is true that the CSP does not *only* partner with religious schools; several Private School Partners are non-religious. The fact remains, however, that the CSP awards public money to students who may then use that money to pay for a religious education. In so doing, the CSP aids religious institutions. Thus, even ignoring the pragmatic realities that scholarship recipients face—such as the trial court's finding that "virtually all high school students" can only use their scholarships to attend religious schools— the CSP violates the clear constitutional command of section 7.[15]

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[15] Respondents present a parade of horribles, arguing that any decision striking down the CSP will produce ripple effects invalidating other public-private partnerships across the state where public money flows to religious schools. But the constitutionality of those programs is not at issue here, and the record contains no data regarding their operation. Therefore, we choose to focus our analysis solely on the CSP.

The program's lack of vital safeguards only bolsters our conclusion that it is constitutionally infirm. Most troubling is that the CSP does not forbid a Private School Partner from raising a scholarship recipient's tuition (or reducing his financial aid) in the amount of the scholarship awarded. Such conduct would pervert the program's "offset" approach and would instead result in the District channeling taxpayer money directly to a religious school. As the trial court found, one religious Private School Partner has already engaged in this very behavior.[16]

Respondents nevertheless contend that the plain language of section 7 is not plain at all, but that the term "sectarian" is actually code for "Catholic." In so doing, Respondents charge that section 7 is a so-called "Blaine Amendment" that is bigoted in origin. *See Taxpayers for Pub. Educ.,* ¶ 62 n.13 (describing Blaine Amendments as "state laws and constitutional provisions which allegedly arose out of anti-Catholic school sentiment"). They thus encourage us to wade into the history of section 7's adoption and declare that the framers created section 7 in a vulgar display of anti–Catholic animus.

We need not perform such an exegesis to dispose of Respondents' argument. Instead, we need merely

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[16] The court of appeals dismissed this incident, highlighting the superintendent's testimony that such conduct "would be in violation of the CSP" and noting that the trial court "cited no evidence supporting a conclusion that such [a] reduction was permissible under the CSP." *Taxpayers for Pub. Educ.,* ¶ 70. But this analysis inverts the issue. The problem is not that the CSP declares such a reduction to be permissible (it does not); it is that the program does not make such reductions *impermissible.*

recall that "constitutional provisions must be declared and enforced as written" whenever their language is "plain" and their meaning is "clear." *People v. Rodriguez,* 112 P.3d 693, 696 (Colo.2005). As discussed, the term "sectarian" plainly means "religious." Therefore, we will enforce section 7 as it is written.[17]

Accordingly, we cannot square the CSP's resultant aid of religious schools with the plain language of section 7. Respondents insist, however, that both state and federal case law compel the conclusion that the CSP in fact comports with section 7. We now review this case law, beginning with our decision in *Americans United.*

C. *Americans United* Is Distinguishable

In *Americans United,* we upheld a grant program that awarded public money to college students who attended religious universities, provided those universities were not "pervasively sectarian." 648 P.2d at 1074–75. Respondents assert that the present case is "no different" from *Americans United,* meaning that we must uphold the CSP. Our analysis reveals, however, that the grant program in *Americans United*

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[17] We note that Respondents' suggestion that "sectarian" literally means "Catholic" is tantamount to an attack on section 7's constitutionality, as the provision would patently violate the First Amendment if it discriminated against a particular religion. But the constitutionality of section 7 is not before us. And Respondents' attempted evasion of this procedural obstacle—they claim that they are not challenging section 7 itself but rather Petitioners' *interpretation* of it—is little more than a Trojan horse inviting us to rule on the actual legitimacy of section 7. We decline such an invitation.

diverges from the CSP in numerous critical ways. As such, the outcome of that case is not dispositive of—and indeed has minimal bearing on—the present dispute.

Americans United revolved around the Colorado Student Incentive Grant Program ("the grant program"), a scholarship for in-state college students. *Id.* at 1074. The grant program allowed eligible universities to recommend particular students deserving of scholarships to the Colorado Commission of Higher Education, which in turn administered the grants. *Id.* at 1075. The Commission awarded the grant money to the university, which then reduced the student's tuition by the amount of the grant. *See id.* at 1081 ("The educational institution serves essentially as a conduit for crediting the funds to the student's account."). Although the grant program embraced most colleges and universities, it excluded institutions that were "pervasively sectarian," and it defined six eligibility criteria that schools needed to meet in order *not* to be branded pervasively sectarian. *Id.* at 1075. We deemed the grant program to be constitutional, *id.* at 1074, and Respondents thus contend that we must now reach the same result with the CSP.

Respondents' reasoning is flawed. Admittedly, the grant program and the CSP share certain core features; both award public money to students attending religious schools, and both are primarily designed to aid students rather than institutions. But closer scrutiny reveals a crippling defect in Respondents' argument: The rationales animating our holding in *Americans United* are inapplicable to this case. That is, in determining that the grant program complied with section 7, we cited several crucial factors. *Id.* at 1083–84. Those factors are absent here.

First, we noted in *Americans United* that the grant program was "designed to assist the student, not the institution." *Id.* at 1083. Facially, that is true of the CSP as well. Yet in *Americans United,* we tethered this observation to the fact that grant recipients could not attend "pervasively sectarian" institutions, noting that this exclusion *"obviates any real possibility* that the aid itself might somehow flow indirectly to an institution whose educational function is not clearly separable from its religious mission." *Id.* at 1081 (emphasis added). Here, that possibility is very real. The CSP places no limitations on the extent to which religion infuses a Private School Partner,[18] and it in fact affirmatively authorizes partnering schools to make "enrollment decisions based upon religious beliefs." Therefore, it is entirely plausible that the CSP gives aid to schools "whose educational function is not clearly separable from [their] religious mission." *See Americans United,* 648 P.2d at 1081.

Second, the grant program only awarded scholarships to students of higher education. *Id.* at

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[18] We do not suggest, of course, that grafting such limitations onto the CSP would necessarily render it compliant with section 7, or would even comport with the First Amendment. *See infra* ¶48 (discussing *Colorado Christian University v. Weaver,* 534 F.3d 1245, 1250, 1263 (10th Cir.2008), which held that the "pervasively sectarian" distinction in Colorado's scholarship programs violated the First Amendment). Regardless, Petitioners do not seek to rewrite the CSP so that it excludes religious schools (pervasively sectarian or otherwise); they simply desire a court order enjoining implementation of the CSP in its entirety.

1084. Recognizing that "as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities," we concluded that "there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id.* Obviously, this rationale of diminished risk cannot apply to the CSP, which covers not collegiate pupils but elementary and secondary school students.[19]

Third, the grant program aided students who attended both public and private universities. We deemed this to be of critical importance, noting that students' opportunity to attend public schools "dispell[ed] any notion that the aid is calculated to enhance the ideological ends of the sectarian institution." *Id.* Once again, this is not true of the CSP, which only bestows scholarships to students attending private schools.

Fourth, the grant program explicitly provided that "no institution shall decrease the amount of its own funds spent for student aid below the amount spent prior to participation in the program." *Id.* We recognized that this formal prohibition "create[d] a disincentive for an institution to use grant funds other than for the purpose intended—the secular educational needs of the student." *Id.* As discussed, *supra* ¶30, the CSP lacks this significant safeguard, and in fact one religious Private School Partner did

[19] Again, we do not imply that the CSP would necessarily be constitutional if it pertained to college students. We simply point out that a linchpin of our analysis in *Americans United* is irrelevant here.

reduce a student's financial aid in the amount of the student's scholarship.

Finally, in order to be eligible for the grant program, a university's governing board could not "reflect" a particular religion, nor could its membership be "limited to persons of any particular religion." *Americans United,* 648 P.2d at 1075. We noted that this restriction "militate[d] against the type of ideological control over the secular educational function" that section 7 forbids, particularly because it "require[d] a strong commitment to academic freedom by an essentially independent governing board with no sectarian bent in the curriculum tending to indoctrinate or proselytize." *Id.* at 1084. Because the CSP willingly partners with private schools that reflect a particular religion, this rationale from *Americans United* is wholly inapplicable here.

All told, although the grant program and the CSP feature surface similarities, they are two highly distinct scholarship programs. Therefore, because our analysis in *Americans United* relied heavily on elements of the grant program that are missing from the CSP, that analysis is of minimal relevance in our quest to determine the CSP's constitutionality.

Accordingly, we reject Respondents' argument that *Americans United* requires us to uphold the CSP. Having done so, we now turn to Respondents' assertion that invalidating the CSP in fact violates the First Amendment.

D. Invalidating the CSP Does Not Violate the First Amendment

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Respondents contend that several federal cases interpreting the First Amendment constitute binding case law forbidding us from striking down the CSP. In particular, Respondents cite the U.S. Supreme Court's decision in *Zelman v. Simmons–Harris,* 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), and the Tenth Circuit's opinion in *Colorado Christian University v. Weaver,* 534 F.3d 1245 (10th Cir.2008).[20] We conclude that neither of these cases is availing.

In *Zelman,* the Court held that an Ohio scholarship program ("the Ohio program") that allowed students to attend religious schools did not violate the First Amendment's Establishment Clause. 536 U.S. at 644–45, 122 S.Ct. 2460. The Court noted that the Ohio program was "entirely neutral with respect to religion" and that it was "a program of true private choice" because it allowed students and parents "to exercise genuine choice among options public and private, secular and religious." *Id.* at 662, 122 S.Ct. 2460. Respondents assert that the CSP bears "striking similarities" to the Ohio program, meaning that *Zelman* controls the outcome here.

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[20] Respondents also rely on *Mitchell v. Helms,* 530 U.S. 793, 829, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), in which a plurality of the Court held that a law that indirectly aided religious schools did not violate the Establishment Clause because it "determine[d] eligibility for aid neutrally, allocate[d] that aid based on the private choices of the parents of schoolchildren, and [did] not provide aid that ha[d] an impermissible content." Because *Mitchell* was a plurality opinion, it is not binding precedent. We thus decline to ascribe to it the force of law.

Had Petitioners claimed that the CSP violated the Establishment Clause, *Zelman* might constitute persuasive authority. But they did not. Rather, Petitioners challenged the CSP under article IX, section 7 of the Colorado Constitution. By its terms, section 7 is far more restrictive than the Establishment Clause regarding governmental aid to religion, and the Supreme Court has recognized that state constitutions may draw a tighter net around the conferral of such aid. *See Locke v. Davey,* 540 U.S. 712, 721, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) ("[T]he subject of religion is one in which both the United States and state constitutions embody distinct views.... That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.").[21] As such, *Zelman's* reasoning, rooted in the Establishment Clause, is irrelevant to the issue of whether the CSP violates section 7.

Furthermore, *Zelman* is factually distinguishable. To begin with, unlike the CSP, the Ohio program allowed students to attend public schools as well as private schools. *Zelman*, 536 U.S. at 645, 122 S.Ct. 2460. More importantly, the Ohio program forbade participating private schools from

[21] For their part, Petitioners contend that *Locke* demonstrates the patent invalidity of the CSP. But this too is incorrect. *Locke* held that a state scholarship program that *excluded* students who were pursuing a degree in devotional theology did not violate the First Amendment. 540 U.S. at 715, 124 S.Ct. 1307. It said nothing about the constitutionality of a program that *allowed* students to attend religious schools. Thus, *Locke's* facts are inverted from those of the present case.

discriminating on the basis of religion. *Id.* Not only does the CSP fail to prohibit this form of discrimination—it actively permits Private School Partners to engage in it.

Colorado Christian is even less germane. In that case, the Tenth Circuit considered the legality of Colorado's scholarship programs—including the very grant program at issue in *Americans United*—and struck them down as violative of the First Amendment for two reasons. 534 F.3d at 1250, 1263. First, the court held that the programs' exclusion of "pervasively sectarian" institutions constituted religious discrimination. *Id.* at 1258, 1260. This holding is simply inconsequential to the legality of the CSP, which does not distinguish among religious schools. If anything, this conclusion merely erodes the strength of *Americans United,* as it invalidates the same program that *Americans United* upheld.

Second, the Tenth Circuit held that the statutory inquiry into whether a university qualified as "pervasively sectarian" involved impermissibly "intrusive judgments regarding contested questions of religious belief or practice." *Id.* at 1261. In particular, the Tenth Circuit noted that courts may not "troll[ ] through a person's or institution's religious beliefs." *Id.* (quoting *Mitchell v. Helms,* 530 U.S. 793, 828, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion) (describing the inquiry into whether a school is "pervasively sectarian" to be "not only unnecessary but also offensive")). Respondents contend that the trial court engaged in such improper conduct when it found as a factual matter that sixteen Private School Partners are religious.

Had the trial court actually conducted such an invasive inquiry, Respondents' argument might carry force. Yet the trial court did not "troll through" the beliefs of any institution. Rather, it simply took notice of the Private School Partners' basic characteristics. For example, the trial court cited various schools' ownership structures (many are formally controlled by churches or dioceses), their admissions policies (several only admit students of a particular faith), and their formal mission statements, all of which school officials corroborated when testifying at the injunction hearing. In conducting this cursory examination, the trial court reached the self-evident and undisputed conclusion that certain Private School Partners are in fact religious.[22] We recognize that a court may not trespass into the depths an institution's religious beliefs. But there is a categorical difference between inquiring into the *extent* of an institution's religiosity and determining its *existence.*[23] To suggest that the trial court here could not even acknowledge that the CSP resulted in partnerships between the District and religious schools would require the court to be willfully blind to the plain realities—and the corresponding constitutional deficiencies—of the program.

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[22] Indeed, the very *name* of fifteen of the sixteen religious Private School Partners features a word— such as "Catholic," "Christian," "Hillel," "Jesuit," or "Lutheran"—that clearly announces the school's religious affiliation.

[23] As Petitioners point out, courts are often *required* to conduct such basic inquiries into the existence of religion. *See, e.g., Maurer v. Young Life,* 779 P.2d 1317, 1331 (Colo.1989) (analyzing an entity's claim that certain properties "qualified for [a tax] exemption *based on use for religious worship and reflection*" (emphasis added)).

Accordingly, we conclude that both *Zelman* and *Colorado Christian* are inapposite to the present case. Therefore, our decision that the CSP violates section 7 does not encroach upon the First Amendment.

IV. Conclusion

Article IX, section 7 of the Colorado Constitution prohibits school districts from aiding religious schools. The CSP has created financial partnerships between the District and religious schools and, in so doing, has facilitated students attending such schools. This constitutes aid to religious institutions as contemplated by section 7. Therefore, we hold that the CSP violates section 7. Accordingly, we reverse the judgment of the court of appeals and remand the case to that court with instructions to return the case to the trial court so that the trial court may reinstate its order permanently enjoining the CSP.

JUSTICE MÁRQUEZ concurs in the judgment.

JUSTICE EID concurs in part and dissents in part, and JUSTICE COATS and JUSTICE BOATRIGHT join in the concurrence in part and dissent in part.

JUSTICE MÁRQUEZ, concurring in the judgment.

I respectfully disagree with the Part II majority[1] that Petitioners lack taxpayer standing to pursue their claim that the Choice Scholarship Program ("CSP") violates the Public School Finance Act of 1994

[1] A majority of this court holds in Part II that Petitioners lack standing to bring their statutory claim.

("the Act"), §§ 22–54–101 to –135, C.R.S. (2014). It is uncontested that Petitioners have taxpayer standing to raise their state constitutional challenges. Although the majority acknowledges that Colorado permits "broad taxpayer standing," the majority nevertheless concludes that Petitioners categorically lack taxpayer standing to raise their statutory claims. Maj. op. ¶22. Yet I perceive no principled basis in our case law to draw distinctions between a taxpayer's standing to bring a statutory claim as opposed to a constitutional claim. Whether the expenditure allegedly runs afoul of a constitutional or a statutory provision, in the context of *taxpayer* standing the core legal interest at stake is identical: It is the taxpayer's economic interest in ensuring that his tax dollars are expended in a lawful manner.

I would hold that Petitioners have alleged sufficient injury in fact to establish taxpayer standing to challenge the alleged unlawful expenditure of funds under the Act. On the merits, I conclude that the CSP violates the Act by funneling public funds through a nonexistent charter school to finance private education. Because I would resolve this case in favor of Petitioners on statutory grounds, I respectfully concur in the judgment only.

I. Taxpayer Standing

Standing is a threshold jurisdictional issue that plaintiffs must satisfy before a court may decide a case on the merits. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo.2004). The purpose of the standing analysis is to test a particular litigant's right to raise a legal argument or claim. *City of Greenwood Vill. v.*

Petitioners for the Proposed City of Centennial, 3 P.3d 427, 436 (Colo.2000).

To establish standing under Colorado law, a plaintiff must satisfy two criteria: First, the plaintiff must have suffered an injury in fact, and, second, this harm must have been to a legally protected interest. *Ainscough,* 90 P.3d at 855 (citing *Wimberly v. Ettenberg,* 194 Colo. 163, 570 P.2d 535, 539 (1977)).

We have characterized the "legally protected interest" requirement as a "prudential rule of standing based on judicial self-restraint." *Conrad v. City & Cnty. of Denver,* 656 P.2d 662, 668 (Colo.1982); *see also Hickenlooper v. Freedom from Religion Found., Inc.,* 2014 CO 77, ¶ 10, 338 P.3d 1002, 1007 (stating that the legally protected interest prong of the standing inquiry "promotes judicial self-restraint"). In describing this prong in *Wimberly,* we referred to a "legally protected interest as contemplated by statutory or constitutional provisions." 570 P.2d at 539. Thus, a "legally protected interest" may be a tangible or intangible interest that rests in property, arises out of contract, lies in tort, or is conferred by constitutional or statutory provisions. *See Barber v. Ritter,* 196 P.3d 238, 246 (Colo.2008).

Yet where a plaintiff asserts *taxpayer* standing, the interest at stake is anchored in his status as a *taxpayer.* Because the taxpayer has (by definition) paid taxes that flow into a pool of public funds, the taxpayer has an "economic interest in having his tax dollars spent in a [lawful] manner." *Conrad,* 656 P.2d at 668. Thus, a taxpayer asserts injury in fact to a legally protected interest when he challenges the allegedly unlawful expenditure of public funds to which he has contributed by his payment of taxes.

In this case, the majority assumes without deciding that Petitioners have alleged an injury in fact, although it never identifies the nature of the injury. Maj. op. ¶ 14. The majority then concludes, however, that under *Allstate Insurance Co. v. Parfrey,* 830 P.2d 905 (Colo.1992), Petitioners' unidentified injury does not implicate any legally protected interest because the General Assembly did not intend to create a private right of action under the Public School Finance Act. Maj. op. ¶¶19, 23. But this court's *Parfrey* test was designed to determine "whether a private tort remedy is available against a nongovernmental defendant for violating a statutory duty," and its factors reflect this aim. *See* 830 P.2d at 911. The *Parfrey* test is wholly inapposite in this context. Petitioners are not suing a private party seeking damages for an alleged private wrong; rather, they are taxpayers suing the government seeking declaratory and injunctive relief for the unlawful expenditure of their tax dollars. *See Dodge v. Dep't of Soc. Servs.,* 198 Colo. 379, 600 P.2d 70, 71 (1979). Because the majority uses the wrong test for standing, it reaches the wrong result.

In *Parfrey,* insureds sued their insurer alleging violations of the insurer's statutory duty to offer certain uninsured/underinsured motorist coverage. 830 P.2d at 906. At issue was whether the statute afforded the insured a private civil tort remedy. *Id.* at 910. We held that a statute confers a private remedy against a nongovernmental defendant where three factors are met: (1) the plaintiff is "within the class of persons" intended to benefit from the statute; (2) "the legislature intended to create, albeit implicitly, a private right of action"; and (3) the implied civil remedy would be "consistent with the purposes of the legislative scheme." *Id.* at 911. As the majority recognizes, the aim of the *Parfrey* test is to discover and give effect to the will of the legislature—the *Parfrey* factors "revolve around the touchstone of legislative intent." Maj. op. ¶ 15 n. 9. Thus, whether a plaintiff may sue a private party for damages for a private wrong under a statute turns on whether the legislature intended to allow such recourse as part of the statutory scheme.

However, where a taxpayer seeks to enjoin the government's unlawful expenditure of public funds, we have never demanded a showing that the legislature authorized a private right of action to seek such relief. Rather, for a century, this court has recognized that an individual taxpayer generally may sue to enjoin "the misapplication of public funds from the state treasury." *Leckenby v. Post Printing & Publ'g Co.,* 65 Colo. 443, 176 P. 490, 492 (1918).

All agree that Petitioners have taxpayer standing to assert their claims that the CSP violates certain provisions of the Colorado Constitution. *See* maj. op. ¶ 22 n. 12. After all, Petitioners have asserted an injury in fact—misapplication of public funds—to their legally protected economic interest in having their tax dollars spent in a lawful manner. *See Hickenlooper,* ¶ 12, 338 P.3d at 1007. But I perceive no principled basis in our case law for the majority to distinguish between taxpayer standing to bring suit to enjoin expenditures of public funds in violation of the

Colorado Constitution and taxpayer standing to bring suit to enjoin expenditures of public funds in violation of a statute. *See* maj. op. ¶ 22. The injury to the taxpayers' economic interest in having their tax dollars spent in a lawful manner is identical. The majority reasons simply that the doctrine "typically" applies to alleged "*constitutional* violations" and claims that to recognize Petitioners' standing to enforce the Act would be to "endorse [a] broad and novel conception of taxpayer standing." *Id.* (emphasis in original). But in Colorado, taxpayers have long had the right to bring suit to enjoin the expenditure of public funds in violation of a statute. *See Packard v. Bd. of Cnty. Comm'rs,* 2 Colo. 338, 339, 350 (1874) (recognizing the right of "resident tax payers" "to resort to equity to restrain ... misapplication of public funds" under state statute); *see also Johnson–Olmsted Realty Co. v. City & Cnty. of Denver,* 89 Colo. 250, 1 P.2d 928, 930 (1931) (acknowledging taxpayer's right to sue to enjoin expenditures under a city charter).

More recently, in *Dodge,* we held that individual taxpayers had standing to enjoin the use of public funds for nontherapeutic abortions on grounds that the state lacked statutory authority to do so. 600 P.2d at 71–72. The majority suggests that *Dodge* is distinguishable because the plaintiffs there "did not argue that the government had *violated* a particular statute; rather, they claimed that *no* statute authorized the government's behavior." Maj. op. ¶ 22 n. 13 (emphasis in original). But, for purposes of standing, such a distinction is illusory. An expenditure of public funds may be deemed "unlawful" whether made in violation of an express statutory provision or in the absence of statutory authorization.

In sum, I perceive no principled basis in our case law to limit taxpayer standing to claims based on alleged violations of the constitution. The taxpayer's economic interest in ensuring that his tax dollars are spent in a lawful manner does not somehow change or cease to exist where the expenditure instead runs afoul of a statute (or lacks statutory authorization). The majority's suggestion that to recognize Petitioners' standing to enforce the Act would be to endorse a "novel conception of taxpayer standing," maj. op. ¶ 22, ignores this court's holding in *Dodge* and our earlier case law on which it relied. *See* 600 P.2d at 71 (citing *Johnson–Olmstead,* 1 P.2d 928; *Leckenby,* 176 P. 490; *Packard,* 2 Colo. 338).

II. Petitioners Have Taxpayer Standing to Challenge Alleged Violations of the Public School Finance Act

I would hold that Petitioners in this case have taxpayer standing to challenge the alleged violations of the Act. Petitioners are nonprofit corporations and individuals: parents of children in Douglas County's public schools, citizens concerned with public education, and, most importantly, Colorado taxpayers. Petitioners contend that the Douglas County School District lacks statutory authority to receive public funds under the Act for public school pupils and to redirect those monies to fund private school education under the auspices of the CSP. In short, Petitioners claim that they are harmed by the diversion of their tax dollars away from public schools and into private schools. Like the taxpayer plaintiffs in *Dodge* and *Johnson–Olmsted*, Petitioners have a cognizable interest in the government's spending their tax money in a lawful manner. *Dodge v. Dep't of Soc. Servs*., 198 Colo. 379, 600 P.2d 70, 72 (1979); *Johnson–Olmsted Realty Co. v. City & Cnty. of Denver*, 89 Colo. 250, 1 P.2d 928, 930 (1931).

Importantly, Petitioners' alleged economic injury in this case is not merely an "indirect and incidental" harm. *Wimberly v. Ettenberg,* 194 Colo. 163, 570 P.2d 535, 539 (1977). In *Hickenlooper v. Freedom from Religion Foundation, Inc.,* this court held that the de minimis cost of "the paper, hard-drive space, postage, and personnel necessary to issue one Colorado Day of Prayer proclamation each year" was not sufficiently related to the plaintiffs' tax contributions to establish an injury in fact. 2014 CO 77, ¶ 15, 338 P.3d 1002, 1008. Here, by contrast, Petitioners estimate that, based on a projected funding amount of $6100 per pupil for the 2011–2012 school year, the CSP would remove more than $3 million from the Douglas County School District's budget. In fact, by the time the trial court entered its injunction, the CSP had already delivered more than $200,000 in tuition checks to Private School Partners. In my view, these expenditures demonstrate that Plaintiffs have alleged a sufficient injury for taxpayer standing purposes. *Wimberly,* 570 P.2d at 539.

III. Petitioners' Claim Under the Public School Finance Act

Having determined that Petitioners have taxpayer standing under the Act, I briefly outline my views of the merits of their claim and my conclusion that the CSP is a patently unauthorized use of public funds under the Act.

Petitioners allege that the CSP violates the Act largely for two reasons. First, the Act is designed to distribute public money to each school district to fund public education, and the CSP violates section 22–54–104(1)(a), C.R.S. (2014), by diverting public funds to private schools. Second, the CSP funnels public funds through the Choice Scholarship Charter School—a charter school that exists only on paper and fails to comport with the requirements of the Charter School Act, § 22–30.5–104, C.R.S. (2014). Because I agree that the CSP diverts public funds allocated for public education to private schools and that the nonexistent Charter School functions as no more than a funding conduit to achieve this end, I would grant Petitioners' requested relief.

The Public School Finance Act was "enacted in furtherance of the general assembly's duty under section 2 of article IX of the state constitution to provide for a thorough and uniform system of public schools throughout the state." § 22–54–102(1), C.R.S. (2014). This Act is the means by which Colorado funds its public schools, and the tax money distributed under the Act is explicitly intended for "*public* schools" and "*public* education." *E.g.,* § 22–54–101, C.R.S. (2014) (short title) (emphasis added); § 22–54–102(1) (legislative declaration) (emphasis added); § 22–54–104(1) (a) ("[T]he provisions of this section shall be used to calculate for each district an amount that represents the financial base of support for *public* education in that district.... The district's total program shall be available to the district to fund the costs of providing *public* education ...." (emphasis added)). The Act does not authorize a district to redirect public funds allocated for a student's public school education to finance that student's private school education.

As the majority describes, the District collects per-pupil funding from the State based on its public school pupil enrollment. Maj. op. ¶ 4; § 22–54–104. Under the Act, charter school students are included in the District's "pupil enrollment" for the purposes of per-pupil revenue, *see* § 22–54–124(1)(c), C.R.S. (2014), as long as the charter school "report[s] to the department the number of pupils included in the school district's pupil enrollment ... that are *actually enrolled* in each charter school." § 22–30.5–112(1)(a), C.R.S. (2014) (emphasis added). The CSP funds itself through per-pupil revenue received from the State by counting the CSP students as charter school students "enrolled" in the Choice Scholarship Charter School. Maj. op. ¶ 4. For each scholarship recipient "enrolled" at the Charter School, the District retains 25% of the per-pupil funding amount to cover administrative costs and sends the remaining 75% to the student's chosen Private School Partner in the form of a check that the parent must endorse for the sole purpose of paying tuition at the private school. *Id.* at ¶ 5.

The problem with this arrangement, of course, is that the Choice Scholarship Charter School does not in fact exist. As the trial court found, the Charter School "has no buildings, employs no teachers, requires no supplies or books, and has no curriculum." No CSP student will spend a single day attending classes at this "school." The Choice Scholarship Charter School is an illusion, serving merely as a conduit to collect per-pupil revenue from the state to send students to private schools. Labeling this private school funding mechanism a "charter school" to collect public funds under the Act does not make it so.

Moreover, the Private School Partners—where the CSP scholarship students are *actually enrolled and educated*—fail to meet multiple requirements of the Charter School Act. Most obviously, charter schools must be public, nonsectarian, and nonreligious, and they must operate within a public school district. § 22–30.5–104(1). Charter schools may not discriminate on the basis of disability, sexual orientation, religion, or need for special education services. § 22–30.5– 104(3). And charter schools may not charge tuition. § 22–30.5–104(5).

The Private School Partners are plainly not public schools, and the trial court found that fourteen of the twenty-three Private School Partners are located outside the Douglas County School District. Sixteen are sectarian or religious and teach "sectarian tenets or doctrines" as this term is used in article IX, section 8 of the Colorado Constitution. At least eight discriminate in enrollment or admissions on the basis of religious beliefs or practices. In addition, the trial court found that the CSP permits Private School Partners to discriminate against students with disabilities; that one school has an "AIDS policy" under which it can refuse to admit, or expel, HIV-positive students; and that another participating school lists homosexuality as a "cause for termination" in its teacher contract. Finally, every single one of the CSP's Private School Partners charges tuition.

Respondents argue that section 22–32–122(1), C.R.S. (2014), which allows school districts to contract with private schools and corporations for educational services, and section 22–30.5–104(4)(b), which permits charter schools to contract with education management providers, expressly authorize the Choice Scholarship Charter School to purchase a "complete package of educational services" from the Private School Partners. *See* Answer Br. for Douglas County School District, et al. at 27. However, section 22–32–122(3)(a) explicitly states that any educational service provided under this statute must be "of comparable quality and *meet the same requirements and standards* that would apply if performed by the school district." (Emphasis added.) Article IX, section 8 of the Colorado Constitution prohibits religious instruction in public schools, and therefore the CSP could not contract with private religious schools for a "complete package of educational services." Likewise, although section 22–30.5–104(4)(b) permits charter schools to enter into private contracts, it does not authorize charter schools to violate the requirements of the Charter School Act. *See* § 22–30.5–104(1).

In sum, the CSP violates the Act by collecting per-pupil funding from the State for students "enrolled" in an illusory charter school and redirecting that public money to pay tuition for those students' private education at sectarian and other private schools—including schools located outside the District. Moreover, these Private School Partners receiving public money for "charter school" students fail to meet the statutory requirements of a charter school.

IV. Conclusion

I would hold that Petitioners have taxpayer standing to pursue their statutory claim. Further, I conclude, as the trial court did, that Petitioners have demonstrated that the CSP violates the Act; thus, Petitioners have a clear and certain right to injunctive relief. I would reverse the judgment of the court of appeals on statutory grounds and would not reach Petitioners' constitutional claims. I therefore respectfully concur in the judgment only.

JUSTICE EID, concurring in part and dissenting in part.

Today, the plurality interprets article IX, section 7 as prohibiting the expenditure of any state funds that might incidentally or indirectly benefit a religious school. This breathtakingly broad interpretation would invalidate not only the Choice Scholarship Program ("CSP"), but numerous other state programs that provide funds to students and their parents who in turn decide to use the funds to attend religious schools in Colorado. The plurality's interpretation barring indirect funding is so broad that it would invalidate the use of public funds to build roads, bridges, and sidewalks adjacent to such schools, as the schools, in the words of the plurality, "rely on" state-paid infrastructure to operate their institutions. Pl. op. ¶ 28. Because I fundamentally disagree with the plurality's interpretation, I respectfully dissent from Part III of its opinion on the following two grounds.[1]

First, the language of article IX, section 7, does not compel this result. It prohibits a government

[1] I join Part II because I agree that the petitioners have no remedy under the Public School Finance Act of 1994, §§ 22–54–101 to –135, C.R.S. (2014), as the Act expressly commits enforcement of its provisions to the Board.

entity from "mak[ing] any appropriation or pay[ing] from any public fund or moneys whatever ... to help support or sustain any [church or sectarian] school ... whatsoever." It thus invalidates a public expenditure made "to help support or sustain" church or sectarian schools. It does not suggest, as the plurality would have it, that any program that provides public money for other purposes—for example, to assist students—is constitutionally suspect simply because the funds indirectly or incidentally benefit church or sectarian schools. Such a reading is contrary to *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1083 (Colo.1982), in which we upheld a state grant program similar to the CSP on the ground that "the aid is designed to assist the student, not the institution." Our approach in *Americans United* mirrors long-standing Establishment Clause doctrine, under which a program "of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals" is "not readily subject to challenge" because the "circuit between government and religion [has been] broken." *Zelman v. Simmons–Harris,* 536 U.S. 639, 652, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002). The plurality not only misinterprets the language of section 7, it mistakenly departs from this fundamental tenet of Establishment Clause jurisprudence.

But a more serious error on the part of the plurality is its steadfast refusal to consider whether section 7 is unenforceable due to possible anti-Catholic bias. The plurality applies what it believes to be (erroneously in my view) the "plain language" of the section. But the plurality cannot sweep the possibility of anti-Catholic bigotry under the plain language rug. The U.S. Supreme Court has made it clear that allegations of such animus must be considered, even where the "plain language" does not invoke religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (rejecting government's contention that constitutional inquiry must end when text does not mention religion, as "facial neutrality is not determinative" of a Free Exercise claim). While a state may choose to, but is not bound to, interpret its own constitutional provisions coextensively with their federal counterparts, the federal constitutional provisions are nonetheless binding on the states. *Americans United*, 648 P.2d at 1078. Here, the plurality has failed to perform its duty to consider whether section 7 is enforceable under the U.S. Constitution before enforcing it against the CSP. For these reasons, I respectfully dissent.

I.

The plurality first takes a wrong turn in interpreting the language of section 7 as invalidating any government expenditure that indirectly benefits religious schools. That is not what the language of section 7 says.

Section 7 bars a government entity from "mak[ing] any appropriation, or pay[ing] from any public fund or moneys whatever ... to help support or sustain any [church or sectarian] school ... whatsoever." This language bars the expenditure of public funds "to help support or sustain" certain schools. But here, the CSP funds are expended not "to help support or sustain" those schools, but rather to help the student recipients. The language does not suggest, as the plurality believes, that government funds that are directed to a student but happen to have an incidental beneficial effect on certain schools are also forbidden. The ***481** plurality stresses that the language prohibits a government entity from making such an expenditure "whatever" to certain schools "whatsoever." Pl. op. ¶ 27. While these terms reinforce the prohibition on making certain expenditures, they do not modify or expand upon what kind of expenditures are prohibited—that is, expenditures "to support or sustain" a church or sectarian school. In other words, contrary to the plurality's reasoning, these words do not transform the prohibition on expenditures "to support or sustain" certain schools into a prohibition on any expenditures that have the incidental effect of benefiting certain schools.

We elucidated the distinction between direct and indirect assistance in *Americans United,* where we upheld a state grant program that disbursed state grant monies into the school accounts of student grant recipients who attended religious colleges. We first addressed the challengers' Establishment Clause claim, noting that to withstand an Establishment Clause challenge, the program "must be one that neither advances nor inhibits religion." 648 P.2d at 1079 (citing *Lemon v. Kurtzman,* 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). At issue in particular was whether the program's "primary effects [were] to advance religion...." *Id.* at 1077. We concluded that the program's "primary effect" was not to advance religion because "[t]he design of the statute

[was] to benefit the student, not the institution." *Id.* at 1081.

We returned to this reasoning in considering whether the grant program was consistent with section 7. The challengers claimed that the grant program violated section 7 because it was "an appropriation to help support or sustain schools controlled by churches or sectarian denominations." *Id.* at 1083. Harkening back to our reasoning in the Establishment Clause context, we observed that "as stated previously, the aid [was] designed to assist the student, not the institution." *Id.* Importantly, we recognized that "there is always a possibility that aid in grant form may seep over into the non-secular functions of an institution," but concluded that "[a]ny benefit to the institution appears to be the unavoidable by-product of the administrative role relegated to it by the statutory scheme." *Id.* "*Such a remote and incidental benefit,*" we continued "*does not constitute, in our view, aid to the institution itself* within the meaning of [a]rticle IX, [s]ection 7." *Id.* at 1083–84 (emphasis added). Thus, under *Americans United*, the focus of the inquiry is whether the funds are expended to help support certain schools or whether they are expended for some other purpose—for example, to assist students, as in that case and here.

The U.S. Supreme Court has recognized this same distinction in its Establishment Clause jurisprudence. In *Zelman,* for example, the Court upheld a program that gave tuition assistance to students from kindergarten to eighth grade in certain districts that could be used to attend any public or private school of their parents' choosing, including religious schools. 536 U.S. at 645, 122 S.Ct. 2460. The Court began by observing that the Establishment Clause prevents states from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. *Id.* at 648–49, 122 S.Ct. 2460. There was no dispute that the program had a valid educational (and secular) purpose, and therefore the Court focused on whether it unconstitutionally advanced religion. *Id.* at 649, 122 S.Ct. 2460.

The Court relied upon its "consistent and unbroken" line of precedent holding that aid programs generally do not impermissibly "advance religion" when "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* The Court discussed *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), where a Minnesota tax deduction program permitted deductions for educational expenses, including for religious schools. *Id.* at 649–50, 122 S.Ct. 2460. The Court rejected an Establishment Clause challenge in that case based on the fact that "public funds were made available to religious schools 'only as a result of numerous, private choices of school-age children.'" *Id.* at 650, 122 S.Ct. 2460 (quoting *Mueller,* 463 U.S. at 399–400, 103 S.Ct. 3062). The Court then pointed to *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), which sustained a Washington state vocational scholarship program that provided aid to a student studying to be a pastor based on "identical reasoning"—namely, that any aid that "'ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.'" *Id.* (quoting *Witters,* 474 U.S. at 487, 106 S.Ct. 748). Finally, the Court turned to *Zobrest v. Catalina Foothills School District,* 509 U.S. 1, 10, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), in which it found no Establishment Clause violation where a federal program permitted sign-language interpreters to work with students in religious schools. *Id.* at 651, 122 S.Ct. 2460. Again, no violation occurred because "parents were the ones to select a religious school as the best learning environment for their child," thus severing the link between government and religion. *Id.* at 652, 122 S.Ct. 2460.

Applying this principle to the case before it, the Court concluded that the program was one of "true private choice" and consistent with the Establishment Clause. *Id.* at 653, 122 S.Ct. 2460. Significantly, the Court recognized that there may be "incidental advancement of a religious mission" in these sorts of programs. *Id.* However, such incidental advancement is "reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* Moreover, the Court refused to attach constitutional significance to the fact that ninety-six percent of the aid recipients enrolled in religious schools. *Id.* at 658, 122 S.Ct. 2460. According to the Court, "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why ... most recipients choose to use the aid at a religious school." *Id.* The point is that aid recipients are the ones to make the choice. *Id.* at 662, 122 S.Ct. 2460. *See also Locke v. Davey,* 540 U.S. 712, 719, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (observing that under the Establishment Clause, "the link between government funds and religious training is broken by the independent and private choice of recipients" (citing *Zelman,* 536 U.S. at 652, 122 S.Ct. 2460 (2002))).

The plurality rejects as "irrelevant" this wealth of Supreme Court precedent that reinforces our reasoning in *Americans United,*[2] pointing out that it interprets the federal Establishment Clause, not section 7. Pl. op. ¶ 46. But the plurality's approach is directly contrary to *Americans United,* where, as discussed above, we expressly relied upon our reasoning in considering the Establishment Clause claim in rejecting the section 7 claim. *See* 648 P.2d at 1083 ("[A]s stated previously [with regard to the Establishment Clause], the aid is designed to assist the student, not the institution."). That the aid in question was expended to support students, not the institution, was a critical factor in both our Establishment Clause and section 7 inquiries.

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[2] The plurality also distinguishes *Americans United* and *Zelman* on the facts. Pl. op. ¶¶ 34–43 *(Americans United);* ¶ 47 (*Zelman*). Of course programs will differ from one another in operation. Here, the differences identified by the plurality are plainly distinctions without a difference, as evidenced by the fact that, in the plurality's view, even if the CSP contained the features it identifies from *Americans United,* those features would not render the CSP constitutional. Pl. op. ¶ 38 n.18; ¶ 38 n.19. Moreover, much of what the plurality relies on to distinguish *Americans United* from this case has been rendered unconstitutional by subsequent developments in the law. *See Colo. Christian Univ. v. Weaver,* 534 F.3d 1245, 1269 (10th Cir.2008) (striking down the portion of the state grant program at issue in *Americans United* that precluded aid to "pervasively sectarian" institutions as unconstitutionally discriminatory among religions and as unconstitutionally invasive of religious belief and practice).

More problematic is the plurality's conclusion that "[b]y its terms, section 7 is far more restrictive than the Establishment Clause regarding governmental aid to religion." Pl. op. ¶ 46. The plurality's mistake is to confuse specificity with restriction. Section 7 is certainly more specific than the Establishment Clause,[3] in that it contains a specific prohibition against making public expenditures "to help support or sustain" certain schools. We made a similar point regarding the specificity of article II, section 4 of the Colorado Constitution—which recognizes the "free exercise and enjoyment of religious profession and worship," as well as that "[n]o person shall be required to attend or support any ministry or place of worship"—in *Americans United,* observing that the state provisions are "considerably more specific than the Establishment Clause of the First Amendment." 648 P.2d at 1081. However, far from casting aside the federal counterpart and its accompanying jurisprudence, we declared that the state provisions should be read "to embody the same values of free exercise and government non-involvement secured by the religious clauses of the First Amendment." *Id.* at 1081–82. We reiterated that "although not necessarily determinative of state constitutional claims, First Amendment jurisprudence cannot be totally divorced from the resolution of these claims." *Id.* at 1078. Here, the Establishment Clause, as interpreted by the Supreme Court, ends up in the same place as the text of section 7—namely, prohibiting expenditures made

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[3] "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I.

to assist institutions, but not prohibiting expenditures made to support students.

The plurality acknowledges that "the CSP does not explicitly funnel money directly to religious schools, instead providing financial aid to students." Pl. op. ¶ 28. But it reasons that because "private religious schools *rely on* students' attendance (and their corresponding tuition payments) for their survival, the CSP's *facilitation of such attendance* necessarily constitutes aid to 'support or sustain' those schools." *Id.* (emphasis added). In case there was any doubt, the plurality again emphasizes the breadth of its holding, announcing that because the CSP provides "public money to students who may then use that money to pay for a religious education, [it] aids religious institutions." *Id.*

Under the plurality's interpretation, anything that enables students to attend a religious school "helps support or sustain" that school. This interpretation is so broad that it would easily have swept aside the grant program at issue in *Americans United.* It would also invalidate the programs at issue in *Zelman, Witters, Mueller,* and *Zobrest* described above, all of which facilitated students' attendance because of tuition assistance (*Zelman* and *Witters*), a tax deduction (*Mueller*), or the provision of an interpreter (*Zobrest*). The plurality's breathtakingly broad interpretation of section 7's prohibition would also sweep aside numerous Colorado programs that permit students to use government funds to attend religious schools. For example, the Exceptional Children's Educational Act permits school districts to place students in private "facility" schools, including religious schools, in order to provide them with a "free and appropriate education" under the federal Individuals with Disabilities Education Act. § 22–20–109(1)(a), C.R.S. (2014). Similarly, the Denver Preschool Program allows parents to use public funds to send their children to any licensed preschool, including religious preschools. Denver Mun.Code, ch. 11, art. III, § 11–22(5)(i). Indeed, under the plurality's decision, any program that provides an incidental benefit to certain schools—for example, programs for public infrastructure and safety—will be constitutionally suspect because the schools rely upon the services to operate. *Cf. Freedom from Religion Found. Inc. v. Romer,* 921 P.2d 84, 90 (Colo.App.1996) (discussing an injunction enjoining government officials from permitting public facilities and funds to be used to facilitate papal visit).

The plurality refuses to contemplate the far-reaching implications of its interpretation and instead "chooses to focus [its] analysis solely on the CSP." Pl. op. ¶ 29 n.15. Yet the plurality's refusal to recognize such implications does not make those implications disappear. In the end, the CSP passes muster under section 7 because it is not an expenditure to help support or sustain certain schools. Instead, it is an expenditure to help support students, who may then choose to use the funds to attend those schools. No one, not even the plurality, disputes this is how the program operates. Pl. op. ¶ 28. I would affirm the court of appeals.

II.

A more fundamental problem with the plurality's opinion is that it holds that because section 7 is enforceable on its "plain language," it need not consider whether the provision is in fact enforceable due to possible anti-Catholic animus.[4] As developed above, I believe the plurality is wrong on the plain language. But even if it were right, it would then be obligated to consider whether the language could be enforced to strike down the CSP. In this case, the plurality simply sticks its head in the sand and hopes that because it cannot see the allegations of anti-Catholic bias, no one else will.

The plurality relies upon *People v. Rodriguez,* 112 P.3d 693, 696 (Colo.2005), for the proposition that constitutional provisions will be enforced "'as written' whenever their language is 'plain' and their meaning is 'clear.'" Pl. op. ¶ 32. But that statement cannot be taken in a vacuum; indeed, it must be read against the backdrop of federal constitutional law generally, which, under certain circumstances, may require a court to go behind the words of a statute or state constitutional provision. This is one of those circumstances.

The Supreme Court made this point clear in *Lukumi,* 508 U.S. 520, 113 S.Ct. 2217, where it considered a challenge under the Free Exercise Clause[5] to city ordinances that banned the ritual sacrifice of animals. The City argued that the

[4] Because I would uphold the CSP, I, like the majority of the court of appeals, would not need to reach this issue. *Taxpayers for Public Education v. Douglas Cnty. Sch. Dist.,* 2013 COA 20, ¶ 62, ——P.3d ——. But because I disagree with the plurality's treatment of the issue, I address it here.

[5] "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I.

ordinances were neutral on their face and therefore immune from constitutional scrutiny. *Id.* at 534, 113 S.Ct. 2217. The Court rejected this argument, holding instead that "[f]acial neutrality is not determinative" of a Free Exercise claim. *Id.* According to the Court, "[t]he Free Exercise Clause ... extends beyond facial discrimination.... The [Clause] protects against government hostility which is masked, as well as overt." *Id.* The court concluded that "[t]he record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* Because the ordinances were not neutral, the Court went on to consider whether they were narrowly tailored to advance a compelling state interest. The Court concluded that they were not. *Id.* at 546, 113 S.Ct. 2217.

Under *Lukumi,* the plurality cannot begin and end its analysis with the conclusion that the plain language of section 7 is not discriminatory. In fact, the very case upon which the plurality relies for the proposition that states "may draw a tighter net around the conferral of [government] aid" to religion, pl. op. ¶ 46—*Locke v. Davey*—reinforces *Lukumi's* instruction that courts must look behind the text to discover any religious animus. 540 U.S. at 725, 124 S.Ct. 1307. In *Locke,* which involved a Washington state scholarship program that excluded students pursuing a degree in theology, the Court concluded that "[f]ar from evincing the hostility toward religion which was manifest in *Lukumi,* we believe that the [Washington program] goes a long way toward including religion in its benefits." *Id.* at 724, 124 S.Ct. 1307. The Court upheld the program against a free exercise challenge only after concluding that it could find nothing "that suggests animus toward religion." *Id.* at 725, 124 S.Ct. 1307. The relevant point here is not the Court's conclusion on the matter but that it performed the inquiry in the first place.

Moreover, in this instance, the text of section 7 is not as neutral as the plurality would have it. As noted above, the text bars expenditures "to help support or sustain any school" that is "controlled by any church or sectarian denomination whatsoever." The plurality equates the term "sectarian" with the term "religious," concluding that "the two words are synonymous." Pl. op. ¶ 27. But even *Black's Law Dictionary* 1557 (10th ed. 2014), upon which the plurality relies for its conclusion, does not equate the two terms, suggesting that sectarian relates to "*a particular* religious sect." (emphasis added). In fact, in a 1927 case, this court upheld a school board rule requiring Bible reading in public schools against a section 7 challenge on the ground that such activity was not "sectarian"—that is, related to a particular sect. *People ex rel. Vollmar v. Stanley,* 81 Colo. 276, 255 P. 610, 615–16 (1927) (stating that "[s]ectarian meant, to the members of the [Colorado constitutional] convention and to the electors who voted for and against the Constitution, 'pertaining to some one of the various religious sects,' and the purpose of said section 7 was to forestall public support of institutions controlled by such sects."), (overruled by *Conrad v. City & Cnty. of Denver,* 656 P.2d 662 (Colo.1983)). *See also Zelman,* 536 U.S. at 721, 122 S.Ct. 2460 (Breyer, J., dissenting) (stating that public schools were considered "nonsectarian" "which was usually understood to allow Bible reading and other Protestant observances"). In sum, contrary to the plurality's interpretation, the term "sectarian" refers to a particular religious sect, not to religion generally.

In *Mitchell v. Helms,* 530 U.S. 793, 828, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), a plurality of the Court referred to the "shameful pedigree" of anti-sectarian sentiment in the 1870's. According to the plurality:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that *"sectarian" was code for "Catholic." See generally* Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38 (1992) (emphasis added).

Id. at 829, 120 S.Ct. 2530. The plurality in this case "decline[s] to ascribe to [*Mitchell*] the force of law" because it is a plurality opinion. Pl. op. ¶ 44 n.20. But this passage from *Mitchell* is not relevant to this case because it has "the force of law,"[6] as the plurality implies; it is relevant for its description of historical context. And while Justice O'Connor, in her separate opinion concurring in the judgment joined by Justice

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[6] "While not a binding precedent, [a plurality opinion] should obviously be the point of reference for further discussion of the issue." *Texas v. Brown,* 460 U.S. 730, 737, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).

Breyer, objected to the plurality's reasoning in *Mitchell*, she lodged no objection to the plurality's historical description. 530 U.S. at 837, 120 S.Ct. 2530 (O'Connor, J., concurring in the judgment). In fact, Justice Breyer, joined by Justices Stevens and Souter, recounted the same history in his dissent in *Zelman*. 536 U.S. at 717, 122 S.Ct. 2460 (Breyer, J., dissenting). As Justice Breyer observed, anti-Catholic sentiment "played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for *'sectarian' (i.e., Catholic) schooling for children*." 536 U.S. at 720, 122 S.Ct. 2460 (Breyer, J., dissenting) (emphasis added).

Today's plurality is nothing less than adamant about its refusal to consider the possibility of anti-Catholic animus, accusing intervenor-respondents of injecting into the litigation "little more than a Trojan horse inviting [the court] to rule on the actual legitimacy of section 7." Pl. op. ¶ 30 n. 16. But this is no Trojan horse. The intervenor-respondents presented expert testimony on the question before the trial court. The trial court found the evidence and argument "unpersuasive." The issue was extensively considered by Judge Bernard in his dissent in the court of appeals. *See Taxpayers for Publ. Educ.,* ¶¶ 162–220 (Bernard, J., dissenting). And before this court, echoing Judge Bernard's dissent, petitioners argue that the argument is meritless, not that it should not be considered

In the end, the plurality's head-in-the-sand approach is a disservice to Colorado, as it allows allegations of anti-Catholic animus to linger unaddressed. The plurality should squarely address the issue of whether section 7 is enforceable, as this court has done with other provisions of the Colorado Constitution. *See, e.g., Colo. Educ. Assoc. v. Rutt,* 184 P.3d 65, 79 (Colo.2008) (interpreting article XXVIII of the Colorado Constitution as enforced against labor organizations consistently with First Amendment jurisprudence). Because the plurality fails to do so, and because it misinterprets the text of section 7 and ignores relevant Establishment Clause jurisprudence, I respectfully dissent from its opinion.

I am authorized to state that JUSTICE COATS and JUSTICE BOATRIGHT join in this concurrence in part and dissent in part.

Appendix B

COLORADO COURT OF APPEALS
DIV. IV

Nos. 11-CA-1856, 11-CA-1857

TAXPAYERS FOR PUBLIC EDUCATION; CINDRA S. BARNARD; MASON S. BARNARD; JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; and SUSAN MCMAHON,

Plaintiffs-Appellees,

v.

DOUGLAS COUNTY SCHOOL DISTRICT, DOUGLAS COUNTY BOARD OF EDUCATION, COLORADO STATE BOARD OF EDUCATION, and COLORADO DEPARTMENT OF EDUCATION,

Defendants-Appellants,

and

FLORENCE and DERRICK DOYLE, on their own behalf and as next friends of their children, A.D. and D.D.; DIANA OAKLEY and MARK OAKLEY, on their own behalf and as next friends of their child, N.O.; and JEANETTE STROHM–ANDERSON and MARK ANDERSON, on their own behalf and as next friends of their child, M.A.,

Intervenors-Appellants.

Announced: February 28, 2013

OPINION

JONES, JUDGE.

In 2011, the Douglas County Board of Education (County Board) adopted the Choice Scholarship Program (CSP). Pursuant to the CSP, parents of eligible elementary school, middle school, and high school students residing in the Douglas County School District (District) may choose to have their children attend certain private schools, including some with religious affiliation. The District would pay parents of participating students "scholarships" covering some of the cost of tuition at those schools, and the parents would then remit the scholarship money to the schools.

Plaintiffs are nonprofit organizations, Douglas County taxpayers, District students, and parents of District students. They filed suit to enjoin implementation of the CSP, claiming that it violates the Public School Finance Act of 1994, sections 22–54–101 to –135, C.R.S.2012 (the Act), and various provisions of the Colorado Constitution.[1]

Following a hearing on plaintiffs' motion for a preliminary injunction, the district court found that the CSP violates the Act and most of the constitutional provisions at issue. The court permanently enjoined implementation of the CSP.

We conclude that plaintiffs do not have standing to seek redress for a claimed violation of the Act, and that the CSP does not violate any of the constitutional

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[1] Parents of five children who had applied for and received scholarships under the CSP intervened in the cases to defend the program.

provisions on which plaintiffs rely. Therefore, we reverse the district court's judgment and remand the case for entry of judgment in defendants' favor.

I. Background

A. The CSP

We glean the facts largely from the district court's written order and, to the extent uncontested, testimony given and exhibits admitted during the preliminary injunction hearing.

The District created a task force to study a variety of school choice strategies for District students. The task force submitted a report to the District identifying about thirty strategies for improving school choice, and submitted a plan for implementing one of those strategies, the CSP, to the County Board. In March 2011, the County Board approved the CSP on a "pilot program" basis for the 2011–2012 school year, limited to 500 students. The following aspects of the CSP bear on the issues raised by the parties.

- The purposes of the CSP 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 of investment of [District] educational spending."
- Private schools, including private schools that are not located in Douglas County, may apply to participate in the CSP.
- Private schools applying to participate in the CSP must provide information about a variety of matters, and must satisfy a

variety of eligibility criteria, some of which relate to academic rigor, accreditation, student conduct, and financial stability. Participating private schools must agree to allow the District to administer assessment tests to District students participating in the CSP.

- Participating private schools are prohibited from discriminating "on any basis protected under applicable federal or state law." But, the CSP does not require as a condition of participation that any private school modify employment or enrollment standards that are based on religious beliefs.
- The CSP provides for District oversight of private schools' compliance with program requirements, and reserves to the District the ability to withhold payments or terminate participation for noncompliance.
- Thirty-four private schools applied to participate in the CSP for the 2011–2012 school year. The District contracted with twenty-three of those schools.
- Of the twenty-three private schools contracting with the District, fourteen are located outside Douglas County, and sixteen teach religious tenets or beliefs. Many are funded at least in part by and affiliated with particular religious organizations.

- Many of the participating private schools base admissions decisions at least in part on students' and parents' religious beliefs and practices. Many also require students to attend religious services. However, the CSP expressly gives students the right to "receive a waiver from any required religious services at the [participating private school]."[2]
- Students are eligible to participate in the CSP only if they are District residents (open-enrolled students are not eligible), have resided in the District for at least one year, and were enrolled in District public schools during the 2010–2011 school year. Any such student desiring to participate in the CSP must complete an application to be submitted to the District and must agree to take state assessment tests.
- Students accepted by the District to participate in the CSP are formally enrolled in the Choice Scholarship Charter School (Charter School). The Charter School administers the CSP, contracting with the participating private schools and monitoring students' class schedules and attendance at participating private schools.

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[2] The district court found that this "opt out" provision is "illusory" because "scholarship students may still be required to attend religious services, so long as they are permitted to remain silent." We discuss the effect of this opt out provision briefly in Part II.B.1 below.

It does not have a building, teachers, or curriculum.

- Each student accepted to participate in the CSP must also be accepted for enrollment in a participating private school chosen by the student's parents. The CSP encourages students and parents to investigate participating private schools' "admission criteria, dress codes and expectations of participation in school programs, be they religious or nonreligious."
- The sole source of funding for the CSP is the total "per pupil revenue" received by the District for the Charter School pursuant to section 22–30.5–112(2)(a.5), C.R.S.2012. The fund of money from which "per pupil revenue" is distributed comprises District property and other ownership taxes and state revenue. §§ 22–54–103(11), –104.1, –106(1)(a)(I), C.R.S.2012.[3]
- The District counts all students enrolled in the Charter School toward its total pupil count for purposes of receiving per pupil revenue. *See* § 22–54–103(10) (defining "pupil enrollment" for purposes of calculating per pupil revenue).

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[3] As of the date of the preliminary injunction hearing, the Colorado State Board of Education (State Board), which is statutorily charged with determining and distributing per pupil revenue, had not yet decided whether it would count students enrolled in the Charter School for purposes of determining the District's total per pupil revenue.

- For each student participating in the CSP, the District (acting through the Charter School) pays scholarships of the lesser of the participating private school's charged tuition or seventy-five percent of the "per pupil revenue" received by the District. (The District retains the remaining twenty-five percent.) The participating student's parents are responsible for paying any difference. The District estimated that per pupil revenue for the 2011–2012 school year would be $6,100, meaning that up to $4,575 could be paid for student tuition at a participating private school.
- The CSP provides that scholarship payments will be made by check, in four equal installments, to parents of participating students. Parents are required to then endorse the checks to the participating private schools.

B. The District Court Proceedings

Plaintiffs, acting in two groups, filed complaints seeking a declaration that the CSP is unlawful and an order enjoining implementation of the CSP. Their claims are based on the Act and seven provisions of the Colorado Constitution. Plaintiffs named the Colorado Department of Education, the State Board, the County Board, and the District as defendants. The cases were consolidated.

Defendants moved to dismiss the complaints for failure to state a claim for relief. Plaintiffs moved for a preliminary injunction. The court held a three-day hearing on the motions for a preliminary injunction, after which the court issued a detailed written order denying defendants' motion to dismiss and finding that the CSP violates the Act and article II, section 4; article V, section 34; and article IX, sections 3, 7, and 8 of the Colorado Constitution. (The court found that the CSP does not violate two constitutional provisions on which plaintiffs rely, article IX, sections 2 and 15.)

Acting sua sponte, the court permanently enjoined implementation of the CSP. The parties apparently agree that the court's order constitutes a final disposition of all claims.[4]

II. Discussion

For clarity of analysis, we divide plaintiffs' claims into three groups: (1) claims alleging violations of

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[4] In effect, the district court consolidated the preliminary injunction hearing with the trial on the merits. *See* C.R.C.P. 65(a)(2). A court should not consolidate the preliminary injunction hearing with the trial on the merits absent notice to and agreement of the parties. *See Graham v. Hoyl,* 157 Colo. 338, 340–41, 402 P.2d 604, 605–06 (1965); *Leek v. City of Golden,* 870 P.2d 580, 585 (Colo.App.1993); *Litinsky v. Querard,* 683 P.2d 816, 819 (Colo.App.1984). Following opening statements, the district court informed the parties that because it seemed a preliminary injunction would have the effect of granting plaintiffs all the relief they had requested, plaintiffs would have to show that their right to relief was "clear and certain." *See Allen v. City & Cnty. of Denver,* 142 Colo. 487, 489, 351 P.2d 390, 391 (1960). Toward the end of the last day of the hearing, the district court indicated that it was considering whether a later trial would be necessary. But the court did not clearly inform the parties that it intended to consolidate the hearing with the trial on the merits. And no party stipulated to that procedure. Nonetheless, on appeal, no party challenges the court's decision to consolidate the hearing with the trial on the merits. Nor does any party complain about a lack of opportunity to present additional evidence.

statutory and constitutional provisions which concern state schools generally—the Act and article IX, sections 2, 3, and 15; (2) claims alleging violations of constitutional provisions which concern aid to or support of religion and religious organizations—article II, section 4, and article IX, sections 7 and 8; and (3) the claim alleging a violation of article V, section 34, which concerns appropriations generally and appropriations to religious organizations specifically.

A. Public Funding and Control Claims

1. The Act – School Funding

Plaintiffs claim that the CSP violates the Act because "[the District] will impermissibly use State monies distributed by the Colorado Department of Education to pay for private school tuition at private schools." *See* § 22–54–104(1)(a) (the amount calculated under the Act as the "financial base of support for public education in the district ... shall be available to the district to fund the costs of providing public education"). After rejecting defendants' challenge to plaintiffs' standing to seek judicial enforcement of the Act, the district court found that the CSP violates the Act because it "effectively results in an increased share of public funds to [the District] rather than to other state school districts."[5]

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[5] As discussed below in Part II.A.2, there is no record support for this finding. Though, as the district court noted, the CSP is structured to allow participating students to be counted for purposes of determining the District's total per pupil revenue, it does not follow that this results in any increase in the District's share. This is because the record evidence indicates that

We need not address the merits of plaintiffs' claim under the Act because we conclude that plaintiffs lack standing to bring it.

Whether a plaintiff has standing to bring a particular claim presents a question of law that we review de novo. *Barber v. Ritter,* 196 P.3d 238, 245 (Colo.2008); *Ainscough v. Owens,* 90 P.3d 851, 856 (Colo.2004).

To establish standing, a plaintiff suing in Colorado state court must establish that (1) it incurred an injury-in-fact; and (2) the injury was to a legally protected interest. *Barber,* 196 P.3d at 245; *Ainscough,* 90 P.3d at 855; *Wimberly v. Ettenberg,* 194 Colo. 163, 168, 570 P.2d 535, 538 (1977). Our inquiry here focuses on the second requirement.[6]

In determining whether a statute gives a particular plaintiff a legally protected interest, we look to whether the General Assembly clearly intended to create a private right of action. *Gerrity Oil & Gas Corp. v. Magness,* 946 P.2d 913, 923 (Colo.1997) ("[W]e will not infer a private right of action based on a statutory violation unless we discern a clear legislative intent to create such a cause of action."). The Act does not expressly authorize a private cause of action to enforce its provisions. Therefore, we look to three factors to determine whether a private cause of action is clearly implied: (1) whether the plaintiffs

participating students would otherwise be enrolled in District public schools.

[6] This is not to say that we necessarily agree with plaintiffs that they demonstrated injury-in-fact. We focus on the second prong of the standing test because plaintiffs' failure to satisfy that prong is most clear.

are within the class of persons intended to be benefitted by the Act (specifically, by section 22–54–104(1)); (2) whether the General Assembly intended to create, albeit implicitly, a private right of action; and (3) whether an implied private right of action would be consistent with the purposes of the Act. *Id.*; *Allstate Ins. Co. v. Parfrey,* 830 P.2d 905, 911 (Colo.1992).

The district court recited these factors but did not engage in any substantive analysis of them. Instead, the court conclusorily ruled that certain plaintiffs' status as District students and parents of District students "confers a legal interest in the enforcement of the statutes enumerated in their claims." In so ruling, the district court erred.

Assuming that the plaintiffs who are District students and parents of District students are within the class of persons intended to be benefitted by the Act, examination of the other two factors does not support the existence of a private cause of action.

There is nothing in the language of the Act remotely suggesting that private citizens or groups have a right to seek judicial enforcement of its provisions. The Act expressly commits enforcement of its provisions to the State Board. § 22–54–120(1), C.R.S.2012 ("The state board shall make reasonable rules and regulations necessary for the administration and enforcement of this article."). And the Act provides a number of mechanisms for ensuring compliance with its funding scheme, none of which contemplate private enforcement. *E.g.,* §§ 22–54–104 (providing in detail how the State Board shall determine each district's total per pupil revenue), –114 to –115 (providing in detail how money in the state public school fund is to be appropriated and distributed), —115(4) (providing means for the State Board to recover any overpayment of state moneys to a district), –129(6)(a)-(b) (providing that the State Board "shall promulgate rules ... as necessary for the administration and enforcement of this section").

Where, as here, a statute provides a means of enforcement, the designated remedy ordinarily excludes all others. *See Gerrity Oil & Gas Corp.,* 946 P.2d at 924–25; *cf. Bd. of Cnty. Comm'rs v. Moreland,* 764 P.2d 812, 817–21 (Colo.1988) (statute which provided specific remedies for violations thereby indicated that the General Assembly had considered the issue of civil liability but had chosen not to make any provision therefor); *Macurdy v. Faure,* 176 P.3d 880, 883 (Colo.App.2007) (statute which entrusted decision whether to perform an autopsy to government officials did not contemplate a private right of action to compel officials to perform an autopsy); *Prairie Dog Advocates v. City of Lakewood,* 20 P.3d 1203, 1208 (Colo.App.2000) (statute which prohibited poisoning wildlife and subjected violators to penalties reserved enforcement to the state, and therefore did not create a private cause of action); *Axtell v. Park Sch. Dist. R–3,* 962 P.2d 319, 320–21 (Colo.App.1998) (because Evaluation Act provided a specific remedy for violations by school districts—withholding or suspension of accreditation by the State Board—it did not create an independent private right of action); *Minnick v. City & Cnty. of Denver,* 784 P.2d 810, 812 (Colo.App.1989) (city ordinance which imposed a prevailing wage requirement on public works projects, and which provided a remedy for violations—withholding payments to contractors—did not create a private right of action); *Silverstein v. Sisters of Charity,* 38 Colo.App. 286, 288–89, 559 P.2d 716, 718 (1976) (statute which provided a criminal penalty for violations did not allow a private civil action for damages; quoted with approval in *Moreland*).

Nor would recognizing a private cause of action be consistent with the Act's purposes. The Act addresses in a detailed way what is a rather vague constitutional requirement. *See* § 22–54–102(1), C.R.S.2012 (the Act "is enacted in furtherance of the general assembly's duty under section 2 of article IX of the state constitution to provide for a thorough and uniform system of public schools throughout the state"). It requires the responsible state agencies (the Colorado Department of Education and the State Board) to engage in constant evaluation and oversight of all local school districts and to manage large sums of money (in amounts which change annually, if not more frequently). As discussed, the State Board is also entrusted with enforcing the Act, and the Act provides mechanisms for the State Board to exercise that authority.

In light of the scope and complexity of the statutory scheme, the responsible state agencies require a certain degree of discretion and flexibility in carrying out their oversight and enforcement responsibilities. We are persuaded that allowing private citizens to act as substitute boards of education by challenging districts' actions in court would interfere with the state agencies' efforts to meet their statutory obligations. And, it would introduce uncertainty into a process where little can be tolerated. Local school districts, for example, would not be able to rely on decisions of the state agencies if those decisions were open to court challenge by any disgruntled citizen.

Therefore, consideration of the relevant factors leads us to conclude that plaintiffs do not have standing to bring a private cause of action seeking enforcement of the Act.

We are not persuaded to the contrary by plaintiffs' arguments.

Though plaintiffs argue that "absent a private right of action, the statute lacks any mechanism to hold an offending school district accountable," that is plainly not the case. *See, e.g.,* § 22–54–115(4) (providing means of recouping overpayments to local school districts). Plaintiffs' *ad hominem* assertion that no enforcement mechanism exists because "the State Board has essentially colluded with the offending district" is unsupported by the record. And, in any event, plaintiffs cite no authority for the proposition that a private right of action must be allowed where the agency charged with enforcing a statute declines to act in a particular instance. Any such disagreement over the necessity of enforcement must be left to the political process.

Nor does taxpayer status give plaintiffs standing. Taxpayer standing is recognized in the context of alleged constitutional violations. *E.g., Barber,* 196 P.3d at 245–47. Plaintiffs cite no authority holding that taxpayer status is sufficient to confer standing to seek judicial enforcement of a statute. Recognizing such standing would in most, if not all cases render unnecessary the standing analysis the supreme court has applied in this context for decades.

Finally, the cases on which plaintiffs rely are distinguishable. In *Board of County Commissioners v. Bainbridge, Inc.,* 929 P.2d 691 (Colo.1996), the plaintiffs' claims alleged constitutional violations, *id.* at 696 n.6, and the court did not address standing. Likewise, the plaintiffs' claims in both *Lobato v. State,* 216 P.3d 29 (Colo.App.2008), *rev'd,* 218 P.3d 358 (Colo.2009), and *Boulder Valley Sch. Dist. RE–2 v. Colo. State Bd. of Educ.,* 217 P.3d 918 (Colo.App.2009), alleged violations of the state constitution. *Lobato,* 216 P.3d at 32, 35; *Boulder Valley Sch. Dist.,* 217 P.3d at 921–22. As discussed, the standing analyses for constitutional and statutory claims are different: the standing inquiry for statutory claims is more rigorous.

Because we have determined that plaintiffs do not have standing to seek judicial enforcement of the Act, we need not examine the parties' arguments on the merits.

2. Article IX, § 2—Thorough and Uniform System of Free Public Schools

As relevant here, article IX, section 2 of the Colorado Constitution requires the General Assembly to "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state...." The district court found against plaintiffs on their claim alleging a violation of this provision because they had not presented "sufficient evidence that [the CSP] prevents students from otherwise obtaining a free education in Douglas County."

On appeal, plaintiffs contend that the court erred in rejecting this claim because (1) students participating in the CSP are not educated gratuitously (as the CSP may cover only part of a participating student's private school tuition); (2) educational programs at the participating private schools vary; and (3) by retaining twenty-five percent of per pupil revenue pursuant to the CSP, the District receives money that otherwise would go to other school districts.

Initially, we reject the state defendants' argument that because plaintiffs have not cross-appealed the district court's adverse ruling on their article IX, section 2 claim, they may not raise these contentions on appeal.

"The general rule is that an appellee must file a cross-appeal in order for an appellate court to consider an alleged error of the trial court which prejudiced the appellee." *Blocker Exploration Co. v. Frontier Exploration, Inc.,* 740 P.2d 983, 989 (Colo.1987). But, "[w]ithout filing a cross-appeal, ... an appellee may raise any argument in support of the trial court's judgment, so long as the appellee does not seek to increase its rights under the judgment." *Leverage Leasing Co. v. Smith,* 143 P.3d 1164, 1167–68 (Colo.App.2006); *see Blocker,* 740 P.2d at 989.

Plaintiffs do not seek to increase their rights under the judgment. If they are successful on these contentions they will not be entitled to any relief in addition to or different from that already awarded by the district court. The mere fact that plaintiffs pled a stand-alone claim based on article IX, section 2 does not, contrary to the state defendants' assertion, mean that success on these contentions would increase their rights under the judgment. *See Evans v. Romer,* 854

P.2d 1270, 1275 & n. 7 (Colo.1993) (supreme court was not limited in assessing only the constitutional right relied on by the district court in striking down the provision at issue because the plaintiffs-appellees were not seeking to increase their rights under the judgment); *cf. Blum v. Bacon,* 457 U.S. 132, 137 n.5, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982) (the appellee could raise a statutory argument on appeal that had been rejected by the lower court despite not having filed a cross-appeal because his relief under the judgment granting an injunction would not be modified); *Dandridge v. Williams,* 397 U.S. 471, 476 & n. 6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) (the appellee could argue that the regulation at issue violated a statute, even though the appellee had lost on that claim and had not filed a cross-appeal); *Castellano v. Fragozo,* 352 F.3d 939, 960 (5th Cir.2003) (despite not having filed a cross-appeal, the plaintiff could defend the judgment based on a constitutional claim that had been dismissed because he was not attempting to expand his rights under the judgment); *Kennecott Copper Corp. v. Curtiss–Wright Corp.,* 584 F.2d 1195, 1206 (2d Cir.1978) (appellee which did not cross-appeal from dismissal of claim alleging a violation of statute could nonetheless argue such violation on appeal as grounds for affirming injunctive relief); *but see Robertson v. City & Cnty. of Denver,* 874 P.2d 325, 327 nn. 2 & 5 (Colo.1994) (because the plaintiffs did not cross-appeal, they could not argue on appeal that the district court erred in rejecting certain constitutional challenges to the ordinance there at issue).

Therefore, we address the merits of plaintiffs' contentions. And we conclude that plaintiffs' contentions fail.

We review de novo the district court's determination whether the CSP is constitutional. *Owens v. Congress of Parents, Teachers and Students,* 92 P.3d 933, 942 (Colo.2004). To the extent the district court made findings of historical fact based on conflicting evidence, however, we review such findings for clear error. *See People in Interest of A.J.L.,* 243 P.3d 244, 249–50 (Colo.2010). A finding of fact is clearly erroneous only if it has no record support. *Id.* at 250; *M.D.C./Wood, Inc. v. Mortimer,* 866 P.2d 1380, 1383–84 (Colo.1994).[7]

We recognize that legislative acts are entitled to a presumption of constitutionality. *See Owens,* 92 P.3d at 942. Plaintiffs argue that we should not apply the presumption to the CSP because it is not a statute enacted by the General Assembly or a municipal ordinance. That view of the presumption's application is too narrow.

The presumption of constitutionality stems from an appreciation of the separation of powers established by the Colorado Constitution; "thereby, the judiciary respects the roles of the legislature and the executive in the enactment of laws." *City of Greenwood Village v. Petitioners for Proposed City of Centennial,* 3 P.3d 427, 440 (Colo.2000). Contrary to plaintiffs' suggestion, Colorado case law does not suggest that this respect is limited to statutory

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[7] We apply these standards of review to all of the district court's rulings on the constitutional provisions at issue.

enactments of the General Assembly and analogous enactments of municipal governments. Colorado appellate courts have also applied the presumption to, for example, administrative regulations adopted by administrative agencies, *e.g., Colo. Civil Rights Comm'n v. Travelers Ins. Co.,* 759 P.2d 1358, 1366 (Colo.1988); an internal rule adopted by the state House of Representatives, *Grossman v. Dean,* 80 P.3d 952, 964 (Colo.App.2003); and, as perhaps most apt here, resolutions adopted by a board of county commissioners, *Asphalt Paving Co. v. Bd. of Cnty. Comm'rs,* 162 Colo. 254, 264–65, 425 P.2d 289, 295 (1967).

We are not persuaded that legislative acts of school districts' boards of education merit different treatment. Pursuant to article IX, section 15 of the Colorado Constitution, the General Assembly created local school districts governed by boards of education. The directors of the boards are elected by qualified district electors, and "have control of instruction in the public schools of their respective districts." Colo. Const. art. IX, § 15. By statute, local boards are entrusted with extensive duties and powers (including, for example, the power of eminent domain), which they carry out and exercise through the adoption of policies, rules, and regulations. §§ 22–32–103(1), –109 to –109.7, –110, –110.6, –110.7, C.R.S.2012. Thus, the boards are legislative bodies. And they are political subdivisions of the state. *See Bagby v. Sch. Dist. No. 1,* 186 Colo. 428, 434–35, 528 P.2d 1299, 1302 (1974) ("A school district is a subordinate division of the government and exercising authority to effectuate the state's education purposes.... As such, school districts and the boards which run them are considered to be political subdivisions of the state." (citations omitted)). We should respect the role of such bodies no less than we do the role of the General Assembly.

Accordingly, we conclude that the CSP is entitled to a presumption of constitutionality. Thus, we must uphold the CSP unless we conclude that plaintiffs proved that it is unconstitutional beyond a reasonable doubt. *Owens,* 92 P.3d at 942; *People in Interest of City of Arvada v. Nissen,* 650 P.2d 547, 550 (Colo.1982). "In addition, we must uphold the [enactment] unless a clear and unmistakable conflict exists between the [enactment] and a provision of the Colorado Constitution.' *Owens,* 92 P.3d at 942 (internal quotation marks omitted; quoting in part *E–470 Pub. Highway Auth. v. Revenig,* 91 P.3d 1038, 1041 (Colo.2004)).[8]

We now turn to the merits of plaintiffs' contentions under article IX, section 2.

As noted, the district court rejected plaintiffs' contention that the CSP denies students a "free" public education because there was insufficient evidence that any student would be denied the opportunity to receive a free public education in Douglas County. The record supports this finding. Indeed, plaintiffs do not even argue to the contrary. Rather, they argue that because students

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[8] The district court does not appear to have presumed the CSP constitutional or to have held plaintiffs to the burden of proving the CSP unconstitutional beyond a reasonable doubt. Its written decision striking down the CSP contains no mention of either standard. We also note that the dissent does not mention a standard of review.

participating in the CSP may not receive a free education (because parents must pay the difference remaining after remittance of the scholarships), the CSP necessarily violates article IX, section 2.

Plaintiffs misapprehend the constitutional mandate. It requires that a thorough and uniform system of free elementary through high school education be made available to students between the ages of six and twenty-one. *See Lujan v. Colo. State Bd. of Educ.,* 649 P.2d 1005, 1025 (Colo.1982) (this provision "is satisfied if thorough and uniform educational opportunities are available through state action in each school district"); *cf. Simmons–Harris v. Goff,* 86 Ohio St.3d 1, 711 N.E.2d 203, 212 (1999) (holding that a program similar to the CSP did not violate the Ohio Constitution's requirement of "a thorough and efficient system of common schools" because it did not undermine that state's obligation to public education at current funding levels); *Davis v. Grover,* 166 Wis.2d 501, 480 N.W.2d 460, 473–74 (1992) (applying a similar constitutional provision to a similar school choice program and holding that it requires only that the legislature provide the opportunity to receive a uniform basic education). It plainly is not violated where a local school district decides to provide educational opportunities in addition to the free system the constitution requires. *Lujan,* 649 P.2d at 1025 (article IX, section 2 "does not prevent a local school district from providing additional educational opportunities beyond this standard"); *cf. In re Kindergarten Schools,* 18 Colo. 234, 234–36, 32 P. 422, 422–23 (1893) (requirement of article IX, section 2 did not prohibit General Assembly from establishing a public school system for educating children less than six years old). Nor is it violated merely because some students' parents may choose to have their children forego the available opportunity to attend a school within the system the constitution requires.

It is questionable whether plaintiffs' remaining contentions are preserved for review. Their briefs do not identify where in the record these contentions were raised, as required by C.A.R. 28(k), and our review of the motions for preliminary injunction, the arguments at the hearing, and plaintiffs' proposed findings does not reveal that they asserted these precise contentions in any substantial way. In any event, they fail as well.

Any lack of uniformity, either among the instructional programs provided by the participating private schools and the public schools or amongst the various private schools themselves, does not render the CSP in violation of article IX, section 2. The requirement that the General Assembly create a thorough and uniform system of free public education does not preclude a local school district from providing educational opportunities in addition to and different from the thorough and uniform system. *See Lujan,* 649 P.2d at 1025.

Moreover, the fact the participating private schools ultimately receive funds distributed to the District as per pupil revenue does not transform the private schools into public schools subject to the uniformity requirement. *See Jackson v. Benson,* 218 Wis.2d 835, 578 N.W.2d 602, 627–28 (1998) (rejecting claim that a parental choice program giving public funds to parents who enroll their children in certain private schools violated a constitutional provision requiring establishment of local schools "which shall be as nearly uniform as practicable"; funding mechanism did not transform private schools into public schools); *Davis,* 480 N.W.2d at 473–74 (same).

Plaintiffs also are incorrect that because the CSP is structured to allow the District to retain twenty-five percent of per pupil revenue allocated for participating students, it diverts funds from other districts and thereby violates article IX, section 2, for at least two reasons.

First, this contention assumes that participating students would not be enrolled in District schools in the absence of the CSP. But, as plaintiffs' counsel conceded at oral argument, that assumption lacks evidentiary support in the record. Indeed, the evidence in the record bearing on this point indicates the contrary. As noted, to be eligible to participate in the CSP, students must be current District residents, must have been District residents for at least one year, and must have been enrolled in District public schools during the 2010–2011 school year (the school year immediately prior to the school year during which the CSP was to operate). And, also as noted, one purpose of the CSP is to provide greater educational choice to District students and parents—that is, choices not previously available to District students and parents because of financial limitations. Thus, if anything, the evidence in the record shows that the District's per pupil revenue would be the same in the absence of the

CSP because the participating students would otherwise enroll in District public schools.[9]

Second, this contention posits an unduly restrictive view of the mandate of article IX, section 2. As discussed, local school districts may provide educational options to students in addition to that required by article IX, section 2. *See Lujan,* 649 P.2d at 1025; *Boulder Valley Sch. Dist.,* 217 P.3d at 927–28 (state system of charter schools does not violate article IX, section 2 because that provision does not prohibit making available additional educational opportunities); *see also Jackson,* 578 N.W.2d at 627–28 (rejecting argument premised on similar constitutional provision that similar school choice program diverted funds from the public school system). And they may expend public funds in doing so. *See* § 22–54–104(1)(a) ("the amounts and purposes for which [a district's total per pupil revenue] are budgeted and expended shall be in the discretion of the district").[10]

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[9] The district court made a conclusory finding to the contrary. But we have found no evidence in the record supporting it, and plaintiffs point us to none. At oral argument, plaintiffs' counsel conceded that the only record evidence on this point supported the contrary conclusion.

[10] In *Bush v. Holmes,* 919 So.2d 392 (Fla.2006), the Florida Supreme Court held that a school choice program violated a provision of the Florida Constitution requiring a uniform system of free public schools. But the program at issue there, unlike the CSP, was funded by money that otherwise would have been distributed to local school districts. *Id.* at 402. And its reasoning—that the state is limited to funding one system, *id.* at 407—is inconsistent with *Lujan*. The court also explicitly based its decision

We therefore conclude that plaintiffs failed to prove beyond a reasonable doubt that the CSP violates article IX, section 2.

3. Article IX, § 3—Use of the Public School Fund

Article IX, section 3 provides in relevant part:

> The public school fund of the state shall, except as provided in this article IX, forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. No part of this fund, principal, interest, or other income shall ever be transferred to any other fund, or used or appropriated, except as provided in this article IX....

The public school fund consists of the proceeds of land given to the state for educational purposes by the federal government upon Colorado's admission into the union, estates which escheat to the state, and gifts to the state for educational purposes. Colo. Const. art. IX, § 5; *see* 18 Stat. 474 § 7; *People in Interest of Dunbar v. City of Littleton*, 183 Colo. 195, 197, 515 P.2d 1121, 1121 (1973).

The district court held that the CSP violates article IX, section 3 because some of the District's total

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on unique language in its constitution that is not found in article II, section 4. *Id.* at 405, 407 & n. 10.

per pupil funding comes from the public school fund. The court reasoned that payments to parents would therefore include money from the public school fund, which would then be received by private schools. We do not agree with that analysis.

Article IX, section 3 requires only that money from the public school fund be "expended in the maintenance of the schools of the state" and "distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law." It plainly applies to distributions made by the state, not local districts. And it requires distributions to the counties and school districts. Upon distribution by the state to the counties and school districts, the money from the fund belongs to the counties and school districts. *Craig v. People in Interest of Hazzard,* 89 Colo. 139, 144–45, 299 P. 1064, 1066 (1931).

In ruling that the District directed public school fund money to participating private schools (through parents of participating students), the district court in effect assumed that once a district receives public school fund money from the state, all money the district expends is subject to the restriction of article IX, section 3. But article IX, section 3 is expressly a restriction on the use of only certain money— that of the public school fund. It does not suggest that the existence of some public school fund money in a district's total per pupil revenue subjects all money comprising the total per pupil revenue to its restriction.

It is undisputed that less than two percent of public school funding comes from the public school fund. (The District presented unrebutted evidence of this fact.) It is also undisputed that (1) at the time of the preliminary injunction hearing, there were approximately 58,000 students in District schools, only 500 of whom (or 0.86 percent) could enroll in the Charter School; and (2) the Charter School would retain twenty-five percent of per pupil revenue attributable to students participating in the CSP. Therefore, it does not follow that money from the public school fund would be diverted to private schools. Because we must presume the CSP is constitutional, *Danielson v. Dennis,* 139 P.3d 688, 691 (Colo.2006), construe the CSP in a manner avoiding constitutional infirmity, if possible, *Bd. of Directors v. Nat'l Union Fire Ins. Co.,* 105 P.3d 653, 656 (Colo.2005), and avoid seeking reasons to find the CSP unconstitutional, *Harris v. Heckers,* 185 Colo. 39, 41, 521 P.2d 766, 768 (1974), we must construe the CSP as funded out of the ninety-eight percent of total per pupil revenue that does not come from the public school fund. *See Danielson,* 139 P.3d at 691 (party challenging the constitutionality of a legislative enactment must establish that "[t]he precise point of conflict between [the legislative enactment] and the constitution ... appear[s] plain, palpable, and *inevitable"*) (emphasis added) (quoting *Union Pac. Ry. Co. v. De Busk,* 12 Colo. 294, 303, 20 P. 752, 756 (1889)).[11]

[11] Even were we to regard a small (less than two percent) percentage of funding for the CSP as coming from the public school fund, we would regard that money as within the twenty-five percent of per pupil revenue retained by the District to administer the program.

Perceiving no plain, palpable, and inevitable conflict between the CSP and article IX, section 3, we conclude that plaintiffs did not meet their burden of establishing the unconstitutionality of the program under that provision.

4. Article IX, § 15—Local Control

Plaintiffs contend that the CSP violates article IX, section 15 of the Colorado Constitution, and that the district court erred in ruling to the contrary. Because plaintiffs do not seek to increase their rights under the judgment by asserting this claim, we have jurisdiction to consider it notwithstanding that plaintiffs did not file a cross-appeal. *See* Part II.A.2, *supra*. Their contention fails.

As noted, article IX, section 15 provides that the directors of the boards of education of local school districts "shall have control of instruction in the public schools of their respective districts." The district court found that this provision is aimed at ensuring that the state does not encroach upon the prerogative of local school districts to control the instruction in the public schools within their respective districts.

We agree with the district court. *See Owens,* 92 P.3d at 935, 938–42 (discussing the purpose of article IX, section 15 and cases applying it). Further, the provision does not relate to instruction in private schools. As discussed above, participating private schools retain their character as private, not public, schools. It follows that article IX, section 15 does not apply to the CSP.

B. Religion Claims

The Colorado Constitution contains a number of provisions addressing the relationship between state government and citizens, on the one hand, and religion generally and religious institutions, on the other hand. Some of these provisions pertain to support for religion and religious institutions. Four are at issue here: article II, section 4; article V, section 34;[12] and article IX, sections 7 and 8.

Defendants urge us to hold that these provisions are substantively indistinguishable from the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. Were we to do so, they contend, we would have no choice but to reject plaintiffs' claims under the state constitution because the United States Supreme Court rejected a First Amendment challenge to a virtually identical school choice program in *Zelman v. Simmons–Harris,* 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002).

No Colorado appellate decision has held that the Colorado Constitution's religion provisions are merely coextensive with the Religion Clauses of the First Amendment. We will not consider that issue because we need not do so to resolve the merits of plaintiffs' claims under existing jurisprudence. *See People v. Thompson,* 181 P.3d 1143, 1145 (Colo.2008) ("[W]e will refrain from resolving constitutional questions or from making determinations regarding the extent of constitutional rights 'unless such a determination is essential and the necessity of such a decision is clear and inescapable.'") (quoting in part *Denver Publ'g Co.*

[12] We discuss this provision in Part II. C below.

v. Bd. of Cnty. Comm'rs, 121 P.3d 190, 194 (Colo.2005)); *Ricci v. Davis,* 627 P.2d 1111, 1121 (Colo.1981) ("[A] court will not rule on a constitutional question which is not essential to the resolution of the controversy before it.").

For the same reason, we will not address defendants' contention that we should disregard some of the religion provisions at issue (article V, section 34; and article IX, sections 7 and 8) because many of those who proposed and voted for them were motivated by anti-Catholic bigotry. According to defendants (and certain amici curiae), these provisions—which they term "Blaine provisions"[13]—are unconstitutional under the federal constitution because of their alleged discriminatory purpose. But again, we need not consider that issue because we conclude that the CSP does not violate any of the subject provisions.

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[13] This term has come to be used to identify state laws and constitutional provisions which allegedly arose out of anti-Catholic school sentiment. In 1875, Congressman James G. Blaine proposed an amendment to the United States Constitution that, in part, would have prohibited disbursement of public funds to parochial schools. It was approved by the House of Representatives, but not by the Senate. Similar prohibitions were adopted in many states, however. *See generally* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns,* 26 Harv. J.L. & Pub. Pol'y 551, 556–76 (2003); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law,* 21 Harv. J.L. & Pub. Pol'y 657, 670–75 (1998); Steven K. Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38 (1992).

1. Article II, § 4—Required Attendance or Support

As relevant here, article II, section 4 provides: "No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." The district court ruled that the CSP violates this prohibition because schools affiliated with religious institutions would receive taxpayer money, and taxpayers would thereby be compelled to support "indoctrination and religious education" at such schools. We disagree.

In Americans United for Separation of Church and State Fund, Inc. v. State, 648 P.2d 1072 (Colo.1982), the court rejected a challenge to a program similar to the CSP under the compelled support provision of article II, section 4. That program provides monetary grants of state funds to Colorado resident students attending private institutions of higher education in the state. As then devised, the program provided aid to students attending "sectarian" schools, but not to students attending "pervasively sectarian" schools. *See* Ch. 279, §§ 23–3.5–101 to –106, 1977 Colo. Sess. Laws 1104–06.

The court began its analysis by recognizing that article II, section 4 "echoes the principle of constitutional neutrality underscoring the First Amendment." *Americans United,* 648 P.2d at 1082.[14] It

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[14] The court did not, however, go so far as to equate article II, section 4 with the Religion Clauses of the First Amendment. *See* 648 P.2d at 1078 (noting that First Amendment jurisprudence "is not necessarily determinative of state constitutional claims"); *see also Conrad v. City & Cnty. of Denver,* 656 P.2d 662, 667 (Colo.1982).

then observed that the compelled attendance or support clause "'"is aimed to prevent an established church."'" *Id.* (quoting *People in Interest of Vollmar v. Stanley,* 81 Colo. 276, 285, 255 P. 610, 615 (1927)).

In upholding the grant program, the court found that it was "designed for the benefit of the student, not the educational institution," and was neutral in the sense that it was "available to students at both public and private institutions of higher learning." *Id.*

Essentially the same can be said of the CSP. The district court found, with record support, that "the purpose of the [CSP] is to aid students and parents, not sectarian institutions." And the CSP is neutral—it is available to all District students and to any private school which meets the neutral eligibility criteria.

The district court, however, determined that the program at issue in *Americans United* is materially distinguishable from the CSP because the CSP does not include "any express language that limits or conditions the use of state funds received by the partner schools for the strict purpose of secular student education." And after extensively scrutinizing the nature of the education provided by certain participating private schools and the degree to which those schools "infuse religious teachings into the curriculum," the court concluded that taxpayer money ultimately would be used to further sectarian institutions' "goals of indoctrination and religious education."[15]

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[15] At one point in its written order, the district court said that it would not "analyze the religiousness of a particular

The district court erred in its analysis, for two reasons. First, contrary to the district court's conclusion, the program at issue in Americans United "does not expressly limit the purpose for which the institutions may spend the funds distributed under the grant program...." *Id.* at 1084. Rather, the supreme court observed that the program provides for a "biannual audit and review of payment procedures and other practices ... [that] are expressly designed to insure that the grant program is being properly administered," and prohibits participating institutions from "decreas[ing] the amount of its own funds spent for student aid below the amount spent prior to participation in the program." *Id.*

In these respects, the program at issue in *Americans United* is analogous to the CSP. As the district court found, the CSP has a "check and balance system" which allows for periodic District review of participating private schools' records to assure that the schools are complying with the educational and other requirements to which they agreed. And the District's Assistant Superintendent testified that any school which would reduce its financial aid to a participating student because of participation in the CSP would be in violation of the CSP. Though the district court found that one such instance of aid reduction had occurred (out of hundreds of

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institution." (The court said this because of a concern that doing so would be impermissible under the First Amendment, a concern that was well-founded. *See* discussion below.) But the court proceeded to do precisely that, discussing at length the religious aspects of certain participating private schools' educational programs and then relying on the results of that inquiry in striking down the CSP.

participating students), the court cited no evidence supporting a conclusion that such reduction was permissible under the CSP. Plaintiffs have not cited any such record evidence either.

Second, the inquiry in which the district court engaged—into the degree to which religious tenets and beliefs are included in participating private schools' educational programs—is no longer constitutionally permissible. In the thirty years since *Americans United* was decided, the United States Supreme Court has made clear that, in assessing facially neutral student aid laws, a court may not inquire into the extent to which religious teaching pervades a particular institution's curriculum. Doing so violates the First Amendment. *See Mitchell v. Helms,* 530 U.S. 793, 828, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality op.); *id.* at 837–67, 120 S.Ct. 2530 (O'Connor, J., concurring, joined by Breyer, J.) (declining to engage in pervasiveness inquiry); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 867, 876–77, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (rejecting the assertion that a public university could refuse benefits of a neutral subsidy to student publications that contained "indoctrination" and "evangelis[m]," as opposed to "descriptive examination of religious doctrine"); *Witters v. Washington Dep't of Services for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986) (provision of financial assistance under vocational rehabilitation program to blind person who chose to attend a Christian college to study ministry did not violate the First Amendment; program was neutral in that it allowed students to use aid to attend public or sectarian schools of their choice).

In *Colorado Christian University v. Weaver,* 534 F.3d 1245 (10th Cir.2008), the Tenth Circuit Court of Appeals addressed the program addressed twenty-six years earlier by the supreme court in *Americans United*. It held that by providing financial aid to students attending sectarian institutions of higher education, but not to students attending "pervasively sectarian" institutions of higher education, the program unconstitutionally discriminated among and within religions. The court based its holding on the conclusion that Supreme Court jurisprudence now holds that inquiry into the pervasiveness of an institution's religious beliefs (including the likelihood of "indoctrination") violates the constitutional requirement of neutrality toward religion embodied in the Establishment and Free Exercise Clauses. *Id.* at 1257–66. Simply put, a government may not choose among eligible institutions "on the basis of intrusive judgments regarding contested questions of religious belief or practice." *Id.* at 1261; accord *Mitchell*, 530 U.S. at 828, 120 S.Ct. 2530 (plurality op.); *see Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335 (D.C.Cir.2002) (in determining whether university was subject to agency's jurisdiction, agency could not inquire into the university's "substantial religious character"); *Columbia Union College v. Oliver*, 254 F.3d 496, 501–06 (4th Cir.2001) (private college affiliated with a religious denomination could not be excluded from state grant program on the basis the college was pervasively sectarian; such inquiry is impermissible under the First Amendment).[16]

[16] In response to the court's decision in *Colorado Christian University,* the General Assembly removed all pervasiveness

Our colleague in dissent says that *Colorado Christian University* is not applicable here because the program at issue there distinguished between sectarian and pervasively sectarian schools. But the principle the court applied in that case, based on current Supreme Court jurisprudence, is that if the state chooses "among otherwise eligible institutions, it must employ neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices." *Colorado Christian Univ.,* 534 F.3d at 1266. Such intrusive judgments are impermissible under the First Amendment. *See also id.* at 1261.[17] We think this principle applies with equal force where the program at issue is facially neutral toward private religious schools because it is open to all private schools. *See id.* at 1255 (reading *Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), as suggesting, though not holding, that "the State's latitude to discriminate against religion ... does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government

provisions and references from the program. *See* Ch. 348, secs. 1, 2, 4, 12, 2009 Colo. Sess. Laws 1822–24, 1827. Thus, any distinction between private schools not affiliated with a religious institution and private schools that are has been eliminated.

[17] We do not hold, of course, that any of the provisions of the Colorado Constitution here at issue violate the Religion Clauses of the First Amendment. We do hold that they must be applied in a way that does not violate the Religion Clauses. *See Colo. Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1146 (10th Cir.2007); *Alliance for Colorado's Families v. Gilbert,* 172 P.3d 964, 968 (Colo.App.2007).

support").[18] Indeed, the program at issue in *Mitchell* (which pertained to elementary and secondary schools) was such a program.

Here, the CSP is neutral toward religion generally and toward religion-affiliated schools specifically. The district court nonetheless found the CSP unconstitutional under article II, section 4 based on an inquiry into the degree to which certain schools "infuse religious teachings into [their] curriculum" and intend to "indoctrinat[e]" students, precisely the type of inquiry forbidden by the First Amendment. We do not interpret article II, section 4 to require, or even allow, this type of inquiry.[19]

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[18] The dissent asserts that *Locke* supports its position that the CSP violates article IX, section 7, a provision discussed below that is similar to article IX, section 4. *Locke,* however, held only that the state was not required to include the study of "devotional theology" within a program awarding college scholarships. It did not hold that the state was required to exclude that field of study from the program. (And the program at issue in *Locke* provided scholarships for, apparently, all other field of study at schools affiliated with religious institutions. *Locke,* 540 U.S. at 724–25 & n. 9, 124 S.Ct. 1307.)

[19] We recognize that the court in *Americans United* may have considered the statutory provisions distinguishing between eligible sectarian schools and ineligible "pervasively sectarian" schools as relevant to the analysis under article II, section 4. But where subsequent developments in Supreme Court jurisprudence render a prior Colorado Supreme Court decision applying state law inconsistent with the federal constitution, we are not required to follow that prior decision. *Cf. People v. Hopper,* 284 P.3d 87, 90 & n. 3 (Colo.App.2011) (noting that subsequent Supreme Court decision had effectively overruled prior state supreme court decision). We also note that it would be paradoxical to hold that a decision (such as *Colorado Christian University*) striking portions of a state law as unconstitutional

Further, we reject the district court's analysis insofar as it perceived a distinction between elementary and secondary schools and institutions of higher education. The inappropriateness of the inquiry into the extent to which a school teaches religious doctrine is based on the First Amendment's requirement of neutrality. That principle does not evaporate because the school in question is an elementary or secondary school. Indeed, the schools at issue in *Mitchell* were elementary and secondary schools.

In concluding that the grant program before it did not violate the compelled support prohibition of article II, section 4, the supreme court in *Americans United* summed up its reasoning as follows:

> [The program] holds out no threat to the autonomy of free religious choice and poses no risk of governmental control of churches. Being essentially neutral in character, it 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. Finally, there is no risk of governmental entanglement to any constitutionally significant degree.

Americans United, 648 P.2d at 1082. The same can be said of the CSP. Therefore, it does not violate the compelled support prohibition of article II, section 4. *Cf. Simmons–Harris,* 711 N.E.2d at 211–12 (similar

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under the federal constitution rendered the law unconstitutional under analogous provisions of the state constitution.

school choice program did not violate Ohio Constitution's compelled support prohibition).

Nor are we persuaded by plaintiffs' argument that the CSP violates the compelled attendance prohibition of article II, section 4 because some participating private schools require students to attend religious services.[20] Assuming that is the case, and assuming that the district court correctly determined that the CSP's "opt out" provision is "illusory," the fact remains that the CSP does not compel anyone to do anything, much less attend religious services. No student is compelled to participate in the CSP or, having been accepted to participate, to attend any particular participating private school. To the extent students would attend religious services, they would do so as a result of parents' voluntary choices. Article II, section 4 clearly does not proscribe such choices.[21]

2. Article IX, § 7—No Aid to Religious Organizations

Article IX, section 7 provides in relevant part:

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[20] The district court did not rule on this issue.

[21] Amicus Curiae Anti–Defamation League contend that the CSP violates the Colorado Constitution, including, apparently, article II, section 4, and state antidiscrimination laws because some participating private schools allegedly discriminate in admissions and hiring on the basis of religious belief, sexual orientation, and disability. Plaintiffs did not make this claim in the district court, and therefore amicus curiae cannot raise it on appeal. *Gorman v. Tucker,* 961 P.2d 1126, 1131 (Colo.1998); *D.R. Horton, Inc.–Denver v. Bischof & Coffman Constr., LLC,* 217 P.3d 1262, 1267 (Colo.App.2009). But we observe that the premise of this argument—that participating private schools are public schools—is incorrect.

> 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....

The district court ruled that the CSP violates this provision essentially for the same reasons it found a violation of article II, section 4. And essentially for the same reasons we have concluded that the CSP does not violate article II, section 4, we conclude that it does not violate article IX, section 7.[22]

In *Americans United,* the supreme court also rejected a challenge to the higher education grant program under article IX, section 7. The court considered a number of things: (1) the aid is intended to assist the student and any benefit to the institution is incidental; (2) the aid is available only to students attending institutions of higher education, where "there is less risk of religion intruding into the secular educational function of the institution than there is at

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[22] Contrary to the dissent's suggestion, we do not hold that the limitations of article IX, section 7 are merely coextensive with those of the Religion Clauses of the First Amendment. Article IX, section 7 may well prohibit types of funding that the First Amendment does not. But, as noted above, we need not decide that question.

the level of parochial elementary and secondary education"; (3) the aid is available to students attending both public and private institutions; and (4) the criteria for institutional eligibility require a strong commitment to academic freedom. *Americans United,* 648 P.2d at 1083–84.

As previously discussed, the CSP, like the program at issue in *Americans United,* is intended to benefit students and their parents, and any benefit to the participating schools is incidental. "Such a remote and incidental benefit does not constitute ... aid to the institution itself within the meaning of Article IX, Section 7." *Id.*; *cf. Zelman,* 536 U.S. at 652, 122 S.Ct. 2460 (holding that school choice program substantially similar to the CSP did not violate the First Amendment because any advancement of religion was only incidental and was attributable to the individual aid recipients, not the government). And although the aid here is not available to students attending public schools (because attendance at public schools is free), it is available to students attending private schools without any religious affiliation. The CSP is neutral toward religion, and funds make their way to private schools with religious affiliation by means of personal choices of students' parents.

Consideration of the other matters considered by the court in *Americans United* is problematic here because those matters involve an inquiry into the extent to which the participating private schools are "sectarian." Such an inquiry is, in our view, foreclosed by the First Amendment's Religion Clauses, as fully discussed above.

But, in any event, we are not persuaded by the dissent's assertion that the distinction between institutions of higher education (colleges and universities) and elementary and secondary schools was crucial to the court's holding. As noted, in *Americans United* the court held that because the program was intended to benefit parents and their children, any indirect benefit to the schools was not "in aid of" any religious organization. *Americans United,* 648 P.2d at 1083–84. This principle holds true regardless of the nature of the school—in all events the aid is incidental and therefore not in violation of article IX, section 7.

And we note that nothing in the text of article IX, section 7 even remotely hints at the distinction on which the dissent relies.

As relevant here, the provision prohibits "anything in aid of any church or sectarian society" or "anything ... to help support or sustain any school ... controlled by any church or sectarian denomination...." Logically, because the provision is not limited to support of the religious mission of any religious institution, inquiry into the extent of religious instruction at a particular school would appear to be irrelevant.

We also observe that the CSP, like the program at issue in *Americans United,* includes eligibility criteria designed to assure that participating private schools' educational programs "produce[ ] student achievement and growth results for [participating students] at least as strong as what District neighborhood and charter schools produce." And the CSP provides for regular District oversight to assure that participating private schools are meeting the secular requirements of the program.

Thus, even if we assume that consideration of all the facts discussed in *Americans United* remains constitutionally permissible, we conclude that our holding is consistent with *Americans United*.[23]

We are unpersuaded by the out-of-state cases on which the dissent relies, *Cain v. Horne,* 220 Ariz. 77, 202 P.3d 1178 (2009); *Bush v. Holmes,* 886 So.2d 340 (Fla.Dist.Ct.App.2004), *aff'd on other grounds,* 91-9 So.2d 392 (Fla.2006); and *Witters v. State Commission for the Blind,* 112 Wash.2d 363,771 P.2d 1119 (1989).[24] In *Cain,* for example, the court based its holding on the conclusion that the fact money was transferred to parents, who had chosen the private schools their children would attend, was irrelevant. *Cain,* 202 P.3d at 1184. That reasoning, which is typical of the reasoning in the cases on which the dissent relies, is flatly at odds with our supreme court's reasoning in *Americans United,* in which the court deemed the neutral character of the grant programs as essentially determinative.[25]

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[23] Our analysis in this regard also applies to plaintiffs' claim under article IX, section 4.

[24] *Univ. of Cumberlands v. Pennybacker,* 308 S.W.3d 668 (Ky.2010), another case on which the dissent relies, is entirely inapposite. That case did not concern a facially neutral program like the CSP. Rather, it concerned a bill directly appropriating state money to build a pharmacy school building on the campus of a particular college affiliated with a religious institution. *Id.* at 671.

[25] This leads us to observe that to accept the dissent's view that the "clear and unambiguous" language of article IX, section 7 requires invalidation of the CSP would require us also to say that

Having considered "the entire statutory scheme measured against the constitutional proscription," 648 P.2d at 1083, we conclude that the CSP does not violate article IX, section 7.

3. Article IX, § 8—Religion in Public Schools

Article IX, § 8—Religion in Public Schools:

> No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school ....

Although this provision plainly applies to "public educational institution[s]" and "public school[s]," the district court reasoned that it applies to the CSP because participating students would be enrolled in the Charter School. It then concluded that participating private schools' admissions criteria (which in some cases include religious qualifications) and requirements of attendance at religious services and religious instruction could be imputed to the

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Americans United was wrongly decided. According to the dissent, the plain language of the provision dictates that whenever state money makes its way to a private school affiliated with a religious institution, the provision is violated. *Americans United* unequivocally held to the contrary. The purpose of the aid and the identity of the person or entity choosing the school make all the difference in determining whether money is "in aid of" such an institution.

Charter School. Thus, the district court found that the CSP impermissibly imposes religious tests for admission to public institutions of the state, requires students of such institutions to attend religious services, and allows sectarian tenets or doctrines to be taught in public schools. We disagree with the district court's reasoning.

The district court failed sufficiently to account for the fact that attendance at any of the participating private schools is not required by the CSP; such attendance is by parental choice. Moreover, as discussed above, participation in the CSP does not transform private schools into public schools.

Nor does the fact students would be enrolled in the Charter School for administrative purposes justify imputing requirements of the participating private schools to the Charter School. The reality is that, for educational purposes, participating students would be enrolled in the participating private schools, as to which article IX, section 8 has no application by its express terms.[26]

Therefore, we conclude that the CSP does not violate article IX, Section 8.

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[26] Defendants argue that the first two sentences of article IX, section 8 do not apply to public elementary and secondary schools, but only to institutions of higher education. We do not need to resolve that issue, however, because even if we assume that the first two sentences apply to elementary and secondary schools, we perceive no violation.

C. Article V, § 34—Prohibited Appropriations

Article V, section 34 provides: "No appropriation shall be made for ... educational ... purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." The district court found that the CSP violates this provision in two ways. First, because "payment of state funds is made directly to the" participating private schools, appropriations are thereby made to entities not under absolute state control. And second, for the same reason, appropriations are made to religious organizations. The district court misconstrued the provision.

Article V, section 34 is part of article V of the Colorado Constitution, which deals with the structure and powers of the General Assembly. *See, e.g.,* art. V, § 1(1). Article V includes two provisions dealing with appropriations, sections 32 and 34. The appropriations encompassed by those sections clearly are appropriations by the General Assembly itself. *Colo. Gen. Assembly v. Lamm,* 700 P.2d 508, 519 (Colo.1985) ("the power of the General Assembly over appropriations is absolute"); *Lyman v. Town of Bow Mar,* 188 Colo. 216, 227, 533 P.2d 1129, 1136 (1975) (article V, section 34 "refers only to state funds and does not extend to municipalities"); *Williamson v. Bd. of Comm'rs (In re House)*, 23 Colo. 87, 91, 46 P. 117, 118 (1896) (article V "had in contemplation the disbursement of state funds only, and their disposition by the state in its corporate capacity ...").

No such disbursement would occur under the CSP. The General Assembly appropriates state money for elementary and secondary education to the Colorado Department of Education, which in turn distributes it to local school districts in the form of total per pupil revenue. At that point, ownership of the funds passes to the local school districts. *Craig,* 89 Colo. at 144–45, 299 P. at 1066; *see* § 22–54–104(1)(a). The District's expenditure of funds under the CSP, therefore, does not constitute an appropriation by the General Assembly.

Further, in *Americans United,* the supreme court held that the grant program there at issue does not violate the prohibition of article V, section 34 barring appropriations from being made to entities not under absolute state control because (1) the aid is designed to assist the students, not the institutions, and therefore any benefit to the institutions is incidental; and (2) the aid serves a discrete and particularized public purpose, namely, to provide assistance to Colorado resident students attending institutions of higher education, which predominates over any individual interest incidentally served by the program. *Americans United,* 648 P.2d at 1074, 1083–86. The CSP survives scrutiny under article V, section 34 for similar reasons.

The district court found that "the purpose of the [CSP] is to aid students and parents, not sectarian institutions." Any benefit to the participating private school is incidental, occasioned by the individual choices of students' parents. *Cf. Simmons–Harris,* 711 N.E.2d at 212 (holding that similar school choice program did not violate constitutional prohibition on use of state school funds because schools receive money "only as the result of independent decisions of parents and students").

And the CSP serves discrete and particularized public purposes. Indeed, it has three such purposes, "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 [District] educational spending." We perceive no principled distinction between these purposes and that found sufficient in *Americans United*.

The district court sought to distinguish *Americans United* on the grounds that, unlike the program at issue in *Americans United,* the CSP does not have "any of the prophylactic measures" to assure that religion would not intrude on the secular education function. For the reasons discussed above, that purported distinction is untenable.

As for the prohibition against appropriations to religious organizations, we perceive no basis for applying a different analysis to that prohibition than that applied to the prohibition against appropriations to entities not under absolute state control.[27]

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[27] In *Cain,* 202 P.3d 1178, the Arizona Supreme Court held that two school choice programs violated two provisions of the Arizona Constitution prohibiting appropriations to religious establishments and private or sectarian schools. But those programs, unlike the CSP, were funded by direct appropriations by the state legislature. And, as discussed above, we do not see how the court's analysis in that case can be squared with *Americans United*.

Therefore, we conclude that the CSP does not violate article V, section 34.

III. Briefs of Amici Curiae

We have received a number of briefs of amici curiae supporting and opposing the district court's judgment. Some amici curiae raise contentions based on constitutional and statutory provisions that were not raised by plaintiffs. That is not the proper role of amici curiae. *See Gorman*, 961 P.2d at 1131; *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1189 (Colo.App.2011); *D.R. Horton*, 217 P.3d at 1267.

Some amici curiae urge us to affirm or reverse the district court's judgment purely for policy reasons, without regard for the governing law. Because making decisions based on such reasons is not part of the courts' constitutional function, these arguments are improper. Such arguments should be directed to the appropriate law-making bodies. *See Town of Telluride v. Lot Thirty–Four Venture, L.L.C.,* 3 P.3d 30, 38 (Colo.2000) ("[C]ourts must avoid making decisions that are intrinsically legislative. It is not up to the court to make policy or to weigh policy.").

IV. Conclusion

Plaintiffs failed to carry their burden of proving the unconstitutionality of the CSP beyond a reasonable doubt, or by any other potentially applicable standard. None of them have standing to assert a claim under the Act. Accordingly, the district court's judgment cannot stand.

The judgment is reversed, and the case is remanded to the district court for entry of judgment in defendants' favor.

JUDGE GRAHAM concurs.
JUDGE BERNARD dissents.

JUDGE BERNARD dissenting.

This difficult case springs from an important public responsibility—educating children—and from thorny questions surrounding the mechanisms that can be employed to fund that responsibility. What those funding mechanisms should be and how they should be maintained are questions that should, in most circumstances, be answered by local school boards.

But this case involves an exception to that general rule. One of the circumstances that cannot be finally resolved by a local school board is whether a particular funding mechanism that it has chosen violates the federal or state constitution.

Colorado Constitution article IX, section 7 (section 7) is far more detailed and focused on the issues in this case than is the language of the First Amendment. Section 7's language is unambiguous. In my view, it prohibits public school districts from channeling public money to private religious schools.

I think that the Choice Scholarship Program is a pipeline that violates this direct and clear constitutional command. I would follow this command, and I would conclude that section 7

- establishes greater protection against the establishment of religion in Colorado's public elementary, middle, and high schools than does the First Amendment's Establishment Clause;

- does not offend the Establishment Clause, the First Amendment's Free Exercise Clause, or the Fourteenth Amendment's Equal Protection Clause;
- bars transferring public funds to private religious elementary, middle, and high schools; and
- renders the Choice Scholarship Program, created by Douglas County School District RE–1, unconstitutional.

Because I would reach these conclusions, I respectfully dissent from the majority's resolution of this case. I would, instead, affirm the district court's decision to permanently enjoin the scholarship program.

Although I dissent, I do not impute any improper bias or sinister motive to the local school board. The trial court found that the purpose of the scholarship program was a "well-intentioned effort to assist students ... not sectarian institutions." But the fact that the school board acted with a good heart does not mean that it can choose a solution to the admittedly complex and vexing problems surrounding educating children that violates Colorado's Constitution.

I. Principles Used to Interpret Constitutional Sections

Our state "constitution derives its force ... from the people who ratified it, and their understanding of it must control. This is to be arrived at by construing the language[ ] used in the instrument according to the sense most obvious to the common understanding." *People v. Rodriguez*, 112 P.3d 693, 696 (Colo.2005) (quoting *Alexander v. People*, 7 Colo. 155, 167, 2 P. 894, 900 (1884)).

We give the language of our constitution its "ordinary and common meaning" in order to give "effect to every word and term contained therein, whenever possible." *Id.* (quoting *Bd. of Cnty. Comm'rs v. Vail Assocs., Inc.,* 19 P.3d 1263, 1273 (Colo.2001)). If the language "is plain, its meaning clear, and no absurdity involved, constitutional provisions must be declared and enforced as written." *Id.* (quoting *In re Great Outdoors Colo. Trust Fund,* 913 P.2d 533, 538 (Colo.1996)). "[I]n doing so, technical rules of construction should not be applied so as to defeat the objectives sought to be accomplished by the provision under consideration." *Id.* (quoting *Cooper Motors v. Bd. of Cnty. Comm'rs,* 131 Colo. 78, 83, 279 P.2d 685, 688 (1955)).

If it seems that a section of the Colorado Constitution *implies* limitations on rights or on the legislature's authority, "it becomes highly important to ascertain, if that may be done, what the framers of the Constitution really had in mind, and actually intended to cover, by the enactment of this provision." *Schwartz v. People,* 46 Colo. 239, 257, 104 P. 92, 98 (1909). To do so, we read the record of the constitutional convention's proceedings and look to "the attitude of the members of that body, as shown by the record concerning the then[-]existing laws on that subject." *Id.*

"Where the analogous federal and state constitutional provisions are textually identical, we have always viewed cases interpreting the federal constitutional provision as persuasive authority." *People v. Dunaway,* 88 P.3d 619, 630 (Colo.2004). However, such decisions do not bind us. *See High Gear & Toke Shop v. Beacom,* 689 P.2d 624, 628 n.1 (Colo.1984) (Tenth Circuit's interpretation of Colorado statute was not binding on Colorado Supreme Court).

Our supreme court has interpreted sections of the Colorado Constitution differently than the United States Supreme Court has interpreted similarly worded sections of the federal constitution. For example, our supreme court's holding that a person has a reasonable expectation of privacy in the telephone numbers that he or she dials, which is based on Colorado Constitution article II, section 7, is more restrictive than the federal rule, which is based on the Fourth Amendment. *Compare Smith v. Maryland,* 442 U.S. 735, 742–45, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), *with People v. Sporleder,* 666 P.2d 135, 140–42 (Colo.1983). Colorado's rule, which is based on Colorado Constitution article II, section 18, barring retrial after an appellate court reverses a trial court's order of dismissal before a verdict has been rendered, is stricter than the federal rule, which is based on the Fifth Amendment's Double Jeopardy Clause. *Compare United States v. Scott,* 437 U.S. 82, 98–99, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), *with Krutka v. Spinuzzi,* 153 Colo. 115, 124–27, 384 P.2d 928, 933–35 (1963).

Another example involves speech. The protections found in the First Amendment apply to the states. *Curious Theatre Co. v. Colorado Dep't of Public Health & Environment,* 220 P.3d 544, 551 (Colo.2009). These protections trump conflicting state constitutional sections. *Id*. However, "the First Amendment limits the power of the federal and state governments to abridge individual freedoms, not the power of states to even further restrict governmental impairment of those individual freedoms." *Id*. The United States Supreme Court has "acknowledged each State's 'sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.'" *Bock v. Westminster Mall Co.,* 819 P.2d 55, 59 (Colo.1991) (quoting *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 81, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980)). Thus, the First Amendment sets the constitutional minimum level of protection that states must provide, but "a state may, if it so chooses, afford its residents a greater level of protection under its state constitution than that bestowed by the Federal Constitution." *Tattered Cover, Inc. v. City of Thornton,* 44 P.3d 1044, 1053–54 (Colo.2002).

When interpreting Colorado Constitution, article II, section 10, which addresses free speech, our supreme court has repeatedly held that this Colorado constitutional section "provides broader free speech protections than the Federal Constitution." *Id.* at 1054 & n.18 (collecting cases). Such conclusions have been based on "differences between the language of the First Amendment ... and the language of the Colorado Constitution" and Colorado's "extensive history of affording broader protection under the Colorado Constitution for expressive rights." *Id*. at 1054.

However, it is fundamentally important to keep in mind that those courts that

> fail to explain important divergences from precedent run the risk of being accused of making policy decisions based on subjective result-oriented reasons....
>
> [C]ourts should be hesitant in interpreting identical language in state constitutions differently in their efforts to reach conclusions which differ from the United States Supreme Court. Principled differences between the state and federal constitutions are a necessary and important aspect of our system of federalism. Differences exist and should be applied when appropriate.

Sporleder, 666 P.2d at 149–50 (Erickson, J., dissenting); *see also People v. Timmons*, 690 P.2d 213, 218 (Colo.1984) (Erickson, C.J., dissenting) ("[W]hen provisions of the Colorado Constitution closely parallel the federal constitution, or in areas in which state rules or statutes are enacted pursuant to or closely dovetail federal acts or policies, the decisions of the United States Supreme Court should be approached with deference.... A state court should attempt to carefully set forth reasons why it believes that state law or policy leads to a different result.").

But, as I explain in some detail below, (1) the language in section 7 is much different from the language of the First Amendment, and, thus, those two constitutional sections are not closely parallel, *see Tattered Cover, Inc.,* 44 P.3d at 1054; (2) prior decisions of the United States Supreme Court and the Colorado Supreme Court have not eliminated those differences as far as the facts of this case are concerned; (3) there are principled differences between the First Amendment and section 7, and recognizing them here is appropriate; and (4) applying section 7 to this case does not violate the Free Exercise, Establishment, or Equal Protection Clauses.

II. Analysis of the Text of the First Amendment and Section 7

A. The Text

The Colorado Constitution creates an obligation that does not appear anywhere in the United States Constitution. Colorado Constitution article IX, section 2, states:

> The general assembly shall ... provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.

See Cary v. Board of Educ., 598 F.2d 535, 543 (10th Cir.1979) ("[T]he Supreme Court has ruled there is no constitutional right to an education. Whether there is a public education system is left to the states." (citation omitted) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973))).

The United States Constitution does not address the creation of any schools, let alone a "uniform system of free public schools." More specifically, there is no discussion of the duty to create such a system, or what its parameters should be, or what limitations should be placed upon it, in the First Amendment. The First Amendment simply states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

As a result, the United States Constitution does not expressly address the situation that we face here: the intersection of public education, public tax dollars, and private religious schools. However, in my view, the Colorado Constitution specifically addresses that intersection.

Section 7, which is entitled "Aid to private schools, churches, sectarian purpose, forbidden," states:

> Neither the general assembly, nor any ... school district ..., shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state ... to any church, or for any sectarian purpose.

B. Interpretation of the Text

Giving the language of this section its ordinary and common meaning, and giving effect to every word in it, *see Rodriguez*, 112 P.3d at 696, I would conclude that this language is clear and unambiguous. I would further conclude that, because the language is plain, its meaning is clear, and there is no absurdity involved, this constitutional section must be "declared and enforced as written." *See id*. I would not employ technical rules of construction to defeat the clearly stated objectives found in this section, *see id.* and, because the language is so clear, I do not think it "implies" limitations on the school district's authority, *see Schwartz*, 46 Colo. at 257, 104 P. at 98.

Rather, those limitations are, in my view, patent. Under section 7, school districts cannot "*ever* make *any* appropriation" or "pay from *any* public fund or moneys *whatever, anything*" to "help support or sustain" elementary, middle, or high schools that are "controlled by *any* church or sectarian denomination *whatsoever*." (Emphases supplied.)

Courts in other states have interpreted similar sections in their state constitutions to reach a similar result. In *Witters v. State Comm'n for the Blind,* 112 Wash.2d 363, 368–70, 771 P.2d 1119, 1121–22 (1989), the Washington Supreme Court considered a section in the Washington Constitution that stated that "[n]o public money ... shall be ... applied to any religious ... instruction." Wash. Const. art. 1, § 11. Relying on that section, the court held that a state commission properly denied a student's request that the state "pay for a religious course of study at a religious school, with a religious career as his goal." 112 Wash.2d at 368, 771 P.2d at 1121.

In *Bush v. Holmes,* 886 So.2d 340, 347–61 (Fla.Dist.Ct.App.2004), *aff'd on other grounds,* 919 So.2d 392 (Fla.2006), the Florida District Court of Appeal evaluated a section of the Florida Constitution that stated that the revenue of the state or of political subdivisions of the state could not be used "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

Fla. Const. art. I, § 3. The court held that a state scholarship program that provided vouchers for students to attend religious schools violated this section.

In *Cain v. Horne,* 220 Ariz. 77, 83, 202 P.3d 1178, 1185 (2009), the Arizona Supreme Court examined a section in the Arizona Constitution that stated that "[n]o ... appropriation of public money [shall be] made in aid of any ... private or sectarian school." Ariz. Const. art. IX, § 10. The court concluded that a proposed voucher program that would have provided funds for students to attend religious schools violated this section.

In *University of Cumberlands v. Pennybacker,* 308 S.W.3d 668, 679–80 (Ky.2010), the Kentucky Supreme Court analyzed a section of the Kentucky Constitution that prohibited public funds from being "appropriated to, or used by, or in aid of, any church, sectarian or denominational school." Ky. Const. § 189. The court decided that this section barred the legislature from appropriating money to build a pharmacy school building on the campus of a Baptist college.

I am persuaded by the reasoning in these cases, and I would follow them here.

In doing so, I recognize that the Supreme Courts of Wisconsin and Ohio have reached a different result. *Simmons–Harris v. Goff,* 86 Ohio St.3d 1, 711 N.E.2d 203 (1999) (interpreting state constitutional section as having the same meaning as the Establishment Clause); *Jackson v. Benson,* 218 Wis.2d 835, 878, 578 N.W.2d 602, 621 (1998) (same). Those cases are distinguishable because the constitutional language that they interpret is substantially different from section 7. The Ohio Constitution section states, "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." Ohio Const. art. VI, § 2. The Wisconsin Constitution section states, "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." Wis. Const. art. I, § 18. Further, based on the analysis in this dissent, I disagree with the reasoning in those opinions.

The United States Supreme Court's decision in *Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), supports my position. There, the Washington legislature created a scholarship program in postsecondary education. But because a section of the Washington Constitution barred the use of public funds for religious instruction, Wash. Const. art. 1, § 11, the legislature stated that the scholarship could not be employed to gain "a degree in theology." *Id.* at 715–16, 124 S.Ct. 1307 (quoting Wash. Rev.Code § 250.80.020(12)(f)).

Locke held that the prohibition of such use of public funds was constitutional because it

> imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

Id. at 720–21, 124 S.Ct. 1307 (citations omitted).

Locke recognized that there is "play in the joints" between the Free Exercise and Establishment Clauses, which means that there is room for some "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718–19, 124 S.Ct. 1307 (quoting *Walz v. Tax Comm'n,* 397 U.S. 664, 669, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)).

Although the section of the Washington Constitution that *Locke* addressed is different from the one at issue here, I am convinced that section 7 fits comfortably into the space created by the "play in the joints" that *Locke* described. Section 7 does not create civil or criminal penalties; it does not discourage any person professing any faith from participating in political affairs; and it does not require anyone to avoid or renounce the governmental benefit in question, which is a secular education.

Other courts have reached similar conclusions when evaluating state constitutional sections or statutes that prohibit funding religious schools. *Wirzburger v. Galvin,* 412 F.3d 271, 280–81 (1st Cir.2005) (Massachusetts constitutional section barring popular initiatives that would channel public financial support to religiously affiliated schools was constitutional under *Locke*); *Eulitt v. Maine,* 386 F.3d 344, 354 (1st Cir.2004) ("[*Locke*] confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund secular equivalents of such activity.... The fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice."); *University of Cumberlands*, 308 S.W.3d at 679–80 ("*Locke* ... firmly supports our conclusion that the Kentucky Constitution does not contravene the Free Exercise Clause when it prohibits appropriations of public tax monies to religious schools."); *Anderson v. Town of Durham*, 895 A.2d 944, 958–59 (Me.2006) (statute's prohibition of funding religious schools "does not burden or inhibit religion in a constitutionally significant manner"); *Bush*, 886 So.2d at 363–66 ("[L]ike the Washington provision in Locke, the Florida no-aid provision is an expression of a substantial state interest of prohibiting the use of tax funds 'directly or indirectly' to aid religious institutions."); *cf. Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 343–44, 738 A.2d 539, 563 (1999) (pre-Locke case; tuition reimbursement plan to parochial schools was unconstitutional under Vermont Constitution section that prohibited the use of public funds to pay for religious worship; the state constitutional section did not violate the Free Exercise Clause).

Applying this authority, I would conclude that section 7 does not violate the Establishment Clause. Rather, it permissibly sets forth a different, more restrictive non-establishment standard. This is because there are "strong state antiestablishment interests in prohibitions on the support of religious establishments," *University of Cumberlands,* 308 S.W.3d at 680, such as private elementary, middle, or high schools "controlled by any church or sectarian denomination." Section 7; *see Bush,* 886 So.2d at 357-61.

C. Americans United, Zelman, and Colorado Christian University

There are three cases at the core of the contention that the express language of section 7 does not control the outcome here. I do not believe that these cases dictate such a conclusion, and I think that there are strong and principled reasons for distinguishing them. I address them in the following order: *Americans United for Separation of Church and State Fund v. State*, 648 P.2d 1072 (Colo.1982); *Zelman v. Simmons–Harris*, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002); and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir.2008).

1. *Americans United*

a. Interpretation of Section 7

The supreme court observed in *Americans United* that, when "interpreting the Colorado Constitution ... we cannot erode or undermine any paramount right flowing from the First Amendment." *Americans United,* 648 P.2d at 1078. I read this statement as being no more than the important, but unremarkable, recognition that sections of a state constitution cannot eliminate the protections of the First Amendment. *See Curious Theatre Co.,* 220 P.3d at 551.

However, once that principle is understood and followed, the supreme court also made clear that the boundaries of section 7 are *not* the same as those of the First Amendment. Rather, the court stated the opposite. It recognized that, although section 7 "address[es] interests not dissimilar in kind to those embodied" in the Free Exercise and Establishment Clauses, "First Amendment jurisprudence" is not "necessarily determinative of state constitutional claims," although such jurisprudence "cannot be totally divorced from the resolution of these claims." *Americans United,* 648 P.2d at 1078. Thus, "resolution of issues under [section 7] ultimately *requires* analysis of the text and purpose of that section." *Conrad v. City & Cnty. of Denver,* 656 P.2d 662, 667, 671 (Colo.1982) (emphasis supplied) (describing the court's analysis of the scope of the Preference Clause of Colo. Const. art. II, § 4, which addresses religious freedom); *see also Conrad v. City & Cnty. of Denver,* 724 P.2d 1309, 1316 (Colo.1986) ("[U]nder certain circumstances we could find a violation of the Preference Clause [of Colo. Const. art. II, § 4], where, under the same or similar factual circumstances, the United States Supreme Court had declined to find a violation of the Establishment Clause.").

As I see it, the text and purpose of section 7 are significantly different from the text and purpose of the Establishment Clause.

b. Universities and Colleges vs. Elementary, Middle, and High Schools

Our supreme court held in *Americans United* that a statutory scheme for the distribution of grants to private and sectarian colleges was, as pertinent here, constitutional under section 7.

However, the supreme court carefully qualified this holding, stating that it was based on "significant differences between the religious aspects of church-affiliated institutions of higher education, on the one hand, and parochial elementary and secondary schools on the other." *Americans United,* 648 P.2d at 1079. The court quoted *Tilton v. Richardson,* 403 U.S. 672, 685–86, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (plurality opinion), as the rationale for this distinction.

> The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at any early age".... There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.... The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.

Americans United, 648 P.2d at 1079.

The supreme court repeated this distinction when specifically addressing the constitutionality of the statute under section 7.

> [T]he financial assistance is available only to students attending institutions of higher education. Because as a general rule religious indoctrination is not a substantial purpose of

> sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education.

Id. at 1084.

The distinction between colleges and universities, on the one hand, and elementary, middle, and high schools, on the other hand, in cases involving the establishment of religion has been reinforced in contexts analogous to the one at issue here. For example, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), the United States Supreme Court held that school-sanctioned prayers at a public high school football game were unconstitutional under the Establishment Clause. The Court observed that "adolescents are often susceptible to pressure from their peers toward [ ] conformity, and that the influence is strongest in matters of social convention." *Id.* at 311–12, 120 S.Ct. 2266 (quoting *Lee v. Weisman*, 505 U.S. 577, 593, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)).

In *Tanford v. Brand,* 104 F.3d 982, 985–86 (7th Cir.1997), the Seventh Circuit Court of Appeals held that a short, nonsectarian prayer and benediction offered at a university graduation ceremony did not violate the Establishment Clause. The court's rationale was, at least in part, based on its observation that university students are more mature than younger students, and they are thus less likely to compromise their principles. *See also Widmar v. Vincent,* 454 U.S. 263, 274 n. 14, 102 S.Ct. 269, 70

L.Ed.2d 440 (1981) ("[University students] are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."); *Chaudhuri v. Tennessee,* 130 F.3d 232, 239 (6th Cir.1997) ("The [United States] Supreme Court has always considered the age of the audience an important factor in the analysis [of Establishment Clause cases]."); *cf. Morse v. Frederick,* 551 U.S. 393, 410, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) ("The [Free Speech Clause of the] First Amendment does not require schools to tolerate at school events student expression that contributes to [the dangers of illegal drug use]."); *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) ("[E]ducators do not offend [the Free Speech Clause of] the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

2. *Zelman*

Zelman held that an Ohio scholarship program that provided public money as scholarships to students who elected to attend religiously affiliated private schools did not violate the Establishment Clause. The majority reasoned that the program was neutral toward religion; that private parental choice, not school district choice, routed the scholarship money to the religiously affiliated private schools; and that all schools in the district, public and private, could participate in the program. *Zelman,* 536 U.S. at 662–63, 122 S.Ct. 2460.

Zelman does not control the outcome here because it only analyzed the program under the Establishment Clause. It obviously did not mention section 7, and it did not address the effect that specific language, such as that found in section 7, would have on its analysis. For these reasons, *Zelman* is neither dispositive of, nor persuasively helpful in, figuring out how section 7 should be read.

Further, *Zelman* did not hold that the Ohio scholarship program was *mandated* by the Establishment Clause. Rather, the Supreme Court concluded that the Establishment Clause did not prohibit the program. Thus, *Zelman* leaves open the question whether a state constitutional section can prohibit such a program.

Moreover, I think that the Choice Scholarship Program suffers from fundamental defects that the programs examined in *Zelman* and *Americans United* did not display.

For example, parental choice is restricted. "[O]nce a pupil has been accepted into a qualified school under [the] program, the parents ... have no choice; they must endorse the check ... to the qualified school." *Cain,* 220 Ariz. at 83, 202 P.3d at 1184.

Second, focusing on parental choice does not, as a matter of state constitutional law, sufficiently ameliorate other problems associated with the program. As Justice Breyer pointed out in his dissent in *Zelman,* 536 U.S. at 728, 122 S.Ct. 2460, such focus does not consider the interests of those taxpayers who do not want to pay for the religious education of children. And it says nothing about the interests of the adherents of minority religions who are too few to build their own schools.

Third, students who participate in the program must be accepted by *two* schools, the private school and the Choice Scholarship School, which the school district describes as a charter school. Even though charter schools must be "public, nonsectarian, nonreligious, non-home-based school[s] which operate [ ] within a public school district," § 22–30.5–104(1), C.R.S.2012, the manner in which the Choice Scholarship School is operated demonstrates that the school district is significantly entangled with private religious schools. Although students in the program attend private schools, they are counted as part of the school district's enrollment for purposes of receiving "per pupil" revenue from the state. Not every school in the school district participates in the program. The school district actively recruited some of the private religious schools that participate in the program, and some schools in the program are not in the district.

3. *Colorado Christian University*

Colorado Christian University involved the same statutory scholarship program that our supreme court analyzed in *Americans United*. Relying on precedent from the United States Supreme Court, our supreme court concluded in *Americans United* that one of the reasons that the statute did not violate the Establishment Clause was because it permitted students attending "sectarian" schools to obtain scholarships, but it denied scholarships to students attending "pervasively sectarian" schools. *Americans United,* 648 P.2d at 1079–81, 1083–84.

The Tenth Circuit held that the distinction between "sectarian" and "pervasively sectarian" schools violated the Establishment Clause by "expressly discriminat[ing] among religions" in a manner that involved "unconstitutionally intrusive scrutiny of religious belief and practice." *Colorado Christian University,* 534 F.3d at 1250.

We are not bound by the Tenth Circuit's decision. *Carter v. Brighton Ford, Inc.,* 251 P.3d 1179, 1182 (Colo.App.2010). More importantly, I respectfully submit that the distinction between sectarian and pervasively sectarian is a red herring in *this* case. The fulcrum on which the holding in *Colorado Christian University* balanced was discrimination *among* religions, based on a distinction between sectarian and pervasively sectarian schools. *Colorado Christian University,* 534 F.3d at 1257–60. My reading of section 7 is that it denies funding to *all* private religious schools, and that, as a result, (1) there is no possible discrimination resulting in some private religious schools receiving funding and others not, *see id.* at 1258; and (2) there is no requirement for government to engage in the sort of "intrusive scrutiny" into the particulars of "religious belief and practice," *see id.* at 1261–66.

In my view, section 7 does not focus on differences among religious doctrines, but on whether the controlling entity is *any* church or sectarian denomination. Indeed, I think that the Tenth Circuit *agrees* with this analysis. *Colorado Christian University* recognizes that section 7 "makes no distinction among religious institutions on the basis of the pervasiveness of their sectarianism." *Id.* at 1268.

As a result, the "exclusionary provisions of the statute," which were based on the distinction between sectarian and pervasively sectarian institutions, are "a square peg with respect to the ... round hole" of section 7. *Id.*

It is easy enough, in my view, to determine whether the controlling entity is *any* church or sectarian denomination. This analysis does not require making the intrusive inquiries into the particulars of religious belief and practice that are necessary to determine whether an institution is sectarian or pervasively sectarian. Rather, it focuses on much broader, much less intrusive questions. For example, how does the entity refer to itself? Does it define its school, or the students who attend the school, in terms of religion? *See Mitchell v. Helms,* 530 U.S. 793, 845, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (O'Connor, J., concurring). Does it put its school to religious uses, such as teaching religious doctrine and engaging in religious indoctrination? *See Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.,* 509 F.3d 406, 424–25 (8th Cir.2007). Does it claim that the school is exempt from property taxation under Colorado Constitution article X, section 5? *See Maurer v. Young Life,* 779 P.2d 1317, 1333 n. 21 (Colo.1989) ("Avoiding a narrow construction of property tax exemptions based upon religious use ... serves the important purpose of avoiding any detailed governmental inquiry into or resultant endorsement of religion that would be prohibited by the [E]stablishment [C]lause...."). The inquiry would simply "consider[ ] the character of the [school's] owner and ... the uses of the [school's] propert[y]." *Id.* at 1331.

I would, therefore, conclude that *Colorado Christian University* is simply inapposite.

III. Section 7's Origins

One of the contentions here is that section 7 was brewed in a cauldron of anti-Catholic prejudice that was bubbling throughout the United States at the time that Colorado's constitutional convention was held. The principal basis for this contention is the controversy surrounding the so-called Blaine Amendment, a proposed, but ultimately defeated, amendment to the United States Constitution. But before I explain the Blaine Amendment, I must put it in context. And to put it in context, I must provide a short history of public schools in our country.

A. Public Schools in the Nineteenth Century

The concept of nonsectarian public schools, called "common schools" when they were originally introduced, was a product of early nineteenth century American leaders who thought that "the education of children was indispensable for the stability and ultimate success of the new republic." Steven K. Green, *The Insignificance of the Blaine Amendment,* 2008 B.Y.U. L.Rev. 295, 301 (2008). Because "[p]ublic schools were seen as indispensable for inculcating the civic, moral, and religious virtues upon which the republic depended," there was a consensus for about the first half of the nineteenth century that the public school curriculum should contain a religious component. *Id*.

This component was primarily Protestant, but, as the nineteenth century unfolded, "in order to ensure that the schools were accessible to children of all faiths, the curriculum would deemphasize religious doctrine out of respect for liberty of conscience and the theological differences of various denominations." *Id.* at 302–03. The concept of "nonsectarian" public schools was designed to defuse "conflict among Protestant sects and to attract children excluded from the Protestant denominational schools." *Id.* at 304.

At the beginning of the nineteenth century, there was little conflict between Catholics and Protestants over the religious component of public school curriculums. The American Catholic population was relatively small. *Id.* However, as increasing numbers of Catholic and Jewish immigrants came to this country, attributes of the religious component of the public school curriculum became controversial. "[T]he Protestant prayer, Bible reading, hymn singing, and catechism found in books such as The McGuffey Reader became offensive to Catholics and the small number of American Jews." *Id.* The King James Version of the Bible was read in the common schools, which affronted Catholics. Noah Feldman, *Non–Sectarianism Reconsidered,* 18 J.L. & Pol. 65, 84–85 (2002).

Catholics asked that the Bible not be read in public schools. Protestant nativists replied that Catholics wanted schools to be "irreligious." *Id.* at 86. There were significant expressions of anti-Catholic sentiment and some anti-Catholic violence. *Id.* This already troublesome situation was exacerbated by the emergence of the anti-Catholic "Know–Nothing" movement in the 1850s. Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application,* 12 Engage: J. Federalist

Soc'y Prac. Groups 111, 112 (2011); *see also Zelman,* 536 U.S. at 720–21, 122 S.Ct. 2460 (Breyer, J., dissenting) (describing conflicts between Catholics and Protestants).

Partly in reaction to these expressions and this violence, Catholics established their own schools, which were "profoundly sectarian and exclusionary." Feldman, 18 J.L. & Pol. at 86, 88–91. The Catholic Church argued that, if public tax money was to be allocated to public schools that read a Protestant Bible and taught Protestant principles, then Catholic schools should also be funded with public tax money. Katz, 12 Engage: J. Federalist Soc'y Prac. Groups at 112.

There were also people who believed that no religious schools should be funded with public money. This "nofunding" concept

> arose out of several complementary rationales. Foremost, public school officials sought to prevent the division of school funds in order to secure the financial stability of the nascent common schools. In the early nineteenth century, public commitment to a system of public education did not come naturally and had to be earned. Competing educational options stood in the way of gaining this public commitment. Closely related, public officials viewed the no-funding principle as a means to standardize education and to ensure financial accountability.

Green, 2008 B.Y.U. L.Rev. at 310 (footnote omitted).

A de-emphasis of the Protestant religious component in public schools began with reformers like

Horace Mann. He encouraged a "shift from instruction in nondenominational Protestantism toward an emphasis on universal religious values." Green, 2008 B.Y.U. L.Rev. at 305. Although Mann believed that schools should teach the basics of Christianity, he thought that schools should go no further "out of respect for freedom of conscience." *Id.* Mann's reforming instincts were not motivated by anti-Catholicism. Rather, he thought that, because Catholics and Protestants were Christians, both groups should participate in public schools instead of building their own school systems. *Id.* at 306–07.

A second reform movement began after the Civil War. It "sought to make public education not simply nondenominationally religious but truly nonsectarian, in that only universally acknowledged *moral* principles would be taught and religious devotion eliminated." *Id.* at 307 (emphasis in original). One way in which this goal would be accomplished would be by eliminating the reading of the Bible from public schools. *Id.* at 307–09.

Thus, "educational leaders and public officials increasingly came to identify the no-funding principle with principles of religious non-establishment." *Id.* at 310. And these leaders and officials saw several ways in which funding religious schools would violate the concept of non-establishment: such funding would "violate[ ] rights of conscience to force one person to pay for another's religious instruction; ... would bring about religious dissension over the competition for funds; and ... would result in ecclesiastical control over public monies." *Id.*

In summary,

> [t]he Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization soon led to widespread demands throughout the States for secular public education. At the same time strong opposition developed to the use of the States' taxing powers to support private sectarian schools. Although the controversy over religious exercises in the public schools continued into [the Twentieth Century], the opponents of subsidy to sectarian schools had largely won their fight by 1900. In fact, after 1840, no efforts of sectarian schools to obtain a share of public school funds succeeded. Between 1840 and 1875, 19 States added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools, and by 1900, 16 more States had added similar provisions. In fact, no State admitted to the Union after 1858, except West Virginia, omitted such provision from its first constitution.

Lemon v. Kurtzman, 403 U.S. 602, 646–47, 91 S.Ct. 2125, 29 L.Ed.2d 745 (1971) (Brennan, J., concurring in part and dissenting in part) (citations and footnote omitted).

With this understanding of the context, I turn to the controversy surrounding the proposed Blaine Amendment.

B. The Blaine Amendment

By 1875, many members of the Republican Party thought their party was in political trouble. The nation had tired of the failures associated with Reconstruction and with the corruption in President Grant's administration. Democrats had gained control of the House of Representatives in 1874, and it appeared that a Democrat might win the White House in 1876, with the assistance of the reconstructed, and strongly Democratic, southern states. Republicans "needed an issue," and they found it in the controversy over the funding of public schools. Green, 2008 B.Y.U. L.Rev. at 321–22.

In September 1875, President Grant, a Republican, gave a speech in which he stated that church and state should be kept "forever separate" and that "not one dollar" should be "appropriated in support of sectarian schools." Feldman, 18 J.L. & Pol. at 98 (quoting Army of the Tennessee—A Speech by Gen. Grant, N.Y. Daily Tribune, Oct. 1, 1875, at 1).

The President followed this speech with an address to Congress in which he proposed a constitutional amendment that would require "each of the several States to establish and forever maintain free public schools adequate to the education of all the children." Katz, 12 Engage: J. Federalist Soc'y Prac. Groups at 112 (quoting 4 Cong. Rec. 175 (1875)). This amendment would have also barred the use of "any school funds, or school taxes ... for the benefit or in aid ... of any religious sect or denomination." *Id.*

James G. Blaine, the Republican Speaker of the House of Representatives, sponsored the amendment that the President had proposed. His amendment was easily approved by the House of Representatives, but it died in the Senate, where it failed to muster the necessary two-thirds majority. *Id.*

The amendment was attacked as being anti-Catholic, and some of its supporters made unambiguously anti-Catholic statements. For example, at least one senator argued that the amendment was necessary because the Catholic Church discouraged liberty of conscience. Another senator countered that the amendment was motivated by religious bias against Catholics. *Id.* A plurality of the United States Supreme Court has stated that consideration of the Blaine Amendment "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828, 120 S.Ct. 2530.

Some commentators argue that anti-Catholic prejudice, which undoubtedly existed and which undoubtedly still exists in the minds of some people, was the sole, or at least the primary, motivating factor for the Blaine Amendment. *E.g.,* Katz, 12 Engage: J. Federalist Soc'y Prac. Groups at 111–12; Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns,* 26 Harv. J.L. & Pub. Pol'y 551, 565–73 (2003); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law,* 21 Harv. J.L. & Pub. Pol'y 657, 659 (1998).

However, other commentators take a more nuanced view, arguing that there was much more going on with the Blaine Amendment than anti-Catholic bigotry. For example, one professor argues that the Blaine Amendment arose as "part of a larger controversy over the responsibility and role of government in public education"; that this "larger controversy" involved people of all faiths, who struggled over whether public education should be "secular, nonsectarian, or more religious"; and that "[i]dentifying a singular motive for the Blaine Amendment is impossible." Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication,* 81 Notre Dame L.Rev. 1717, 1743 (2006); *see also, e.g.,* Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No–Funding" Principle,* 2 First Amend. L.Rev. 107, 113–14 (2003); Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice,* 83 Den. U.L.Rev. 57, 64 (2005) ("Blaine maintained that he was not anti-Catholic, and no evidence suggests that he had any personal animosity toward Catholics. Blaine's mother was Catholic and his daughters were educated in Catholic schools. Publicly, Blaine maintained that the amendment was merely meant to settle the 'School Question,' the day's most heated political issue."); Feldman, 18 J.L. & Pol. at 115 ("Certainly no attempt to make sense of the legacy of non-sectarianism ought to ignore the strains of anti-Catholicism that run through its reception. But one of [the author's purposes] has been to consider another, parallel legacy of non-sectarianism—particularly, the aspiration to imparting shared moral values through the identification of common foundational commitments.").

And there were those who supported the Blaine Amendment because they thought it would defuse the conflict between Protestants and Catholics over school funding that had been simmering for decades. For example, the Democratic New York Tribune observed that

> [t]hinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible.

Green, 2008 B.Y.U. L.Rev. at 323 (citing N.Y. Trib., Dec. 15, 1875, at 4). The Republican New York Times expressed similar sentiments. *Id.* (citing N.Y. times, Dec. 15, 1875, at 6).

C. Colorado's Constitutional Convention

In 1875, Congress passed an enabling act that, in section 1, authorized inhabitants of the Territory of Colorado to "form ... a state government ... which, when formed, shall be admitted into the Union." *Proceedings of the Constitutional Convention* 9 (Smith-Brooks Press, State Printers 1907). As pertinent here, the enabling act required that the drafters of Colorado's Constitution

> provide by an ordinance irrevocable without the consent of the United States and the people of [the State of Colorado] ... [t]hat perfect toleration of religious sentiment shall be secured, and no inhabitant of [the State of Colorado] shall ever be molested in person or property, on account of his or her mode of religious worship.

Id. at 10. The constitutional convention passed such an ordinance on the first day that it met. *Id.* at 15.

The constitutional convention in which the Colorado Constitution was drafted was in session intermittently between December 20, 1875, and March 15, 1876. *Id.* at 15, 709, 716–17. There were thirty-nine delegates, twenty-four Republicans and fifteen Democrats. Dale A. Oesterle and Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 6 (Greenwood Press 2002).

As relevant here, the delegates engaged in three "heated" debates over religious matters. *Id.* at 7. Should property owned by religious institutions be taxed? Should God be mentioned in the constitution's preamble? Should public school funds be allocated to private religious schools?

The issue of taxation of churches eventually resulted in a moderate compromise: "unless the legislature acted to the contrary, lots with buildings used solely for religious worship, for schools, and for charitable purposes, as well as cemeteries not used for profit, [won] tax immunity." Donald W. Hensel, *Religion and the Writing of the Colorado Constitution,* 30 Church History: Studies in Christianity and Culture, Issue 3, 349, 352 (Sept.1961). The compromise was embedded in Colorado Constitution, article X, section 5.

The issue of mentioning God in the Preamble also resulted in a compromise, with Catholics and Protestants cooperating. Hensel at 356, 358. As a result, the Preamble refers to the "Supreme Ruler of the Universe."

Turning to the issue of funding religious schools with public money, early in the constitutional convention, on January 5, 1876, a resolution was referred to the Committee on Education, which contained the concepts, and almost all the language, that became section 7. *Proceedings of the Constitutional Convention* at 43.

Throughout the convention, members of the public presented proposals to the delegates in the form of petitions. Some of these petitions requested a complete separation of church and state in public schools. *Id*. at 83–84, 277, 278. Groups of Protestant churches submitted petitions that made various requests, including that public schools remain "nonsectarian"; that the Bible should be read to students; or that the Bible should neither be "excluded from nor forced into" public schools. *Id*. at 87, 113, 261.

Catholic Bishop Joseph Machebeuf twice addressed the convention in writing. The first petition that he submitted suggested that, if the state constitution denied Catholic schools public funds, Colorado's Catholics would feel "bound in conscience" to oppose the constitution's ratification. *Id*. at 235.

According to one commentator, Bishop Machebeuf "opened the door to anti-Catholic fulminations by sending [this] rather tactlessly-worded resolution." Hensel at 353.

> It was not convention action but Bishop Machebeuf's participation which evidently publicized the issue throughout the territory. Had it not been for his demands, an editor asserted, the delegates would have ignored the question.

Id. at 354.

Bishop Machebeuf's second written presentation sought to mollify the delegates. He wrote of anti-Catholic prejudice, and he apologized for any "threats and aggressive tone" that the delegates may have perceived in his first submission. *Proceedings of the Constitutional Convention* at 330–32. However, he did not back away from his argument that Colorado's Constitution should not prohibit the state from funding Catholic schools. *Id.*

Bishop Machebeuf's written comments expressed a sincere, important, and strong commitment to opposing anti-Catholic bigotry. However, there is evidence that suggests that he was also motivated by financial considerations.

> Since the enabling act set aside two sections in every township to support the public schools, one-eighteenth of the territory's public lands was at stake. By this same act such land could not be sold for less than $2.50 an acre. Even with much of the public land depleted by sale, the value of the school lands was at least $5,000,000, an unusually tempting prize.

Hensel at 353.

There was immediate and strong reaction to the Bishop's comments. One commentator expressed the opinion that Bishop Machebeuf "imperiled the constitution's ratification with his intimidations." *Id.* at 354. An editor of a Denver newspaper "wondered what would happen if the Baptists, Methodists, or Jews threatened to defeat the constitution unless it allowed their dogmas to be taught at public expense." *Id.*

A motion to strike the entire text of what was to become section 7 failed, three votes in favor, twenty-four votes against. The language was then approved, twenty-five votes in favor, three votes against. *Proceedings of the Constitutional Convention* at 357–58.

The delegates did not insert language in the constitution that directly addressed the reading of the Bible in public schools. However, they

> rejected the assumption that Bible-reading was indispensable evidence that the schools were moral institutions. A citizen put it simply: the Bible could take care of itself and need no "legislation to bolster it up." Another observer applauded the decision to "let religion be taught in the family circle, in the church, and in the Sunday school."

Hensel at 356.

When the delegates finished their work in March 1876, they had

> decided that parochial schools could not share in the public school fund, and that public schools could not teach sectarian religious dogma. On these two issues alone the convention refused to compromise contending factions. The Protestant majority saw to that. To strengthen the separation of church and state, Coloradans had to pay an initial price of animosity to avoid later and more corrosive bitterness.

Id.

The ratification vote was held on July 1, 1876. Two days before the vote, "Catholics conducted a pro-constitution rally in Denver." Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century,* at 224 (unpublished doctoral thesis, University of Colorado 1957).

The final vote tally was 19,505 votes: 15,443 Coloradoans voted for ratification; 4,062 voted against it. Elmer Herbert Meyer, *The Constitution of Colorado,* The Iowa Journal 271 (State Historical Society of Iowa, Apr. 1904), *available at* www.archive.org/stream/publicarchivesof00paxsrich/ publicarchivesof00paxsrich_ djvu.txt. On August 1, 1876, President Grant issued a proclamation stating that "the admission of the State of Colorado into the union is now complete." *Proceedings of the Constitutional Convention* at 735.

Section 7 was not, and is not, unique. Although different commentators produce different figures, the constitutions of between thirty-five and forty states contain similar sections limiting or prohibiting funding of religious schools. Green, 2008 B.Y.U. L.Rev. at 327. Of these sections, seventeen were in place before the controversy over the Blaine Amendment erupted. These could have "easily served as models for the post-Blaine provisions." *Id.* at 328; *see also Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice,* 83 Den. U.L.Rev. at 66–70. The delegates to Colorado's constitutional convention were aware of at least some of these other sections. Hensel at 354.

IV. Free Exercise Clause and Equal Protection Attacks on Section 7

Some of the parties supporting the school district's position contend that section 7 was a product of anti-Catholic prejudice. Citing cases such as *Romer v. Evans*, 517 U.S. 620, 633–43, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), they argue that this constitutional amendment imposes a disadvantage on religion that was "born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634, 116 S.Ct. 1620. They submit that section 7 violates the Free Exercise and the Equal Protection Clauses because its drafters, either overtly or covertly, wrote section 7 with the reprehensible intent of "oppress[ing] a religion [and] its practices." *Church of Lukumi Babalu Aye*, 508 U.S. at 547, 113 S.Ct. 2217. They urge that we should focus on the "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id*. at 540, 113 S.Ct. 2217.

I respectfully disagree with these arguments for two reasons. First, when the language of constitutional sections is clear, as is the case with section 7, I question the appropriateness of proceeding further analytically. Second, I do not read the historical record in Colorado as clearly supporting the thesis that section 7 was the direct, ineluctable, and sole product of anti-Catholic animosity.

It is well-established law in Colorado that, if the language of a constitutional section is clear and unambiguous, we do not resort to other modes of interpretation to determine its meaning. *See Rodriguez,* 112 P.3d at 696. And I cannot read the plain language of section 7 as espousing a narrowly anti-Catholic view. Rather, I read the language as having a different, and broader, scope: it applies to all religious institutions. As our supreme court observed in *People ex rel. Vollmar v. Stanley,* 81 Colo. 276, 287, 255 P. 610, 615 (1927), *overruled by Conrad,* 656 P.2d at 670 n. 6,

> [s]ectarian meant, to the members of the [constitutional] convention and to the electors who voted for and against the Constitution, "pertaining to some one of the various religious sects," and the purpose of ... section 7 was to forestall public support of institutions controlled by such sects.

Section 7 refers to "*any* church or sectarian society"; to "*any* school [or] academy ... controlled by *any* church or sectarian denomination *whatsoever* "; and to "*any* church, or for any sectarian purpose." (Emphasis supplied.) Even assuming, for the purposes of argument, that the use of the word "sectarian" refers either to the teachings of the various Protestant sects, *see* Green, 2008 B.Y.U. L.Rev. at 304, or that it is code for "anti-Catholic," *see Mitchell,* 530 U.S. at 828, 120 S.Ct. 2530, section 7 accompanies the word "sectarian" with much broader words: "denomination," "church," "any," and "whatsoever." And section 7's prohibition of distributions to all religious schools controlled by churches or sectarian denominations is categorical. A school district cannot "ever" make an appropriation; it cannot pay from "any public fund or money's whatever, [or] anything in aid."

And, if we are to look to the statements, events, and history behind these constitutional sections to determine whether they were the products of anti-Catholic animus, *see Church of Lukumi Babalu Aye,* 508 U.S. at 540, 113 S.Ct. 2217, to what do we look, and upon whose intent do we focus? This is a difficult, perhaps impossible, task in a context like the one we face here. See *id.* at 558, 113 S.Ct. 2217 (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body, and this Court has a long tradition of refraining from such inquiries." (citations omitted)).

Are we concerned with the intent of the delegates at the convention? At least as far as I can tell, the historical record of Colorado's constitutional convention does not contain their speeches or their verbatim or summarized comments about the substance of section 7. If we do not know their thoughts, at least as expressed by their words, how can we tar all, or many, or a few, of them with the brush of religious bias?

Or are we to determine the intent of the voters who ratified the Colorado Constitution? What was their understanding of section 7? *See Rodriguez,* 112 P.3d at 696. Did all 15,443 Coloradans who voted for ratification think that section 7 discriminated against Catholics, and did they wish to achieve such discrimination? Did all 4,062 Coloradans who voted against ratification oppose it because they understood section 7 to be the product of bigotry? We do not know.

And even if a historical inquiry is necessary to determine whether section 7 was produced by "animosity toward the class of persons affected," *see Romer,* 517 U.S. at 634, 116 S.Ct. 1620, I think that the historical record indicates that many forces were at work during our constitutional convention.

Although the congressional debate about the Blaine Amendment occurred essentially contemporaneously with our constitutional convention, that debate concerned much more than religious bigotry. How can Republican political interests best be preserved against growing Democratic power? How should public schools be funded? Should the evolution of public schools toward becoming entirely secular continue? Is it important to have public schools that teach common values? Is it important to keep public schools free of religious control and churches free of government control? *See Lemon,* 403 U.S. at 646–47, 91 S.Ct. 2125 (Brennan, J., concurring in part and dissenting in part); *"Bad History": The Lure of History in Establishment Clause Adjudication,* 81 Notre Dame L.Rev. at 1743; *"Blaming Blaine": Understanding the Blaine Amendment and the "No–Funding" Principle,* 2 First Amend. L.Rev. at 113–14; Feldman, 18 J.L. & Pol. at 115.

It is undeniable that anti-Catholic prejudice existed in Colorado at the time of our constitutional convention, and that there was friction between Catholics and Protestants. *See Proceedings of the Constitutional Convention* at 330–32 (written address of Bishop Machebeuf); *The Colorado State Constitution: A Reference Guide* at 7. However, the following factors convince me that it is not clear that such bias was the sole motivation, or even the primary driving force, behind the drafting and ratifying of section 7.

The congressional enabling act that authorized the citizens of Colorado to proceed to become a state expressly required that any state constitution contain an ordinance stating that "perfect toleration of religious sentiment shall be secured, and no inhabitant of [the State of Colorado] shall ever be molested in person or property, on account of his or her mode of religious worship." *Proceedings of the Constitutional Convention* at 10.

A proposal containing the language that became section 7 was submitted by a subcommittee to the convention's delegates before the records of the convention refer to any dispute about its subject matter. *See id.* at 43. Section 7's language is substantially the same as the language contained in the initial proposal.

The various petitions concerning the issue of funding religious schools espoused substantially different views. These included petitions from Protestants, Catholics, and those who expressed a desire for secular schools. *See The Colorado State Constitution: A Reference Guide* at 7.

The language of section 7 applies to all religious institutions, not only the Catholic Church. It uses words such as "sectarian," "church," "denomination," "any," and "whatsoever."

The delegates decided against taxing all church property. They did not vote for taxing Catholic Church property.

Although there had historically been conflict between Catholics and Protestants over which version of the Bible should be read in public schools, *see* Feldman, 18 J.L. & Pol. at 84–85, the delegates did not mandate that the King James Version should be read in public schools, *see* Hensel at 356.

There is evidence to suggest that Bishop Machebeuf fanned the flames of the dispute between Catholics and Protestants in the course of the convention; the dispute might well not have arisen had he not attempted to "intimidate" the delegates; and, although he was rightfully concerned about religious bias against Catholics, he was also motivated by a desire to gain access to the public school fund. *The Colorado State Constitution: A Reference Guide* at 7; Hensel at 353–54. Further, shortly before the ratification vote, at least some Catholics participated in a rally in support of the constitution's ratification. Hensel, *A History of the Colorado Constitution in the Nineteenth Century,* at 224.

One commentator has expressed the opinion that, although there had been disagreements between Catholics and Protestants, the outcome of such friction was eventually salutary. "To strengthen the separation of church and state, Coloradans had to pay an initial price of animosity to avoid later and more corrosive bitterness." Hensel at 356; *see also* Green, 2008 B.Y.U. L.Rev. at 323 (quoting comments from New York City newspaper editors making the same point about the Blaine Amendment).

Section 7 was passed during a time of educational reform, in which "educational leaders and public officials increasingly came to identify the no-funding principle with principles of religious nonestablishment." Green, 2008 B.Y.U. L.Rev. at 307–09.

Although the numbers may vary depending on who is doing the counting, *see id.* at 327, many other states' constitutions contain sections similar to section 7. A goodly portion of these preceded the controversy over the Blaine Amendment. It is difficult to believe that so many states, for over more than one hundred years, *see Lemon,* 403 U.S. at 646–47, 91 S.Ct. 2125 (Brennan, J., concurring in part and dissenting in part), would deliberately enshrine anti-Catholic prejudice in their constitutions. *See University of Cumberlands,* 308 S.W.3d at 681–82 (Kentucky constitutional section was not an anti-Catholic "Blaine amendment"); *Bush,* 886 So.2d at 351 n. 9 ("[T]here is no evidence of religious bigotry relating to Florida's no-aid provision."); *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice,* 83 Den. U.L.Rev. at 98 ("Analyzing the history of eight so-called Blaine Amendments [including section 7] does not reveal them to be legislatively enacted bigotry.").

As a result, I would reject the arguments that section 7 violates either the Free Exercise or Equal Protection Clauses. *See Wirzburger,* 412 F.3d at 275–85 (Massachusetts constitutional section does not violate Free Exercise or Equal Protection Clauses); *Eulitt*, 386 F.3d at 353–56 (Maine statute does not violate Free Exercise or Equal Protection Clauses); *University of Cumberlands*, 308 S.W.3d at 679–82 (Kentucky constitutional section does not violate Free Exercise or Equal Protection Clauses); *Anderson*, 895

A.2d at 959–61 (Maine statute does not violate Free Exercise or Equal Protection Clauses); *Bush*, 886 So.2d at 362–66 (Florida constitutional section does not violate the Free Exercise Clause); *Witters*, 112 Wash.2d at 370–73, 771 P.2d at 1122–23 (Washington constitutional section does not violate Free Exercise or Equal Protection Clauses).

V. Conclusion

Lest anyone believe that the position I espouse here is a "legalistic swipe at religion," *see University of Cumberlands*, 308 S.W.3d at 686 (Cunningham, J., concurring), I respectfully submit that the history of religious oppression and conflict throughout the course of our grand American experiment, *see id.* is a cautionary tale that should never be forgotten. "[O]ur fundamental belief as a nation that religion and state should co-exist in harmony with each other, but along distinct and separate tracks" allows religion "to breathe free of the enervating drag of government regulation, taxation and control," *id.* at 687.

This religious freedom is, in my view, an admirable product of "the constitutional division of church and state" that has allowed

> [r]eligious schools [to be] free to exist and function in accordance to their own moral and theological dogma. This includes the right to restrict their memberships and their campus academia to strict, sometimes even unpopular, religious views and activities. When state involvement and support begins to be part of their operations, this freedom goes away.

Id. at 688. Applying section 7 as written in this case would reduce the problems associated with funding private elementary, middle, and high schools that are controlled by any church or sectarian denomination "whatsoever," while carefully protecting the right of Colorado's citizens to exercise their religious conscience in their homes, churches, synagogues, temples, and private religious schools.

We have, in the years since this nation was founded, become breathtakingly diverse in a religious sense. At least fifty-five major religious groups and subgroups now have roots here, and some of these groups contain sects that express enormously different beliefs. *Zelman,* 536 U.S. at 723, 122 S.Ct. 2460 (Breyer, J., dissenting). It is this diversity, I respectfully suggest, that most starkly points out the great risks in the school district program at issue here.

> School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking

> legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

Id. at 723–24, 122 S.Ct. 2460.

Appendix C

DISTRICT COURT, DENVER COUNTY,
STATE OF COLORADO

Nos. 11-cv-4424, 11-cv-4427

JAMES LARUE, et al.,
Plaintiffs,
v.
COLORADO STATE BOARD OF EDUCATION, et al.,
Defendants,
and
FLORENCE DOYLE, et al.,
Intervenors,
and
TAXPAYERS FOR PUBLIC EDUCATION, et al.,
Plaintiffs,
v.
DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et al.,
Defendants.

Filed: August 12, 2011

ORDER

THIS MATTER is before the Court on Motions for Preliminary Injunction filed separately by Plaintiffs James Larue, *et al.* and Taxpayers for Public

Education, *et al.* (collectively, "Plaintiffs").[1] Defendants Douglas County Board of Education and Douglas County School District, Colorado Board of Education and Colorado Department of Education (collectively, "Defendants"), and Intervenors Florence and Derrick Doyle, *et al.* (collectively, "Intervenors") filed their respective Responses on July 22, 2011. Plaintiffs filed their respective Replies on July 25, 2011. A three day hearing was held beginning on August 2, 2011. Testimony was taken and exhibits were received. Also ripe for the Court's consideration is Defendants' Motion to Dismiss filed on July 22, 2011 and joined by Intervenors on July 26, 2011. Having reviewed the briefs, the exhibits, the relevant authorities, and considered the credibility of the witnesses, the Court now makes the following findings of fact and conclusions of law:

I. Findings Of Fact

A. The Creation of the Choice Scholarship Program

Beginning in June 2010, the Douglas County School District assembled a School Choice Task Force ("Task Force") consisting of seven subcommittees and approximately 80 members, including members of Plaintiffs in this case. The Task Force held a series of public meetings to discuss a range of school choice options for the Douglas County School District.

In approximately November 2010, the Task Force produced the *Blueprint for Choice* which was

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[1] On July 11, 2011, Case No. 11cv4427 was consolidated into Case No. 11cv4424.

subsumed into the Douglas County School District's Strategic Plan.

In December 2010, the Task Force presented plans for the Choice Scholarship Pilot Program ("Scholarship Program") to the Douglas County Board of Education. *See* Oversight Comm. Mtg., Feb. 10, 2011 (Ex. 76). Dr. Elizabeth Celania-Fagen ("Dr. Fagen"), the Superintendent of Douglas County School District, testified during the injunction hearing that the Scholarship Program is one of approximately 30 strategies subsumed into the *Blueprint for Choice* to ultimately improve choice for parents and students in the district.

On March 15, 2011, the Douglas County School Board approved the Scholarship Program for the 2011-2012 school year as part of the larger *Blueprint for Choice* and Strategic Plan. *See* Choice Scholarship Program ("Policy") (Ex. 1).

Prior to approval of the Scholarship Program on March 15, 2011, the staff of the Colorado Department of Education met on multiple occasions with Douglas County School District staff regarding the structure of the Scholarship Program. *See*, *e.g.*, Jan. 5, 2011 mtg. notes (Ex. 69); February 10, 2011 mtg. minutes (Ex. 76); March 7, 2011 mtg. notes (Ex. 90).

At these meetings, the Colorado Department of Education advised the Douglas County School District on the legality of the Scholarship Program and how to structure the Scholarship Program so as to receive "per pupil" funding under the Public School Finance Act. *See*, *e.g.*, Jan. 5, 2011 notes (Ex. 69) (discussing funding and other issues including "church/state" problems, "excessive entanglement," and legal challenges associated with forming a charter school to administer the Program); March 7, 2011 notes (Ex. 90) (discussing use of charter school structure, special education, geographic limitations, and other issues). At the injunction hearing, Robert Hammond ("Mr. Hammond"), the Colorado Commissioner of Education, confirmed that, at the January 5, 2011 meeting, the Colorado Department of Education did not intend to block the implementation of the Scholarship Program. He additionally acknowledged that at the time he made this statement, he had no documents outlining the Scholarship Program.

Dr. Fagen and her administration began implementing the Scholarship Program on Wednesday, March 16, as directed by the Douglas County School Board for the 2011-2012 school year.

B. The Choice Scholarship Program

The purposes of the Scholarship Program 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 [Douglas County School District] educational spending." *See* Policy § A ¶3 (Ex. 1). The Scholarship Program allows qualified scholarship students to attend the private school (also referred to as "Private School Partner") of his or her choice, with scholarship funds provided to reduce the overall cost of tuition.

If a student is selected to participate in the Scholarship Program and is accepted at a participating Private School Partner, the Douglas County School District pays the private school, via a restrictively-endorsed check to the recipient's parents, 75% of the "per pupil revenue" that it receives from the state of Colorado, currently estimated at $4,575 for 2011-2012, or the private school's actual tuition fee, whichever is less. *See* Executive Summary to the Choice Scholarship Program ("Exec. Summary"), at 2 (Ex. 1). Dr. Fagen, Dr. Christian Cutter ("Dr. Cutter"), the Assistant Superintendent of Elementary Education of the Douglas County School District, and John Carson ("Mr. Carson"), the President of the Douglas County School District Board of Education, corroborated the amount of the tuition payments at the hearing and testified that the Douglas County School District will retain the other 25% as "administrative costs."

Under the Scholarship Program, Douglas County School District pays participating Private School Partners by check in four equal installments throughout the school year. For each payment, Douglas County School District issues a check payable to the order of the parent or guardian of each scholarship student and sends that check directly to the Private School Partner at which the student is enrolled. The parent or guardian of the student is required to endorse the check for the sole use of paying tuition at the Private School Partner. *See* Policy §§ B ¶8, C ¶4, D ¶7.c (Ex. 1).

The parent or guardian of a student participating in the Scholarship Program is responsible for all tuition, costs and fees in excess of the amount provided by the Choice Scholarship that may be assessed by the Private School Partner. *See* Policy § D ¶ 7.h (Ex.1).

Dr. Cutter and Mr. Carson testified that the Scholarship Program is described as a "pilot" for the

2011-2012 school year, and the number of students that can receive public funds to attend private schools under the Scholarship Program is set at 500. *See, e.g.*, Policy § F; Exec. Summary, at 1 (Ex. 1). To date, Douglas County School District has offered 500 such "scholarships" to students to use as full or partial payment of tuition at designated Private School Partners for the 2011-2012 school year. As of the date of the injunction hearing, Dr. Cutter testified that 271 of the 500 students admitted under the Scholarship Program had been accepted to a Private School Partner. Leanne Emm ("Ms. Emm"), the Assistant Commissioner of Public School Finance for the Colorado Department of Education, further testified that approximately 184 checks have been mailed to Private School Partners totaling over $200,000.

The Scholarship Program does not prohibit participating private schools from raising tuition after being approved to participate in the Scholarship Program, or from reducing financial aid for students who participate in the Scholarship Program. Thus far, at least one school, Valor Christian High School, has cut financial aid for a scholarship recipient in the amount of the tuition awarded under the Scholarship Program. *See* July 24, 2011 email to Tamra Taylor et al. (Ex. 102) ("[o]nce we got the voucher, Valor [Christian] adjusted our financial aid to reduce it by the amount of the voucher.").

Dr. Cutter testified during the injunction hearing that he was not aware that Ms. Taylor, his administrative assistant, had received this email. He additionally stated that was not aware of any other situation in which a participating family under the

Scholarship Program suffered a loss of financial aid as a result of their participation in the Scholarship Program. Dr. Cutter further acknowledged that he believed if a Private School Partner under the Scholarship Program reduced financial aid for a scholarship student participating in the program, it would "go against the intended contract" with the Douglas County School District.

To be eligible to participate in the Scholarship Program, students must be Douglas County School District residents who were enrolled in a Douglas County School District school for the 2010-2011 academic year and have resided in the Douglas County School District for no less than one year. Non-resident, open-enrolled Douglas County School District students are not eligible to participate. *See* Policy § D ¶5 (Ex. 1). Dr. Fagen testified that there is no policy provision precluding out of district students from moving into Douglas County, and enrolling in a Douglas County District public school, for one year and then applying to the Scholarship Program.

Students seeking to participate in the Scholarship Program must complete a Scholarship Program application and agree to take Colorado's statewide assessment tests. *See* Policy § D ¶7.g (Ex. 1). There are no income limitations or requirements to apply for a scholarship under the Scholarship Program.

The Scholarship Program "encourages" students to research a Private School Partner's "admission criteria, dress codes and expectations of participation in school programs, be they religious or nonreligious." Policy § D ¶2 (Ex. 1).

A student selected to receive public funds under the Scholarship Program must also apply for and be granted admission to a Private School Partner. *See, e.g.*, Policy § D ¶6; Charter Sch. App., p.3.

Scholarship Program students must also enroll in the Douglas County School District's Choice Scholarship Charter School ("Choice Scholarship School").

At the injunction hearing, Dr. Fagen testified that admission into a Private School Partner is not a prerequisite for receiving a scholarship under the Scholarship Program. However, in the Choice Scholarship School Application, the enrollment policy states: "[t]o be eligible for enrollment in the [Choice Scholarship School], a student must . . . be accepted and attend a qualified Private School Partner School." *See* Charter Sch. App., p.8 (Ex. 5, at 8).

C. The Choice Scholarship Charter School

Plaintiffs filed suit to enjoin the Scholarship Program on June 21, 2011. Later that day, the Douglas County School Board conditionally approved the creation of the Choice Scholarship Charter School." *See* Douglas County School District's Resolution of June 21 (Ex. 6, at p. 27). The Choice Scholarship Charter School application had been submitted to the Douglas County School Board on the same day, June 21, 2011. *See* Charter Sch. App., p.1 (Ex. 5, at 1). Dr. Cutter testified that the Scholarship Program was being implemented at the same time the Choice Scholarship School was being developed.

The Douglas County School Board gave final approval to the creation of the Choice Scholarship

School on July 20, 2011. This was corroborated by testimony of Dr. Cutter, Dr. Fagen, and Mr. Carson.

The purpose of the Choice Scholarship School is to administer the Scholarship Program. *See, e.g.*, Charter Sch. Cont. § 4.2 (Ex. 6); Policy § A (Ex. 1). The Choice Scholarship School purports to contract with the Private School Partners for all educational services provided to students participating in the Scholarship Program. *See* Charter Sch. Cont. § 4.5 and § 7.4 (Ex. 6).

One of the major tasks of the Choice Scholarship School is to "gather all information and report to the Colorado Department of Education . . . so that Choice Scholarship students will be included in the Douglas County School District's pupil count and receive per-pupil revenue from the state for the Choice Scholarship students." *See* Policy § C ¶ 10 (Ex. 1). The Choice Scholarship School also monitors students' class schedules and attendance at the Private School Partners. In addition, the Private School Partners may be charged with disciplining students for engaging in certain types of misconduct at the private schools. Choice Scholarship Sch. App. (Ex. 5).

School officials testifying during the hearing conceded that the Choice Scholarship School exists only on paper. The same school officials concurred with the fact that the Choice Scholarship School has no buildings, employs no teachers, requires no supplies or books, and has no curriculum. The Choice Scholarship School is merely the name given to the person(s) within the Douglas County School District who will administer the Scholarship Program. *See generally* Charter Sch. Cont. (Ex. 6).

Douglas County School District claims all students "enrolled" at the Choice Scholarship School as part of the Douglas County School District's "pupil enrollment" for the purposes of C.R.S. § 22-54-103(10). *See* Policy § D ¶ 1. Douglas County School Districts provides 100% of the "per pupil revenues" (less deductions for administrative overhead or purchased services) for each of the 500 scholarship participants directly to the Choice Scholarship School. *See* Charter Sch. Cont. §8.1.A (Ex. 6).

Dr. Cutter testified that the sole source of funding for the Choice Scholarship Schools is the "per pupil revenue" received from the state pursuant to C.R.S. §22-30.5-112(2)(a.5). *See also* Charter Sch. Cont. § 8.1.A, B (Ex. 6) ("The parties agree that the [Choice Scholarship] School is not entitled to any other funding . . . Consistent with Policy JCB, the [Choice Scholarship] School shall receive only PPR").

D. The Private School Partners

To participate in the Scholarship Program, Private School Partners must apply, and disclose information related to enrollment, employment, financial stability, and other matters. *See* Policy § E ¶ 3 (Ex. 1). They need not be located within the boundaries of, or proximate to, the Douglas County School District. *See* Policy § E ¶ 1 (Ex. 1)

As part of the application, Private School Partners must agree to satisfy certain requirements, such as meeting the "minimum number of teacher-pupil instruction hours." Policy § C ¶10 (Ex. 1). Private School Partner applicants must also agree to allow Douglas County to administer assessment tests to the students in the Scholarship Program. *See* Policy § E ¶3.g (Ex. 1).

In order to participate in the Scholarship Program, however, a private school need not modify its admissions or hiring criteria, even if they involve religious or other discrimination. In fact, the Scholarship Program authorizes participating schools to "make employment and enrollment decisions based upon religious beliefs." Policy § E ¶3.f (Ex. 1). This was undisputed by the school officials during the injunction hearing.

In the spring of 2011, the Douglas County School District accepted applications from 34 Private School Partners for participation in the Scholarship Program. *See* Partner List (Ex. 3). As of July 31, 2011, the Douglas County School District has contracted with 23 of those private schools to participate in the Scholarship Program. *Id.*

1. Identities of private school partners

The following Private School Partners have signed contracts to participate in the Scholarship Program:

- Ambleside School is a private school currently located at 345 E. Wildcat Reserve Pkwy, Highlands Ranch, Colorado 80126 but scheduled to relocate to 1510 East Phillips Ave., Centennial, Colorado 80122 for the 2011-2012 school year;
- Aspen Academy is a private school located at 5859 S. University Blvd., Greenwood Village, Colorado 80121;

- Ave Maria Catholic School is a private school located at 9056 East Parker Road, Parker, Colorado 80138;
- Beacon Country Day School is a private school located at 6100 E. Belleview, Greenwood Village, Colorado 80111;
- Cherry Hills Christian is a private school located at 3900 Grace Boulevard, Highlands Ranch, Colorado 80126;
- Denver Christian Schools-Highlands Ranch Campus is a private school located at 1733 E. Dad Clark Drive, Highlands Ranch, Colorado 80126;
- Denver Christian Schools-Van Dellen Campus is a private school located at 4200 E. Warren Ave., Denver, Colorado 80222;
- Denver Christian Schools-High School Campus is a private school located at 2135 S. Pearl Street, Denver, Colorado 80210;
- Evangelical Christian Academy is a private school located at 4190 Nonchalant Circle South, Colorado Springs, Colorado 80917;
- Front Range Christian School is a private school located at 6657 W. Ottawa Ave., A-17, Littleton, Colorado, 80128;
- Hillel Academy of Denver is a private school located at 450 Hudson, Denver, Colorado 80246;
- Humanex Academy is a private school located at 2700 S. Zuni Street, Englewood, Colorado 80110;

- Lutheran High School is a private school located at 11249 Newlin Gulch Blvd., Parker, Colorado 80134;
- Mackintosh Academy is a private school located at 7018 S. Prince Street, Littleton, Colorado 80120;
- Mullen High School is a private school located at 3601 Lowell Blvd., Denver, Colorado 80236;
- Regis Jesuit High School is a private school located at 6300 S. Lewiston Way, Aurora, Colorado 80016;
- Shepherd of the Hills Lutheran is a private school located at 7691 S. University Blvd., Centennial, Colorado 80122;
- Southeast Christian School is a private school located at 9650 Jordan Road, Parker, Colorado 80134;
- St. Peter Catholic School is a private school located at 124 First Street, Monument, Colorado 80132;
- The Rock Academy is a private school located at 4881 Cherokee Drive, Castle Rock, Colorado 80109;
- Trinity Lutheran is a private school located at 4740 North Highway 83, Franktown, Colorado 80116;
- Valor Christian High School is a private school located at 3775 Grace Blvd., Highlands Ranch, Colorado 80126;

- Woodlands Academy is a private school located at 1057 Park Street, Castle Rock, Colorado 80109.

  Fourteen of the twenty-three participating private schools are located outside of the Douglas County School District: Aspen Academy, Beacon Country Day School, Front Range Christian School, Humanex Academy, Mackintosh Academy, Regis Jesuit High School, and Shepherd of the Hills Lutheran School are located in Arapahoe County; Denver Christian Schools (multiple campuses), Hillel Academy, and Mullen Hugh School are located in Denver County; and Evangelical Christian Academy and St. Peter Catholic School are located in El Paso County.

ii. Religious affiliation of private school partners

The Scholarship Program does not limit participation to private schools that are nonsectarian. *See* Policy § E ¶ 2.c (Ex. 1).

Sixteen of the twenty-three private partner schools approved to participate in the Scholarship Program are sectarian or religious, as those terms are used in Article II, Section 4; Article V, Section 34; and Article IX, Section 7, of the Colorado Constitution. They teach "sectarian tenets or doctrines" as that term is used in Article IX, Section 8 of the Colorado Constitution.

For virtually all high school students participating in the Scholarship Program, the only options are religious schools. Of the five participating schools that are non-religious, one is for gifted students only (Mackintosh Academy), another (Humanex Academy) is for special needs students, and the remaining three run through eighth grade only. *See, e.g.*, Humanex Academy App. (Ex. 58); Woodlands App. (Ex. 62); Mackintosh App. (Ex. 60); Aspen App. (Ex. 54); Beacon App. (Ex. 56). The school officials testifying confirmed these facts during the injunction hearing.

As of the time of the injunction hearing, approximately 93% of the confirmed private school enrollment was attending religious schools. At the high school level, there are 120 students, and only *one* of them will attend a non-religious school (Humanex Academy).

Most of the Private School Partners that have been approved to participate in the Scholarship Program are owned and controlled by private religious institutions. *See, e.g.*, Ave Maria App., at 6 (Ex. 18) (controlled by Diocese of Colorado Springs); Cherry Hills Christian App. at 1 (Ex. 19, p.10, 15) (controlled by Cherry Hills Community Church.); Evangelical Christian App., at 1 (Ex. 25 p.16) (controlled by Village Seven Presbyterian Church); Lutheran High School App., at 1, 2 (Ex. 37 p. 10, 11) (controlled by Lutheran Church - Missouri Synod); Mullen High School App., Faculty Handbook, at 1 (Ex. 40 p. 6) (owned and controlled by "Christian Brothers of New Orleans/Santa Fe Province"); Shepherd of the Hills App., at 1 (Ex. 42 p.10) (owned and operated by Shepherd of the Hills Lutheran Church); Southeast Christian School App., at 1,2 (Ex. 44 p. 10, 11) (controlled by Southeast Christian Church); Rock

Academy App., Parent Handbook (Ex. 47 p. 44); Trinity Lutheran App., Handbook (Ex. 48 at p.11, 18) (controlled by Trinity Lutheran Church). Dan Gehrke ("Mr. Gehrke"), Executive Director of the Lutheran High School Association, testified at the injunction that all of the members that makeup the Colorado Lutheran High School Association, which runs and has a vested interest in the high school, are churches.

The governing entities of many participating Private School Partners reflect, and are often limited to, persons of the schools' particular faith. *See, e.g.*, Ave Maria App., at 6) (Ex. 18); Cherry Hills App., at 1 (Ex. 19 p. 10) (stating that school superintendent reports to pastor of Cherry Hill Church, and Board of Elders); Evangelical Christian App. Bylaws at IV. B (Ex. 25 p. 17) (stating that each member of the Board shall be from "a reformed denomination subject to the approval of the Sessions of the Founding Churches"); Lutheran High School App., Diploma of Vocation (Ex. 37 p. 23) (appointing Dan Gehrke as Director "in the name of the Triune God"); Shepherd of the Hills App., at 1 (Ex. 42 p. 10) (stating that the Board serves as a trustee for the congregation); Southeast Christian App., at 1 (Ex. 44 p.10) (stating that "Southeast's Elder Board provides oversight to the School Board. The church is staff directed and elder protected."); Trinity Lutheran App., at 1 (Ex. 48 p. 10) (stating that the Trinity congregation is the "ultimate governing authority"). Mr. Gehrke and Robert Bignell ("Mr. Bignell"), Superintendent at Cherry Hills Christian, both confirmed this at the injunction hearing.

Many of the participating Private School Partners are funded primarily or predominantly by sources that promote and are affiliated with a particular religion. *See, e.g.*, Lutheran High School App., Promissory Note (Ex. 37 p. 15) (evidencing loan from Lutheran Church Extension Fund—Missouri Synod); Mullen High School App., at 1 (Ex. 40 p.6) (stating school is "owned and operated" by "Christian Brothers of New Orleans . . . in cooperation with the Archdiocese's Catholic School Office of the Catholic Archdiocese of Denver"); Shepherd of the Hills App., Enrollment Policies (Ex. 42 p. 14) (stating that Shepherd of the Hills is "sponsored and maintained by Shepherd of the Hills Lutheran Church"); Trinity Lutheran App., Accreditation Report (Ex. 48 p. 192) (stating that "school and church operate under a unified budget with the church financing a portion of the total school costs"). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

Most of the Private School Partners that have been approved to participate in the Scholarship Program require students to attend religious services. *See, e.g.*, Ave Maria App. at 3, 7, 8) (Ex. 18); Cherry Hills App., at 3 (Ex. 19); Evangelical Christian App., at 2 (Ex. 25); Front Range Christian App., at 6,7 (Ex. 29 p. 15, 16); Denver Christian School App., at 4 (Ex. 23); Hillel Academy App., at 5 (Ex. 31 p.14); Lutheran High School App., at 3 (Ex. 37 p.12); Mullen High School App., at 2 (Ex. 40 p. 2); Regis Jesuit App., at 6 (Ex. 41 p. 15); Southeast Christian App., at 5 (Ex. 44 p. 14); The Rock Academy App., at 2 (Ex. 47 p. 11); Trinity Lutheran App., at 4 (Ex. 48 p. 13); Valor Christian App., at 4 (Ex. 49 at p. 13). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

Most participating Private School Partners discriminate in enrollment or admissions on the basis of the religious beliefs or practices of students and their parents, and some even give preference to members of particular churches. *See*, e.g., Ave Maria App., at 8, 27 (Ex. 18) (discriminating in admissions and hiring); Denver Christian at 100-1, 100-5 (Ex. 23 p. 16-17, 20) (discriminating in favor of "children of parents who are members of a Reformed church); Evangelical Christian App., Doctrinal Statement (Ex. 25 p. 101) ("Evangelical Christian Academy shall admit only students of parents who give evidence of regeneration, who affirm this doctrinal statement"); Front Range App., Student Enrollment Info. (Ex. 29 p. 18) (acceptance contingent on attestation of parent); Lutheran High School App., Employee Handbook (Ex. 37 p. 65) (discriminating in favor of Lutherans in hiring); Shepherd of the Hills App., Enrollment Policies 6.1.2.1, and Employee Resource Guide 1.40, and Enrollment Paragraphs (Ex. 42 pp. 14, 22, 27, 28-29) (discriminating on the basis of religion in admissions and employment by, for example, categorizing workers as "called" vs. "non-called.") The Rock Academy App., Parent Handbook (Ex. 47 p. 47, 87) (giving preference for admission to members of the Rock Church); Valor Christian App., Employee Handbook (Ex. 49 p. 81) (requiring teachers to be 'authentic and committed believers in Jesus Christ'"). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

Most of the participating Private School Partners subject students, parents, and faculty to religious tests and qualifications. *See, e.g.*, Cherry Hills App., Family Commitment Policy (Ex. 19 p. 36) (requiring students and Parents to execute "Family Commitment Statement" that includes commitment to pray); Denver Christian App., Policy Manual (Ex. 23 p. 16-17) (requiring faculty to sign religious attestation); Evangelical Christian App., Handbook at 15, Employment Policy at 1, Doctrinal Statement (Ex. 25 p. 46, 94 101) (requiring parents to attest to faith in Jesus Christ and sign "doctrinal statements", and requiring faculty to attend church that agrees with "statement of faith"); Front Range App. (Ex. 20 p. 18, 58, 64, 70) (requiring parent to profess a "personal relationship with God," and requiring teachers to execute Statement of Faith and Declaration of Moral Authority); Shepherd of the Hills App., Enrollment Policies 6.1.2.1 (Ex. 42 p. 14) (requiring students to attest that they "will accept training in the teachings in the Christian faith."); Southeast Christian App., Family Commitment Agreement (Ex. 44 p. 27-29) (requiring parents and students to sign "commitment agreement" and "give your Christian testimony."); Valor Christian App., Employee Handbook (Ex. 49 p. 81, 117) (requiring faculty to agree to the Statement of Faith as a condition of employment). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

The primary missions of most of the Private School Partners, and of the religious entities that own, operate, sponsor, or control them, is to provide students with a religious upbringing and to inculcate in them the particular religious beliefs and values of the school or sponsoring religious organization. *See, e.g.*, Ave Maria App., at 3, 7 (Ex. 18) (mission statement); Cherry Hills App., at 1 (Ex. 19) (mission statement); Denver Christian App., Policy Manual

100-7 (Ex. 23 p. 22) (describing educational philosophy as preparing students for service in the Kingdom of God); Evangelical Christian App., Philosophy Statement (Ex. 25 p. 14) (describing education as founded on the centrality and preeminence of Christ in all things); Front Range App., at 2 (Ex. 29 p. 11) (stating that school exists to equip students to "impact the world for Christ"); Hillel Academy App., at 2 (Ex. 31 p. 11) (describing educational goals, in part, as "to provide a Judaic education that allows students to act as fully functioning Orthodox Jews."); Lutheran App., at 2 (Ex. 37 p. 11) ("Christian principles guide all of student life; classes, sporting and special events, and relationships."); Mullen App., Faculty Handbook at 1 (Ex. 40 p. 18) (preparing graduates to "embrace God's gift of learning [and] devote their lives ceaselessly for His learning"); Regis App., at 3 (Ex. 41 p. 12) (stating that Regis graduates "will come to know and experience God"); Shepherd Hills' App., at 2 (Ex. 42 p. 11) (Mission statement: "Through the Gospel of Jesus Christ, Shepherd of the Hills Christian School seeks to strengthen families by helping parents to train their children in a Christian way of life …"); Southeast Christian App., at 2 (Ex. 44 p.12) (" The Christian school is an arm of the Christian home in the total education of children." . . . "Train up a child in the way he should go, and even when he is old he will not depart from it.") (quoting Proverbs 22:6); The Rock Academy App., Parent Handbook (Ex. 47 p. 45) ("The Rock Academy exists to partner with parents in training the next generation through discipleship in God's word . . ."); Trinity Lutheran App., Parent/Student Handbook (Ex. 48 p. 18, 32) ("The "primary objective of Trinity Lutheran School is to support parents in the spiritual training of their children."); Valor Christian App., Mission Statement (Ex. 49 p. 18) (school's "vision" is to "prepar[e] tomorrow's leaders to transform the world for Christ"). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

The curricula at most participating schools is thoroughly infused with religion and religious doctrine, and includes required courses in religion or theology that tend to indoctrinate and proselytize. The participating schools additionally require theology classes as a component for graduation eligibility. *See, e.g.*, Cherry Hills App. (Ex. 19 p. 18); Denver Christian App., Policy Manual at 100-7 (Ex. 23 p. 22) (describing pillar of the curriculum as "Religion: Knowledge of religions, church history, Christian doctrine, and Christian ethics; always involving a challenge to respond in faith and obedience to the Lord."); Evangelical Christian App. (Ex. 25 pp. 19, 52) (requiring "Bible classes for graduation" and stating that "all materials are taught from a Christian Reformed worldview."); Front Range App., at 3 (Ex. 29 p. 12) ("We believe that all truth is God's truth. Therefore, all academic disciplines are taught and integrated within a Christian worldview."); Hillel Academy App. at 3 (ex. 31 p. 12) ("Our Judaic Program adheres to a traditional (Halakha) interpretation of laws and customs."); Lutheran High School App., Employee Handbook at 44 (Ex. 37 p. 104) (stating that religious instruction is an "integral part of every subject area"); Southeast Christian App., at 2 (Ex. 44 p. 11, 14) ("Biblical integration is included in all aspects of our learning. Bible class is considered a core academic class."); The Rock App., (Ex. 47 p. 31) (curriculum description); Trinity Lutheran App., Parent Student Handbook (Ex. 48 p. 21) ("describing "in-classroom time given to devotions and worship"); Valor Christian App., Student Handbook (Ex. 49 p. 60) (requiring 3.5 semesters of required courses in religion or theology). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

E. The Restrictions on Religious and Other Discrimination, Religious Education, and Mandatory Participation in Religious Services

The Scholarship Program provides no meaningful limitations on the use of taxpayer funds to support or promote religion, and no meaningful protections for the religious liberty of participating students. The Scholarship Program permits participating Private School Partners to discriminate on the basis of religion in both admission and in employment. *See* Policy § E ¶ 2, 3.f) (Ex. 1). Douglas County School District "recognize[s] that many schools embed religious studies in all areas of the curriculum." FAQ (Ex. 2).

There are no restrictions on how participating Private School Partners may spend the taxpayer funds that they receive under the Scholarship Program. The participating private schools are free to use these funds for sectarian purposes, including, for example, religious instruction, worship services, clergy salaries, the purchase of Bibles and other religious literature, and construction of chapels and other facilities used for worship and prayer. *See* FAQ (Ex. 2).

Mr. Bignell explained in a letter on April 15, 2011, to Dr. Cutter, "My summary of our two-hour interview is that the district wants *no control* over Cherry Hills Christian or any other partner school." (Ex. 101) (emphasis added). This was additionally confirmed by the testimony of Dr. Cutter.

The Scholarship Program permits participating private schools to discriminate against students with disabilities. This was confirmed by the testimony of Dr. Cutter. Douglas County School District categorizes students with disabilities who participate in the Scholarship Program as "parentally-placed students with disabilities" and includes a disclaimer in its form application stating that the "[d]istrict-provided services to parentally placed students with disabilities are limited." (Ex. 5 p. 10). Further, parents opting to have their children participate in the Scholarship Program essentially waive their rights under the Individuals with Disabilities Education Act. *See* Policy JCB (Ex. 107 at p. 5).

Participating Private School Partners may also engage in other forms of discrimination. For example, Denver Christian's application sets forth its "AIDS policy," under which it can refuse to admit, or expel, HIV-positive students. (Ex. 23 p. 28.) The "Teacher Contract" at Front Range lists homosexuality as "a cause for termination." (Ex. 29 p. 71).

F. The "Opt Out" Provision Against Religious Instruction or Participation In Religious Exercises

The Scholarship Program purports to afford participating students the right to "receive a waiver from any required religious services at the [Private School Partner]." *See* Policy § E ¶3.l (Ex. 1). But this "opt out" right is illusory. Dr. Cutter confirmed that scholarship students may still be required to attend religious services, so long as they are permitted to remain silent. *See* FAQ (Ex. 2). Many participating private religious schools require such attendance. *See supra*, at ¶ 54.

Scholarship students have no right to opt-out of religious instruction, even if the religious instruction would conflict with their own religious beliefs. *Id.* Scholarship students also have no right to sit silent during other religious exercises that does not occur in the context of formal religious worship services and chapel, such as prayer recitations, scriptural readings, etc, which many schools mandate throughout the day. *Id*. This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

Douglas County School District officials collaborated with religious Private School Partners to ameliorate their concerns regarding the initial waiver language which provided a complete right to opt out of religious services and instruction. Further, District Officials intentionally weakened the waiver language to encourage private religious schools to participate in the Scholarship Program. Shortly before the Douglas County School Board voted on the Scholarship Program, Dr. Cutter explained to a group of private religious schools that he had received "mixed responses" to a waiver policy that would have required participating private schools students in the Scholarship Program to "*remove themselves* from faith-based classes and/or activities" March 5, 2011 Email (Ex. 86) (emphasis added). Dr. Cutter also asked a group of private religious schools whether the waiver provision was a "deal-breaker." *See, e.g.*, March 7, 2011 Email (Ex. 87); March 8, 2011 Email (Ex. 88). The testimony of Dr. Cutter confirmed that these facts were accurate. Dr. Cutter further acknowledged that a large number of the private schools were sectarian and that it was imperative to get their participation. Dr. Cutter confirmed that without the religious schools' participation, there would not be much of a Scholarship Program.

The limited opt-out right is subject to even further reduction—or outright elimination— based on the opinion and testimony of Mr. Cutter. For example, Mr. Cutter assured Ken Palmreuter of Trinity Lutheran that "because services vary between faiths and institutions, the waiver will include unique specifics for each individual school. It's not a 'one waiver fits all.' you and I can work together to make sure it is comprehensive after your application is submitted." April 17, 2011 Email (Ex. 96).

G. The Education Provided By The Participating Religious Private School Partners

A "uniform standard" for public education in Colorado is set forth in the criteria created by the state legislature and is implemented by and under the continued supervision of the local school boards. Douglas County School District has adopted Colorado State Standards, as promulgated by the Colorado Department of Education, to create learning targets for the District. Douglas County School District's Standards Website (Ex. 10). These standards describe the learning goals in each area of instruction for each academic grade level. *Id.*

Douglas County School District also issues its own learning goals for each school year, outlining the key academic objectives to be achieved for that year. Douglas County Student Learning Goals (Ex. 9). Teachers in Douglas County School District are subject to licensing criteria as set forth by the Colorado State Board of Education.

The Scholarship Program's Private School Partners, however, are not subject to these standards. Participating Private School Partners are not required to use the Douglas County School District's content standards or curriculum, comply with its State accreditation contract or otherwise meet State accountability mandates, adopt its educational goals, use its assigned textbooks and materials, or adhere to student-teacher ratios and other pedagogical policies established by the District. *See* FAQ (Ex. 2). Teachers employed by the private schools participating in the Scholarship Program are not required to hold current Colorado Department of Education Teachers Licenses with appropriate endorsements and experience for the courses that they teach. *Id*. This was confirmed by the testimony of Dr. Cutter.

H. The Colorado Department Of Education Has Not Decided Whether To Fund The Program

The Scholarship Program is premised on the assumption that the Colorado Department of Education will pay Douglas County School District the "per pupil revenue" for students that attend participating private schools under the Scholarship Program. *See* Policy § C ¶6, 10 (Ex. 1)

Douglas County School District has already begun distributing money to participating private schools. As of the date of the injunction hearing, 271 of the 500 students admitted under the Scholarship Program had been accepted to Private School Partners and approximately 184 checks have been mailed to Private School Partners totaling over $200,000.

Mr. Hammond testified at the injunction hearing that the state has not determined whether or not it will fund the Scholarship Program.

Mr. Hammond testified at the injunction hearing that, if the Colorado Department of Education determines that students participating in the Scholarship Program should not be part of the pupil count for Douglas County School District, the state may seek reimbursement from the Douglas County School District of any state aid used to finance the Scholarship Program. Specifically, Mr. Hammond testified that the state could "claw back" the moneys spent towards the Scholarship Program if the Scholarship Program is determined to be improper.

Additionally, the Scholarship Program could be abruptly terminated when the State conducts its audit sometime in 2012, when students are already enrolled and immersed in the private schools. Students in the Scholarship Program would need to be reintegrated into public schools, or parents would be forced to pay the remaining private tuition on their own. Public school curricula would be disrupted, classes might need to be added or reallocated to accommodate hundreds of unplanned students, and additional textbooks and supplies that were not budgeted or planned for would need to be quickly procured.

Furthermore, the Douglas County School District could face the obligation to return millions of education dollars to the State. Many, if not all, of these circumstances could likewise occur in the event injunctive relief is granted.

Although the state has not committed to fund the Scholarship Program, the Douglas County School District nonetheless intends to forego investments in Douglas County public schools, which are necessary to keep pace with increased student enrollment, on the assumption that the Scholarship Program will alleviate this increased enrollment. Specifically, Dr. Fagen testified that the Scholarship Program will alleviate additional cost, such as classroom materials and facilities, associated with an increasing student enrollment.

Mr. Carson testified at the hearing that if the Scholarship Program is successful, he hopes to expand the Scholarship Program beyond the initial 500 students. *See also* December 12, 2010 Email (Ex. 126). Mr. Carson further stated that his viewpoint on expanding the Scholarship Program generally reflected the thoughts of the other Douglas County School Board members.

Mr. Carson testified that, under the state education funding system, more students equaled more money to the school district. Mr. Carson elaborated that part of his job responsibility is to devise ways to increase money and students to the Douglas County School District. Mr. Carson testified that the Douglas County School District has suffered tens of million dollars in budget reductions, and because the Douglas School District "does not have a finite pot of money, [the Douglas County School District's] budget is dependent upon pupil growth." Therefore, if the Scholarship Program grows in size, Douglas County School District's budget grows in size. Dr. Cutter testified that after running a financial analysis on the Scholarship Program, the Scholarship Program was forecasted to "break even" at 200 scholarship students. If these scholarship students are counted in the Douglas County School District's per pupil revenue, as the school officials testified that they will be, the funds directed to the Douglas County School District will be at the cost to other school districts around the state.

II. Standard Of Review

A. C.R.C.P. 12(B)(1) – Lack of Standing

A motion to dismiss for lack of standing is governed by C.R.C.P. 12(b)(1). "Subject matter jurisdiction is defined as a court's power to resolve a dispute in which it renders judgment." *Levine v. Katz,* 192 P.3d 1008, 1011 (Colo. App. 2006). In order for a court to have proper jurisdiction over a dispute, "the plaintiff must have standing to bring the case." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) (en banc). Furthermore, "[s]tanding is a threshold issue that must be satisfied in order to decide a case on the merits. *Id.*

A trial court may consider any competent evidence pertaining to a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction without converting the motion to a summary judgment motion. *Lee v. Banner Health*, 214 P.3d 589, 593 (Colo. App. 2009). A plaintiff has the burden of proving that the trial court has jurisdiction to hear the case. *Id*. at 594.

B. C.R.C.P. 12(5) – Failure to State a Claim Upon Which Relief Can Be Granted

In addressing a C.R.C.P. 12(b)(5) motion, the court must view the allegations in the light most favorable to the non-moving party, *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992) (en banc), and accept all averments of material fact contained in the complaint as true. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995) (en banc) (quoting *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122-23 (Colo. 1992) (en banc)). Whether a claim is stated must be determined solely from the complaint. *Dunlap,* 829 P.2d at 1290.

Under C.R.C.P. 8(a)(2), all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." *Henderson v. Gunther*, 931 P.2d 1150, 1168 (Colo. 1997) (en banc). Thus, dismissal of claims under C.R.C.P. 12(b)(5) is proper only "where a complaint fails to give defendants notice of the claims asserted." *Shockley v. Georgetown Valley Water & Sanitation Dist.*, 548 P.2d 928, 929 (Colo. App. 1976). Unless it appears beyond doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief, the motion will be denied. *Dunlap*, 829 P.2d at 1290.

C. C.R.C.P. 65 – Injunction

Colorado law is clear on the requirements to enter an injunction. Courts are permitted to enter an injunction pursuant to C.R.C.P. 65. In order for a preliminary injunction to enter, a plaintiff must demonstrate the following elements:

(1) a reasonable probability of success on the merits;

> (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
>
> (3) that there is no plain, speedy, and adequate remedy at law;
>
> (4) that the granting of a preliminary injunction will not disserve the public interest;
>
> (5) that the balance of equities favors the injunction; and
>
> (6) that the injunction will preserve the status quo pending a trial on the merits.

See Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982) (internal citations omitted).

C.R.C.P. 65(f) additionally contemplates that injunctions can be mandatory or permanent and that the court can require a party to take affirmative action "if merely restraining the doing of an act or acts will not effectuate the relief to which the moving party is entitled[.]" "It is generally held that if a preliminary mandatory injunction will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, it should not be issued. Only in rare cases if the complainant's right to the relief is *clear and certain* will an injunction issue under such circumstances as involved here." *Allen v. Denver*, 351 P.2d 390, 391 (Colo. 1960) (emphasis in original).

III. Conclusions of Law

The Court now addresses Defendants' Motion to Dismiss and Plaintiffs' Motions for Preliminary Injunction, in turn:

A. Motion to Dismiss

Defendants allege that Plaintiffs' claims for violations of C.R.S. § 22-54-101 *et seq*. and violation of Article IX, Section 3 of the Colorado Constitution should be dismissed, pursuant to C.R.C.P. 12(b)(1), because Plaintiffs lack standing to bring these claims. Furthermore, Defendants contend that Plaintiffs' remaining claims for violations of Article II, Section 4, Article IX, Sections 2, 7, 8, and 15, and Article V, Section 34 should be dismissed for failure to state a claim upon which relief can be granted, pursuant to C.R.C.P. 12(b)(5). In response, Plaintiffs argue that standing is proper for all claims alleged and that all claims are viable and properly alleged. The Court addresses each of Defendants' arguments, in turn, below.

1. Lack of Standing for Statutory Claims

Defendants allege that Plaintiffs lack standing to bring their statutory violation claims because Plaintiffs lack a legally protected interest to enforce the statutes and have not suffered an injury in fact. Plaintiffs argue that they have suffered both economic and non-economic losses and they have a protected legal interest in their constitutional and statutory claims.

In *Wimberly v. Ettenberg*, the Colorado Supreme Court outlined a two-step test for determining standing. 570 P.2d 535, 539 (Colo. 1977) (en banc). A plaintiff has standing if he or she (1) incurred an injury-in-fact (2) to a legally protected interest, as contemplated by statutory or constitutional provisions. *See id*. This test, because of its application in a variety of different contexts, has become the general test for standing in Colorado. *See Brotman v. East Lake Creek Ranch, LLC,* 31 P.3d 886, 890 (Colo. 2001) (en banc). "In Colorado, parties to lawsuits benefit from a relatively broad definition of standing." *Ainscough*, 90 P.3d at 855.

The first prong of the test has been interpreted to require "a 'concrete adverseness which sharpens the presentation of issues' that parties argue to the courts." *Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) (en banc) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). An injury that is "indirect and incidental" is insufficient to confer standing. *Brotman*, 31 P.3d at 891. "In the context of administrative action, this element of standing does not require that a party suffer actual injury, as long as the party can demonstrate that the administrative action 'threatens to cause' an injury." *Bd. of County Comm'rs v. Colo. Oil and Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003). "However, an injury must be sufficiently direct and palpable to allow a court to say with fair assurance that there is an actual controversy proper for judicial resolution." *Id.*

The second prong of the test "requires that the plaintiff have a legal interest protecting against the alleged injury." *Ainscough*, 90 P.3d at 856. There are three factors that courts use to determine whether a statute reflects a legislative purpose to confer a legal interest that entitles plaintiff to judicial redress: "(1) whether the statute specifically creates such a right in the plaintiff; (2) whether there is any indication of legislative intent to create or deny such a right; and

(3) whether it is consistent with the statutory scheme to imply such a right." *Olsen v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002) (citing *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1057 (Colo. 1981) (en banc)).

Here, Plaintiffs have alleged a direct economic injury on the grounds that the Scholarship Program will result in over $3 million in public funding being removed from the Douglas County School District. Plaintiffs further claim that because this action is based upon an administrative action, the threat of diverting money intended to further their children's education is sufficient to establish standing. Finally, Plaintiffs assert that they have a legal interest in protecting against the injury, both as taxpayers opposing the unconstitutional and unlawful expenditure of funds, and as parents and students protecting their interest in public education.

Defendants argue that any injury alleged is not sufficiently direct to establish standing for Plaintiffs. Furthermore, Defendants argue that the statutes upon which Plaintiffs base these claims lack the express language to establish standing for taxpayer enforcement, lack any indication of legislative intent to create a taxpayer right of enforcement, and lack the implication that a general right of taxpayer right of judicial redress exists.

The Court finds that the injuries asserted by Plaintiffs, both economic and non-economic, are sufficient in quality and directness to establish standing. The prospect of having millions of dollars of public school funding diverted to private schools, many of which are religious and lie outside of the

Douglas County School District, creates a sufficient basis to establish standing for taxpayers seeking to ensure lawful spending of these funds, in accordance with the Public School Finance Act. Similarly, these same circumstances are sufficient to establish standing for students, and the parents of students, seeking to protect public school education.

With respect to legal interest, the Court notes that Defendants' argument focuses, almost exclusively, on a lack of legislative purpose to confer a legal interest on taxpayers. Although this argument has some merit, the argument ignores the fact that Plaintiffs are comprised of not only taxpayers, but parents and students as well. Plaintiffs have successfully argued that their status as students in the Douglas County School District, as well as parents to these students, confers a legal interest in the enforcement of the statutes enumerated in their claims.

In conclusion, the Court finds that Plaintiffs have sufficiently established that they have proper standing to assert their claims against Defendants' alleged statutory violations.

2. Lack of Standing for Article IX, Section 3 Claim

Defendants next challenge Plaintiffs' standing on their constitutional claim for the violation of Article IX, Section 3 of the Colorado Constitution. As with the statutory claims, Defendants allege that Plaintiffs lack standing because Plaintiffs lack a legally protected interest and have not suffered an injury in fact. Plaintiffs argue that they have suffered economic and non-economic losses and that they have a protected legal interest in their constitutional and statutory claims.

While the *Wimberly* test outlined above applies equally to constitutional claims, it bears noting that additional deference is given to plaintiffs asserting claims based on constitutional violations. *See, e.g.*, *Ainscough*, 90 P.3d at 856; *Colo. State Civil Serv. Employees Ass'n v. Love*, 448 P.2d 624, 627 (Colo. 1968) (en banc). The Supreme Court has interpreted *Wimberly* to confer standing when a plaintiff argues that a governmental action that harms him is unconstitutional. *Ainscough*, 90 P.3d at 856. "[A] precept of constitutional law is that a self-executing constitutional provision ipso facto affords the means of protecting the right given and of enforcing the duty imposed." *Love*, 448 P.2d at 627. Although citizens may generally sue to protect a "great public concern" regarding the constitutionality of a law, the jurisprudence on this particular section of the Colorado Constitution indicates otherwise. *Compare Love*, 448 P.2d at 627 *with Brotman*, 31 P.3d at 891-92. In *Brotman*, although the Court held that taxpayers lack standing to bring claims under this Section of the Constitution, the Court expressly noted that this decision "does not preclude a determination like that in Branson that plaintiff schools and schoolchildren might have such standing." *Brotman*, 31 P.3d at 892.

In the present case, Plaintiffs are comprised not only of taxpayers, but also of parents and students in the Douglas County School District. While the Colorado Supreme Court's holding in *Brotman* expressly precludes taxpayer standing to assert claims based on the violation of Article IX, Section 3 of the Colorado Constitution, the Supreme Court clearly articulates that this holding is not sufficient to preclude standing of schools and students affected by the disbursement of funds generated from school lands. As outlined in the statutory claims section, *supra*, Plaintiffs have successfully asserted economic and non-economic injuries and have argued that their status as students and parents in the Douglas County School District confers a legal interest in the enforcement of the statutes enumerated in their claims. In evaluating Plaintiffs' standing, the Court reads the Supreme Court's language in *Brotman* in conjunction with its "relatively broad definition of standing" in Colorado and general conferral of standing upon a plaintiff arguing that an unconstitutional governmental action has injured the plaintiff.

In conclusion, the Court finds that Plaintiffs have sufficiently established that they have proper standing to assert their claims for the violation of Article IX, Section 3 of the Colorado Constitution.

3. Failure to State a Claim Upon Which Relief Can Be Granted

Next, the Court turns to Defendants' challenge of the remaining constitutional claims. Defendants contend that, because Plaintiffs' remaining claims lack merit and fail to show a probability of success, these claims should be dismissed pursuant to C.R.C.P. 12(b)(5). Conversely, Plaintiffs argue that all claims asserted are viable claims for constitutional violations and, furthermore, are likely to succeed on the merits.

Colorado jurisprudence is clear that C.R.C.P. 12(b)(5) motions are generally disfavored and are designed to allow a defendant to test the formal sufficiency of a complaint. *See, e.g.*, *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999) (en banc); *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996) (en banc). Thus, "a complaint is not to be dismissed [under a C.R.C.P. 12(b)(5) motion to dismiss] unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." *Dorman*, 914 P.2d at 911. Under the Colorado Rules of Civil Procedure, all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief," therefore a complaint is sufficient to withstand a motion to dismiss if the plaintiff states a claim that would entitle him to relief. C.R.C.P. 8(a)(2); *Shapiro & Meinhold*, 823 P.2d at 122-23.

Here, in their remaining constitutional claims, Plaintiffs' Complaints allege violations of Article II, Section 4, Article IX, Sections 2, 7, 8, and 15, and Article V, Section 34 of the Colorado Constitution. Generally, these claims allege that the Choice Scholarship Program, as currently constituted, requires students to "attend or support [a] ministry or place of worship, religious sect or denomination against [their] consent," fails to provide a "thorough and uniform system of free public schools," provides aid to churches and religious institutions, utilizes religious tests or qualifications for admission into public educational institutions, fails to maintain school board and school board director control of instruction in local schools, and provides appropriations to a "denominational or sectarian institution or association." In addition, Plaintiffs' Complaints include factual allegations which support the assertion of these claims.

While these claims have been hotly contested by Defendants, pursuant to the C.R.C.P. 12(b)(5) jurisprudence, the Court views these allegations in the light most favorable to Plaintiffs, the non-moving parties with respect to the Motion to Dismiss. Accordingly, taking the allegations in the complaints as true, the Court finds that the Plaintiffs' allegations are sufficiently pled to put Defendants on notice of the claims asserted. Furthermore, the Court finds that, despite Defendants' argument, Plaintiffs' claims are not precluded by Colorado substantive law. Finally, the Court affords a more detailed assessment of the merits of these claims below.

In conclusion, the Court finds that Plaintiffs have sufficiently alleged their remaining claims for constitutional violations.

WHEREFORE, in light of the reasoning above, Defendants' Motion to Dismiss is DENIED.

B. Injunction

Plaintiffs request the Court to enter an injunction preventing Defendants from funding or otherwise implementing the Scholarship Program. A heightened standard is compelled in this case because, as the Court stated during the injunction hearing, Plaintiffs' request for preliminary injunction, if granted, would provide Plaintiffs with all of the relief sought in their respective complaints. Further, a trial court has broad discretion to formulate the terms of injunctive relief when equity so requires. *See Colo. Springs Bd. of Realtors v State*, 780 P.2d 494 (Colo. 1989). Certainly the totality of the circumstances in this case warrants the modification of typical injunction proceedings from the norm.

Because the Court has determined that the higher standard of proof of a permanent or mandatory injunction applies here, *see supra*, the Court addresses the *Rathke* criteria in the following manner: the initial analysis will be directed to an assessment of the six *Rathke* elements and the degree to which Plaintiffs have met their burden for preliminary injunctive relief. The Court will dedicate a more detailed analysis of the constitutional and statutory provisions, with respect to the question of whether Plaintiffs have established by clear and certain evidence their entitlement to mandatory or permanent injunctive relief. The purpose in addressing the *Rathke* criteria in this fashion is to augment the Court's conclusion that, not only have Plaintiffs proven the six *Rathke* criteria by a preponderance of the evidence such that a preliminary injunction would be warranted, but that Plaintiffs additionally provided clear and certain evidence entitling them to mandatory or permanent injunctive relief.

1. Danger of real, immediate, and irreparable injury

Plaintiffs are in danger of real, immediate, and irreparable injury. An injunction is warranted where property rights or fundamental constitutional rights are being destroyed or threatened with destruction. *Rathke*, 648 P.2d at 652. The injuries to Plaintiffs' constitutional rights are irreparable and, without enjoining the Scholarship Program, Plaintiffs' injury cannot be undone. *See Kikimura v. Hurley*, 242 F.3d

950, 963 (10th Cir. 2001) (holding that a violation of an individual's religious rights is not adequately redressed by monetary compensation and is therefore irreparable, and explaining that "when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

Here, as more fully detailed below, the undisputed evidence before the Court reflects that the Scholarship Program continues to move forward in preparation for the 2011-2012 school year and Defendants continue to enroll students and make payments to Private School Partners. Further, Dr. Fagen and other Douglas County School District officials testified that school has already started in most Douglas County public schools. Plaintiffs have established, by a preponderance of the evidence, that the Scholarship Program violates both financial and religious provisions set forth in the Colorado Constitution. This evidence includes testimony from parents who reside in Douglas County, administrators from the Private School Partners, and employees of the Douglas County School District, confirming that the Scholarship Program, among others things: (1) requires participating students to attend religious services and receive religious instruction; (2) provides aid to churches and religious institutions; and, (3) utilizes religious tests or qualifications for admission into partner schools and, consequently, into the Choice Scholarship School. Allowing the program to continue to move forward with students attending the Private School Partners and Defendants distributing taxpayer funds to support the Scholarship Program violates Plaintiffs' constitutional rights and, therefore, presents a danger that is real, immediate, and irreparable to Plaintiffs.

In conclusion, the Court finds that Plaintiffs' danger is real, immediate, irreparable, and ongoing. Accordingly, the Court finds that this element of *Rathke* supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

2. No plain, speedy, and adequate remedy at law

Because injunctive relief falls within the Court's equitable authority, and because the Plaintiffs' request for an injunction presents the only adequate remedy for the alleged statutory and constitutional violations, there is no plain, speedy or adequate remedy at law available to Plaintiffs. *See Pinson v. Pacheco*, 397 Fed.Appx. 488, 492 (10th Cir. 2010) (stating that a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief). This *Rathke* element, a lack of plain, speedy or adequate remedy at law, is highly correlated to the "danger of real, immediate, and irreparable injury" element outlined above because a finding of irreparable injury is consistent with the finding that a plaintiff lacks an adequate remedy at law. *See Rathke*, 648 P.2d at 653-54. As outlined below, by not enjoining the Scholarship Program, Plaintiffs' constitutional rights will be irreparably violated and, necessarily, this constitutional injury cannot be undone or remedied by monetary or any other compensation. *See Kikimura*, 242 F.3d at 963.

In conclusion, the Court finds that Plaintiffs have proven, by a preponderance of the evidence, that no plain, speedy, and adequate remedy exists at law. Accordingly, the Court finds that this *Rathke* element supports a decision to enjoin the program.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

3. Granting of a preliminary injunction will not disserve the public interest

Enjoining Defendants' implementation of the Scholarship Program does not disserve the public interest. Although Defendants assert that the interests of participating students and the Douglas County School District in the educational process would be enhanced by the implementation of the Scholarship Program, this interest is outweighed by the substantial disservice to the public interest that would result from the implementation of an unconstitutional program affecting approximately 58,000 students and the taxpaying residents of Douglas County.

In conclusion, the Court finds that the Plaintiffs have shown, by a preponderance of the evidence that the public interest ultimately favors, and is served, in upholding the requirements established by the

Colorado Constitution. Accordingly, the Court finds that this element of *Rathke* supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

4. Balance of equities favors the injunction

As articulated by both Plaintiffs and Defendants during the proceedings, this factor is, in many ways, the most difficult for this Court to determine. With respect to Plaintiffs, a denial of the request for injunction presents significant injury in the form of continued constitutional and statutory violations of Plaintiffs' rights. Conversely, with respect to Defendants, granting the Plaintiffs' request for injunctive relief will undoubtedly result in significant hardships for the families already selected for enrollment in the Scholarship Program, as well as the Private School Partners (for instance, the Woodlands Academy) that have relied on the Scholarship Program's implementation.

Defendants assert that a finding against the Scholarship Program will result in the potential disruption of other statutory-based programs that are already in place. As the Court describes in greater detail below, the evidence presented demonstrates that there are significant differences between the Scholarship Program and other statutorily-based programs discussed at the injunction hearing.

Accordingly, the Court finds that the theoretical impact on other statutorily-based programs does not weigh into its decision on the merits of the injunction.

While the Court recognizes the difficulty in deciding the balance of equities, ultimately, the Court finds that the balance of equities element of *Rathke* favors the enjoining of the Scholarship Program. Specifically, the Court finds that the threatened constitutional injuries to Plaintiffs, and the other residents of Douglas County they represent, outweighs the threatened harm the injunction may inflict on Defendants, Intervenors, and the students and families selected for participation in the Scholarship Program. Plaintiffs have demonstrated by a preponderance of the evidence that the Scholarship Program, through the aforementioned constitutional violations and the suspect transfer of public funds to support private schools, will cause Plaintiffs' substantial and irreparable harm. Moreover, Plaintiffs' injury would be amplified for every additional student enrolled in the Scholarship Program and on each additional day the Program operates. As Dr. Carson and Dr. Fagen testified, this expansion is a circumstance that is likely to occur. Because Plaintiffs have shown that it is not only probable, but clear and certain, that they will succeed on the merits, as discussed, *infra*, and because Plaintiffs will suffer irreparable harm if the preliminary injunction is not granted, the balance of the equities favors an injunction. *See Keller Corp. v. Kelley*, 187 P.3d 1133, 1137 (Colo. App. 2008).

The Court, in arriving at its decision, in no way diminishes the impact an injunction will have on the

Defendant families and those in similar situations. However, in balancing the degree of impact and the number of families involved, the Court concludes that the balance of equities compels granting Plaintiffs' request for preliminary injunctive relief. Accordingly, the Court finds that this *Rathke* element supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

5. Injunction will preserve the status quo

The issuance of an injunction will preserve the status quo. Generally, the status quo to be preserved is the "the last peaceable uncontested status existing between the parties before the dispute developed." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1006 (10th Cir. 2004) *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *see also Arapahoe Cnty. Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 598 (Colo. 1998); *Sanger v. Dennis*, 148 P.3d 404, 419 (Colo. App. 2006).

Here, the last peaceable status before the dispute was the absence of the Scholarship Program. The undisputed evidence before the Court demonstrates that when Plaintiffs first filed suit, the Choice Scholarship School had not been implemented or introduced, the list of schools participating had not been finalized, public funds had not been distributed, and the 2011-12 academic year had not begun. The Court is not persuaded that the status quo changed as a result of the summertime involvement of a few scholarship participants with their new Private School Partner, by the distribution of funds to Private School Partners after the lawsuit was filed, or by the investments of some Private School Partners in the hiring of new teachers or remodeling of classrooms. Ultimately, the enjoining of the Scholarship Program will preserve the status quo as the former students participating in the Scholarship Program will continue to receive their education from a Douglas County public school as before the Scholarship Program was implemented. The Court heard testimony of the possibility that some students may potentially face the unfortunate difficulty of returning to the school they attended before enrolling in the Scholarship Program, however, while this scenario is possible, nothing was presented to the Court beyond speculation that such a scenario might occur. Plaintiffs have expressly not asked the Court to direct the disenrollment of scholarship recipients already attending Private Partner Schools or the return of funds already expended.

Finally, the Court is not persuaded by Defendants' contention that Plaintiffs "sat on their hands" or engaged in undue delay in the filing of this lawsuit. The Court finds that there is sufficient evidence in the record to establish that during the time between the Scholarship Program was officially created and the filing of this lawsuit, Plaintiffs were involved in pre-trial investigatory procedures relating to the implementation and creation of the Scholarship Program.

In conclusion, the Court finds that the Plaintiffs have shown, by a preponderance of the evidence that enjoining the Scholarship Program will preserve the status quo. Accordingly, the Court finds that the status quo is maintained by the issuance of a preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

6. Reasonable probability of success on the merits

In conducting its analysis of the present case under the first Rathke element, the Court reviews the following constitutional and statutory provisions: Article II, Section 4, Article V, Section 34, and Article IX, Sections 2, 3, 4, 7, 8, and 15 of the Colorado Constitution and Sections 22-54-101 *et seq*. and 22-32-122 of the Colorado Revised Statutes. The Court addresses each of these arguments below.

a. The historical significance of the United States Constitution and the Colorado Constitution

In response to Plaintiffs' claims that the Scholarship Program violates various funding and religious provisions of the Colorado Constitution, Defendants essentially claim that, while the religious provisions of the Colorado Constitution are "considerably more specific" than the federal Establishment Clause, *Americans United for Separation of Church and State Fund, Inc. v. State of*

Colo., 648 p.2d 1072, 1082 (Colo. 1982), the Colorado Constitution's different religious provisions are no different nor impose no greater restriction than the federal Establishment Clause.

The Court is not persuaded by this assertion because it is premised on the idea that the framers of the Colorado Constitution must have debated, drafted, and ratified these provisions without purpose. Further, ignoring the detailed language of Colorado's religious constitutional provisions and labeling them "no broader than the federal Establishment Clause" would render them of no value. *See Cain v. Horne*, 202 P.3d 1178, 1182 (Ariz. 2009) (evaluating the constitutionality of a similar "scholarship" program and declining to interpret the Arizona Constitution's "Aid Clause as no broader than the federal Establishment Clause.").

Defendants have provided no legal authority supporting a limitation on the scope of the religious provisions of the Colorado Constitution and this Court declines the invitation to craft one now.

While, as pointed out in Defendants' briefing, the Court in *Americans United* may have stated that the religious provisions of the Colorado Constitution "embody the same values of free-exercise and governmental non-involvement secured by the religious clauses of the First Amendment," 648 p.2d at 1081-82, the Court in *Americans United* also stated that the Establishment Clause is "not necessarily determinative of state constitutional claims." *Id*. at 1078. Had the Court in *Americans United* agreed with Defendants' position in this case, the Court would have abandoned the specific analysis of the religious provisions in the Colorado Constitution and focused strictly on the federal Establishment Clause and the underlying interpretations from federal courts. However, the Colorado Supreme Court did not. Further, Defendants provide no authority, and the Court is aware of none, to suggest that the federal Establishment Clause precludes this Court's consideration of the religious provisions of the Colorado Constitution.

Since Plaintiffs make no claim here with respect to the federal Establishment Clause, and because the federal Establishment Clause does not subsume the Colorado Constitution, the Court narrows its focus to the provisions of the Colorado Constitution rightly at issue.

Defendants next argue that the First Amendment, through the Free Exercise Clause, requires states to aid religious schools. However, Defendants direct the Court to no legal authority to support this contention. To the contrary, in *Locke v. Davey*, the U.S. Supreme Court rejected a Free Exercise challenge to a scholarship program enacted in Washington State that forbids students to use state scholarship funds to pay for a degree in theology. *See* 540 U.S. 712, 725 (2004). In doing so the Court held that the Free Exercise clause *does not* require a state to fund theology students. *Id.* (emphasis added). Accordingly, in this case, this Court is not prepared to mandate that Colorado taxpayers fund private religious education.

Similarly, Defendants' argument that the Court should ignore the language of the Colorado Constitution because the provisions were written and ratified under the guise of "Catholic bigotry" is unpersuasive. First, Defendants provide no legal authority that would allow this Court to undertake such an endeavor. In fact, this exact argument has been rejected by various other state courts. *See Cain*, 202 P.3d at 1184; *Bush v. Holmes*, 886 So. 2d 392, 412-413 (Fla. 2006). Second, even if there were such authority, there is a genuine dispute as to the historical relevance of the "Blaine amendments" in the context of the Colorado Constitution. To begin, Colorado's "no aid" provision is nearly identical to a provision in the Illinois Constitution, Article VIII, Section 3, which was enacted prior to the proposal of the Blaine amendments. *See Education in Colorado 1861-1885*, Colorado State Teacher's Association, 37-38 (1885). Further, as acknowledged by Dr. Charles Glenn, an expert witness for Defendants in this case, Catholics even conducted a "pro-constitution" rally in Denver just days before ratification, signifying at least some Catholic support of the provisions of the Colorado Constitution. Therefore, as Defendants have provided no legal authority to suggest that the Court may disregard certain constitutional provisions because they "may have been tainted by questionable motives," the historical nature of the Blaine Amendments does not factor into the Court's decision in this Order. *See Cain*, 183 P.3d at 1278 n.2.

Accordingly, the Court turns its attention to focus on each of the alleged violations of the Colorado Constitution at issue in the present case, in turn below.

b. Article IX, Section 7 of the Colorado Constitution

First, Plaintiffs claim that the Scholarship Program violates Article IX, Section 7 of the Colorado Constitution because the Scholarship Program takes public funds intended to support public schools and uses them instead to help support or sustain the Private School Partners controlled by churches or religious denominations.

Article IX, Section 7 of the Colorado Constitution directs that:

> 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 whatsoever, 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 of land, money, or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Colo. Const. art. IX, Section 7 (emphasis added).

To determine whether there is "aid" to a sectarian or religious school within the meaning of the Colorado Constitution, "[t]he answer to the question must be sought by consideration of the entire program measured against the constitutional proscription." *See Americans United*, 648 P.2d at 1083.[2]

Since the Colorado Supreme Court's holding in *Americans United*, the U.S. Supreme Court has reversed course with respect to the analysis of "pervasively sectarian" institutions.[3] Specifically, the U.S. Supreme Court has determined that any inquiry into the religiousness of a particular institution, including religious schools, is improper. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000); *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1263 (10th Cir. 2008). In *Mitchell*, the Court stated, "[t]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive." 530 U.S. at 828. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's

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[2] The Court noted that:

> We do not confine ourselves to the statutory criteria for a "pervasively sectarian" institution . . . in determining whether there is aid to a 'sectarian' institution within the meaning of the Colorado Constitution. These statutory criteria reflect a legislative effort to comply with the standards which evolved under Establishment Clause doctrine for aid to private institutions and although relevant to our analysis, they do not by themselves answer the question whether the statutory program violates the proscription of Article IX, Section 7.

Id.

[3] The *Americans United* Court based its holding, in part, on whether the public aid was permitted to "pervasively sectarian" institutions, as defined by statutory criteria which have since been repealed. *See* C.R.S. 23-3.5-105(1) (repealed 2009).

or institution's religious beliefs . . . [t]he application of 'pervasively sectarian' factors collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.*

Accordingly, the Court will not analyze the religiousness of a particular institution. However, because an institution's status as "pervasively sectarian" was but one factor addressed by the *Americans United* Court, the fact that this Court declines to address that factor is not dispositive of the constitutionality of the Scholarship Program.

In *Americans United*, the Court determined that a college tuition-assistance program, as passed by the General Assembly, did not violate the Colorado Constitution's no aid provision based on five factors.

First, the aid was designed to assist the student, not the institution, and any benefit to the institution appeared to be an unavoidable byproduct of an administrative role relegated to it by the statutory scheme or program. *See* 648 P.2d at 1083.

Second, the aid was only available for students attending institutions of higher education. *Id*. The court stated, "[b]ecause as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id*. at 1084.

Third, aid is available to students attending both public and private institutions, thereby dispelling any notion that the aid was calculated to enhance the ideological ends of the sectarian institution. *Id.*

Fourth, although the statute enabling the funding did not expressly limit the purpose for which the institutions could spend the funds distributed to them by the grant program, the statute directed a bi-annual audit of payment procedures and other practices. These statutory provisions were expressly designed to insure that the grant program was being administered properly. The college-tuition assistance program also included a statutory provision which provided that, "upon commencement of participation in the program, no institution shall decrease the amount of its own funds spent for student aid below the amount spent prior to participation in the program." This prohibition, the Court concluded, "create[d] a disincentive for an institution to use grant funds other than for the purpose intended – the secular educational needs of the student." *Id.*

Lastly, the Court used the statutory "pervasively sectarian" criteria, as referenced above, finding that the subject institutions did not rise to the level of "pervasively sectarian" and therefore the program did not constitute impermissible aid to sectarian institutions.[4]

Here, applying the same factors set forth in *Americans United*, with the exclusion of the statutory criteria for what constitutes a "pervasively sectarian"

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[4] As stated above, this Court declines an invitation to address whether the Private Partner Schools in this case constitute "pervasively sectarian" institutions. *See Mitchell*, 530 U.S. at 828.

institution, the Court finds a stark disparity in the overall substance of the Scholarship Program at issue in the present case and the college-tuition assistance program at issue in *Americans United*.

First, the Court in *Americans United* was concerned with the purpose of the aid provided by the state to the sectarian institution. The Court concluded that because the purpose was to aid the students and not the institution itself, the public funds did not constitute impermissible aid within the meaning of Article IX, Section 7. *Id.* at 1083. Here, like the college-tuition assistance program at issue in *Americans United*, the Scholarship Program appears to be a well-intentioned effort to assist students in Douglas County. As Defendants have stated, the purpose of the program is to aid students and parents, not sectarian institutions. The Court agrees with Defendants on this point.

Additionally, the Court in *Americans United* considered the fact that the college tuition-assistance program had a bi-annual audit to ensure that state funds being paid to the sectarian institution were being used in a constitutionally permissive manner. *Id*. at 1084. Further, there was a provision in the college tuition-assistance program requiring that the sectarian institution maintain the amount of its own funds spent for student aid prior to participation in the program, thereby "creat[ing] a disincentive for an institution to use grant funds other than for the purpose intended – the secular educational needs of the student." *Id*.

Here, like the college tuition-assistance program in *Americans United*, the Scholarship Program appears to have a check and balance system whereby Douglas County retains a right to periodically review the records, including the financial records of the Private School Partners participating in the program. Section 3.1(A) of the agreement between the Douglas County School District and the Choice Scholarship Charter School sets forth the Douglas County School District's rights and responsibilities and requires that records be open to inspection and review by Douglas County School District officials. *See* Charter Sch. Cont. (Ex. 6). Similarly, Section 3.2 (A) requires that financial records be posted and reconciled "at least monthly." *Id.* Section 3.2(D)(ii) further requires that, in addition to the general posting of financial information, the Private School Partners must provide a proposed balanced budget, a projected enrollment, a charter board approved budget, quarterly financial reports, an annual audit, and an end of year trial balance. *Id.*

However, this is where the similarities between the college tuition-assistance program in *Americans United* and the present case end. Specifically, there is no express provision within the Scholarship Program that prevents the Private School Partners from using public funding in furtherance of a sectarian purpose. In fact, because of the interplay between the participating Private School Partners' curriculum and religious teachings, any funding of the private schools, even for the sole purpose of providing education, would further the sectarian purpose of religious indoctrination within the schools educational teachings and not the secular educational needs of the students. This was corroborated by the testimony of Mr. Gehrke. Mr. Gehrke testified that tuition, including the tuition from students participating in the Scholarship Program, is the largest source of revenue for the high school. Mr. Gehrke also testified that the tuition received from the Scholarship Program supports the operation of the school, teacher salaries, chapel facilities, and aids in carrying out the mission of the school, which is to "nurture academic excellence and encourage growth in Christ." Among the benefits Lutheran High School seeks to gain out of the school's participation in the Scholarship Program is increased enrollment. An increase in enrollment would result in more tuition to aid in payment of Lutheran High School's financial debt and mortgage payments. Mr. Gehrke specifically testified during the hearing that the school's mortgage payments are paid directly to the Lutheran Church Extension Fund, a bank that is a "dual ministry in partnership" with the Lutheran Church.

Further, there is evidence that at least one school, Valor Christian High School, has reduced its financial aid award to a scholarship recipient in the same amount awarded through the Scholarship Program. *See* July 24, 2011 Email (Ex. 102). In his testimony, Dr. Cutter stated that he was not aware of this action, but believed that a Private School Partner that reduced financial aid for students participating in the Scholarship Program would "go against the intended contract" with the Douglas County School District.

This identical scenario was expressly disapproved in *Americans United*. Allowing Valor Christian High School to reduce a scholarship participant's financial aid in the amount of the tuition provided through the Scholarship Program would essentially directly hand over public funds to Valor, for Valor's use in any manner it sees fit, including the promotion of sectarian purposes. Moreover, these public funds would otherwise have been used for the needs of public school students in Douglas County.

The next item deemed important by the *Americans United* Court was the fact that the aid was only available for students attending institutions of higher education. "Because as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id*. at 1084.

Here, unlike the college tuition-assistance program in *Americans United*, the Scholarship Program is not designed for students attending an institution of higher education. Rather, the Scholarship Program is intentionally directed to students attending elementary and secondary schools. This fact alone is cause for constitutional alarm because, as the Court in *Americans United* explicitly warned, the "risk of indoctrination" is substantially higher when associated with a voucher program designed to aid primary and secondary institutions. *Id*. Further, while the Scholarship Program purports to provide students participating in the program an "opt out" or "waiver" from any required religious services at the Private School Partner, the "waiver" "does not include [religious] instruction." *See* FAQ (Ex. 2). In fact, for many of the Private School Partners, religious instruction is the foundation of their core educational curriculum and religious theology is embedded in many of their classes. This was confirmed by Messrs. Gehrke and Bignell. The materials and applications for the Private School Partners confirm that their curriculum is premised on the basis of religious education and teaching in the classroom. *See*, *supra*, ¶¶44-45.

Because the scholarship aid is available to students attending elementary and secondary institutions, and because the religious Private School Partners infuse religious tenets into their educational curriculum, any funds provided to the schools, even if strictly limited to the cost of education, will result in the impermissible aid to Private School Partners to further their missions of religious indoctrination to purportedly "pubic" school students. Therefore, the Scholarship Program is subject to the heightened risks described in *Americans United*. *See* 648 P.2d at 1083-84.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Scholarship Program violates Article IX, Section 7 of the Colorado State Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

c. Article II, Section 4 of the Colorado Constitution

Plaintiffs allege that the Scholarship Program violates Article II, Section 4 of the Colorado Constitution because it compels taxpayers, through the use of funds provided by the Public School Finance

Act, to support the churches and religious organizations that own, operate, and control many of the private religious schools that are participating in the Scholarship Program.

Article II, Section 4 of the Colorado Constitution provides:

> 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.

Colo. Const. art. II, Section 4.

In *Americans United*, the Colorado Supreme Court also addressed a challenge to the college tuition-assistance program as being in violation of Article II, Section 4 of the Colorado Constitution. Similar to the Court's analysis of whether the program violated Article IX, Section 7, the Court did not view the college tuition-assistance program as constitutionally flawed under Article II, Section 4 as providing "compelled support" from Colorado taxpayers. In reaching that determination, the Court in *Americans United* based its conclusion on the following factors: (1) the program was designed for the benefit of the students, not the institution; (2) the program was available to all students at institutions of higher learning; and, (3) the financial assistance was distributed under statutory conditions calculated to significantly reduce any risk of fallout assistance to the participating institution. *See* 648 P.2d 1072, 1082.

Here, as discussed above with respect to Article IX, Section 7, the Court agrees, and the testimony of the school officials reflect, that the purpose of the Scholarship Program was for the benefit of the students, not the benefit of the private religious schools. However, the Court is still faced with the glaring discrepancy between the college tuition-assistance program in *Americans United* and the Scholarship Program at hand. While there is significant language in the policy enacting the Scholarship Program intended to alleviate concerns regarding how public finances are to be used, e.g., an annual audit and the required production of financial records at the request of Douglas County School District officials, neither the Scholarship Program nor the contracts between the Choice Scholarship School and Private School Partners contain any express language that limits or conditions the use of the state funds received by the partner schools for the strict purpose of secular student education.

To the contrary, as discussed above in regard to Article IX, Section 7, the public funds in this case are *not* limited to those seeking an education at an institution of higher learning, but rather to primary elementary and secondary educational schools. Additionally, the mission statements and described purposes of the participating Private School Partners are to infuse religious teachings into the curriculum. It necessarily follows that any public taxpayer funding provided to the partner schools, even for the sole purpose of education, would inherently result in compulsory financial support to a sectarian institution to further its goals of indoctrination and religious education. Further, as discussed above, as the Scholarship program is presently constituted, Private School Partners are allowed to, and, as the evidence reflects, undoubtedly will use public funds to further their respective religious missions.

The conclusion that necessarily follows is that, under the Scholarship Program any "compelled support" by way of taxpayer funding to a Private School Partner whose mission is to provide an education based on theological and religious principles is a violation of Article II, Section 4 of the Colorado Constitution. As the Court stated in *Americans United*, "[b]ecause as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id*. at 1084.

Accordingly, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits of this claim, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

d. Article IX, Section 8 of the Colorado Constitution

Plaintiffs allege that the Scholarship Program violates Article IX, Section 8 because the Scholarship Program: (1) subjects scholarship recipients to religious admission criteria; (2) requires scholarship recipients to attend religious services if the Private School Partner directs its own students to attend; and, (3) subjects scholarship recipients to the teachings of religious tenets and doctrines. Defendants argue that this Article IX, Section 8 does not apply to the Scholarship Program because the Private School Partners are not "public" institutions.

Article IX, Section 8 requires that:

> [1] No religious test or qualification shall ever be required of any person as a condition of *admission* into any public institution of the state, either as a teacher or student; and [2] no teacher or student of any such institution shall ever be required to *attend* or participate in any religious service whatsoever. [3] No sectarian tenets or doctrines shall ever be *taught* in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

Colo. Const. Art IX, Section 8 (emphasis added).

A fundamental principle of Colorado law is that any person of any religion or no religion may become a student of a public institution. *See People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927), *rev'd* *on other grounds*, *Conrad v. City & Cnty. of Denver*, 656 P.2d 662 (Colo. 1982). On their face, the following two provisions in Article IX, Section 8 protect students enrolled in public schools from forced attendance at religious services and forced exposure to religious teachings. *See* Colo. Const. art. IX, Section 8.

All of the students participating in the Scholarship Program are "enrolled" at the newly developed Choice Scholarship Charter School. Charter schools are defined as "public schools" "for any purpose under Colorado law." *See* C.R.S. § 22-30.5-104(4). Similarly, charter schools are public entities for purposes of constitutional and statutory liability. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010). Charter schools may not discriminate on the basis of religion, sexual orientation, or disability among others. C.R.S. § 22-30.5-104(b)(3). Finally, charter schools are required to "[o]perate . . . pursuant to . . . article IX of the state constitution." C.R.S. § 22-30.5-204(2)(a).

The Choice Scholarship School was specifically enacted as a public charter school for the purposes of implementing the Scholarship Program. During the hearing, the witnesses testifying on behalf of Defendants conceded that the Choice Scholarship School was designed for pupil "counting" purposes in order to qualify for state public funding.

Accordingly, because students participating in the Scholarship Program are still "counted" for purposes of receiving their per pupil revenue, the treatment of scholarship recipients must comport with Article IX of the Colorado Constitution requiring the Douglas County School District to protect the religious liberty of the scholarship recipients that are enrolled in the Choice Scholarship School. Specifically, public school students participating in the Scholarship Program should not be subject to: (1) religious qualifications for admission; or (2) compelled attendance at religious services and mandatory religious instruction.

i. Qualifications for admission

First, Article IX, Section 8 of the Colorado Constitution forbids the use of religious qualifications or standards for admission into the public schools. Dr. Fagen testified that admission into a Private School Partner is not a prerequisite for receiving a scholarship under the Scholarship Program. However, the evidence and other testimony presented at the hearing makes it clear that *enrollment* in the Choice Scholarship School is predicated on a student's admittance into one of the Private School Partners. In the Choice Scholarship School Application, the enrollment policy states: "[t]o be eligible for enrollment in the CCS [Choice Scholarship School], a student must … be *accepted* and attend a qualified Private School Partner all as defined and described in DCSD Board Policy JCB." *See* Charter Sch. App. (Ex. 5) (emphasis added).

The enrollment policy carries significant constitutional ramifications because under the Scholarship Program, Private School Partners will *not* be required to change their admission criteria to accept students participating in the program. This was confirmed by both Dr. Cutter and Dr. Fagen. The Choice Scholarship School Application specifically states that: "Choice Scholarship recipients shall satisfy all admission requirements of the Private

School Partner on their own." Further, the policy enacting the Scholarship Program states, in the section entitled, "Private School Partner's Conditions of Eligibility," that "religious Private School Partners may make enrollment decisions based upon religious beliefs." *See* Policy JCB (Ex. 107). Further, in Scholarship Program's "Frequently Asked Questions," the Douglas County School District states, "[i]t is not our intention in this program to change any school's application process." *See* FAQ (Ex. 2). This fact is also corroborated by testimony from Dr. Fagen, Dr. Cutter, and Messrs. Gehrke and Bignell.

Since admission into the Choice Scholarship School rests on whether or not a student meets the sectarian and faith based qualifications of the participating religious Private Partner Schools participating in the Scholarship Program, a student may not qualify under the Scholarship Program unless the student meets the faith based qualifications of a participating private school. *See*, *supra*, ¶¶42-43.

These admission qualifications violate Article IX, Section 8 of the Colorado Constitution. Because admission into the Scholarship Program, a "public program," is predicated on acceptance into one of the Private School Partners, the vast majority of which have faith based admission requirements, the Court concludes, based on the overwhelming evidence, that the Scholarship Program imposes a "religious test or qualification . . . as a condition of admission" into a public school, in violation of Article IX, Section 8 of the Colorado Constitution.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits of this claim, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

ii. Compelled attendance at religious services and mandatory religious instruction

The undisputed evidence reflects that the Scholarship Program, in theory, provides scholarship recipients participating in the Scholarship program with an "opt out" or "waiver" from any required religious services at a Private School Partner. The policy enacting the Scholarship Program states in the section entitled, "Private School Partner's Conditions of Eligibility," that "[a] religious Private School Partner shall provide Choice Scholarship parents the option of having their child receive a waiver from any required religious services at the Private Partner School." *See* Charter Sch. App. (Ex. 5).

However, upon review, the undisputed evidence clearly reflects that any such "opt out" or "waiver" fails to pass muster under Article IX, Section 8. For example, as set forth in the Scholarship Program's "Frequently Asked Questions," the waiver "does not include instruction" and although "[s]tudents may opt-out of participation" in worship service, students may nevertheless "be required to respectfully attend, if that is the school's policy." *See* FAQ (Ex. 2). This fact is not disputed by Defendants and was corroborated by the individual Private School Partner Applications, *see*, *supra*, ¶¶51-54, as well as the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell. Moreover, some Private Partner Schools considered a total and complete opt out of religious services and instruction to be a "deal breaker." (*See*, *supra*, ¶ 53). Similarly, in an email exchange between Robert Ross, legal counsel for the Douglas County School District, and School District officials, Mr. Ross described the waiver from religious services as "[n]ot much of an opt out" because the waiver did not cover attendance at worship services or instruction. *See* March 28, 2011 Email (Ex. 97). Dr. Fagen, Dr. Cutter, and Mr. Carson testified in unanimity concerning the distinction between religious services and religious instruction. Further each corroborated in their testimony that the opt out waiver was limited to religious services only, and that Private Partner Schools were entitled to compel attendance but not participation in religious services by scholarship recipients.

The fact that students may be required to attend religious services "if that is the school's policy" disregards the plain language of Article IX, Section 8. Furthermore, the Scholarship Program, as discussed in great detail above, not only allows for religious teaching, but that is precisely the mission of the religious Private School Partners participating in the program.

Defendants' argument that the prohibitions of Article IX, Section 8 do not apply to the Scholarship Program because the Private School Partners are not public is not persuasive. Defendants enroll students into a public charter school for the benefit of "counting" in order to receive public funds. Student admission into the charter school is predicated on the students' admission into one of the Private School Partners and once the students begin attending classes, they may be subject to mandatory attendance at religious services and religious teachings and indoctrination within the educational curriculum. Defendants' assertion that the Private School Partners are not "public," thereby availing themselves from the requirements of Article IX, Section 8 of the Colorado Constitution, is unavailing in light of the weight of the evidence and applicable law here.

In Colorado, *Americans United* remains the benchmark by which the constitutionality of public funding of private schools is judged. Defendants' well intentioned effort at providing choice in schools simply misses that mark.

Accordingly, because of the Scholarship Program's provisions allowing for faith based admission standards, compelled attendance at religious services, and teaching of religious tenets to students enrolled in a public charter school are violations of art. IX, § 8, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

e. The Public School Finance Act, Colorado Revised Statutes, Section 22-54-101 *et seq.* & Article IX, Section 2 of the Colorado Constitution

Plaintiffs contend that the Douglas County School District intends to use funds distributed by the Colorado Department of Education under the Public School Finance Act to pay tuition at private schools, in direct contravention of both Article IX, Section 2 of the

Colorado Constitution and the Public School Finance Act, C.R.S. § 22-54-101 *et seq*. Specifically, Plaintiffs allege that the Scholarship Program contradicts the plain language of the "thorough and uniform" clause in Article X, Section 2 and undermines the Public School Finance Act's funding balance, which seeks relatively "uniform" funding of education across the state.

Article IX, Section 2 of the Colorado Constitution requires that public funds be used "for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state," where all K-12 students "may be educated gratuitously." *See* Colo. Const., art. IX, Section 2. The Colorado General Assembly enacted the Public School Finance Act "in furtherance of the general assembly's duty in correlation of section 2 of Article IX to provide for a thorough and uniform system of public schools throughout the state." *See* C.R.S. § 22-54-102(1).[5] [6] Taken together, Article IX, Section 2 and the Public School Finance Act establish a clear intent and explicit directive that funds distributed to school

[5] The Public School Finance Act is also the legislative means by which Colorado public schools are funded and explicitly and exclusively sets aside education funding for "public education" and "public schools." C.R.S. §§ 22-54-101, -102, -104(1)(a), §§ 22-55-101(1), -106(1)(b), § 22-1-101.

[6] A "public school" is defined as "a school that derives its support, in whole or in part, from moneys raised by a general state, county, or district tax." C.R.S. § 22-1-1-1(1). Conversely, a "private school" is a school that "does not receive state funding through the 'Public School Finance Act of 1994,' article 54 of this title, and that is supported in whole or in part by tuition payments or private donations." C.R.S. § 22-30.5-103(6.5).

districts under the Public School Finance Act must be used only to support free public education at public schools.

Plaintiffs first argue that the Scholarship Program runs contrary to the framers' intent of the "thorough and uniform" clause because participants of the Scholarship Program will not be enrolled in, be in attendance at, or receive instruction in a Douglas County public school. Plaintiffs further allege that the Scholarship Programs violates the requirement of Article IX, Section 2 that each child of school age has the opportunity to receive a free education. *See Lujan*, 649 P.2d at 1017.

The drafters of the Colorado Constitution charged the General Assembly with "the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." Colo. Const. art. IX, Section 2. According to the drafters, it is the "system of free public education" that must be thorough and uniform. *Id*. The Colorado Supreme Court affirmed this notion in *Lujan* by stating that "Article IX, Section 2 of the Colorado Constitution is satisfied if thorough and uniform educational opportunities are *available* through state action in each school district. *See id*. at 1025 (emphasis added).

Here, the Court is not persuaded that Plaintiffs have presented the Court with sufficient evidence to support their argument that the Scholarship Program is constitutionally invalid under Article IX, Section 2. While the Scholarship Program fails to comport with other Constitutional provisions, the Court finds that Plaintiffs have not provided sufficient evidence that the Scholarship Program prevents students from otherwise obtaining a free public education in Douglas County. Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 2, as it is not dispositive.

However, Plaintiffs also urge the Court to conclude that the Scholarship Program undermines the Public School Finance Act's funding balance, which seeks relatively "uniform" funding of education across the state.

The Public School Finance Act establishes a finance formula for "all school districts" in the state. C.R.S. § 22-54-102(1). Under the Act, the first step in Colorado public school funding is the determination of the "Total Program" amount for each school district. The amount "represents the financial base of support for public education in that district." C.R.S. § 22-54-104(1)(a). A district's Total Program is made available to the district by the state "to fund the costs of providing public education." *Id.* The Act directs that the formula "be used to calculate for each district an amount that represents the financial base of support for public education in that district" and that the monies "shall be available to the district to fund the costs of providing public education." C.R.S. § 22-54-104(1)(b).

The formula calculates the per pupil funding amount for each school district based on a statewide base funding amount adjusted by "factors" intended to address certain characteristics of each school district. *See* C.R.S. § 22-54-104. A district's Total Program funding is determined by multiplying the district's per pupil funding amount by the district's funded pupil count, and adjusting by specific statutory factors. *Id*.

"Funded pupil counts" are self-administered by school districts each year. Pursuant to Colorado regulations, "[a] district's pupil membership shall include only pupils enrolled in the district and in attendance in the district." 1 CCR § 301-39:2254-R-5.00. Local districts perform this pupil count each October 1 and report the numbers to the State Board and the Department of Education by November 10. 1 CCR § 301-391:2254-R-3.01.

A school district's funding under the Act depends on its pupil enrollment, which is generally defined as the number of pupils enrolled in the school district on October 1 of the applicable budget year. *See* C.R.S. §§ 22-54-103(7)(e) and (10)(a)(1); 1 CCR § 301-391:2254-R-3.01. For instance, the number of pupils enrolled on October 1, 2010, determines funding for the budget year beginning July 1, 2010. Because the fiscal year begins before the count date, funding under the Act is distributed based on estimated pupil counts. After October 1, once all enrolled pupils have been counted, funding under the Act is adjusted to reflect the actual count. *See* 1 CCR § 301-391:2254-R-3.01. This formula was corroborated by Ms. Emm at the injunction hearing.

Each school district's Total Program funding under the Act is composed of the "local share," which is mainly comprised of the proceeds of property taxes levied on the real property within the district's boundaries and the "state share," which is state funding and provides the difference between a district's Total Program and its local share. C.R.S. § 22-54-106. State aid provides the difference between a district's total program funding and the district's local share. *Id.* The state share is funded from state personal income, corporate, sales, and use taxes, as well as monies from the public school fund established by Article IX, Section 3 of the Colorado Constitution. *Id.*

The Colorado Department of Education distributes money to school districts in twelve approximately equal monthly payments beginning on July 1. Because the "funded pupil count" is not determined until October 1 and reported until November 10, in the first half of the fiscal year, the payments are based upon pupil count and assessed value estimates. *See* 1 CCR § 301-391:2254-R-3.01. For the 2011-2012 school year, Douglas County School District estimates that the local share of these funds will account for 33.14% of the per pupil funding for the Douglas County School District, while state sources will account for the remaining 66.86%. The school district estimates that the per pupil revenue from the state for the 2011-2012 school year will be roughly $6,100. This amount was confirmed by witnesses testifying on behalf of Defendants at the injunction hearing. Even though the scholarship recipients will not spend any amount of time in an instructional setting in a Douglas County public school, the witnesses testifying on behalf of Defendants confirmed that the Douglas County School District intends to obtain the full per pupil funding amount from the state for each scholarship student.

Here, the Court is persuaded by the overwhelming evidence in the record that the Scholarship Program fails to comport with the Public School Finance Act provisions which promote "uniform" funding of education across the state. The formula under the Act is predicated on each district counting the students it has enrolled in the "schools of the state," and then allocating state funding based on that public school count. The Scholarship Program, as presently constituted, effectively results in an increased share of public funds to the Douglas County School District rather than to other state school districts. The undisputed evidence and the testimony of Mr. Hammond, Dr. Cutter, Dr. Fagen, and Mr. Carson, all confirmed that the development of the Choice Charter School was devised specifically as a mechanism to obtain funding from the state and to circumvent any legal impediments the Scholarship Program might encounter. Dr. Cutter, Dr. Fagen, and Mr. Carson additionally acknowledged that the Choice Scholarship School has no building, no curriculum, and no books. Thus, the Court finds that the enactment of the Choice Scholarship School violates the Public School Finance Act funding balance and inappropriately taps resources from other Colorado school districts.

Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 2, as it is not dispositive. However, the Court does find that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits on their claim regarding the Public School Finance Act, Plaintiffs have demonstrated that the Scholarship

Program violates the Public School Finance Act, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

f. Article V, Section 34 of the Colorado Constitution

Plaintiffs argue that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution because the Scholarship Program provides taxpayer funds to sectarian institutions and to institutions not under absolute control of the state for nonpublic purposes. To the contrary, Defendants maintain that Article V, Section 34 is not applicable as the Scholarship Program does not utilize General Assembly appropriations and, even if the Scholarship Program did use General Assembly appropriations, the Scholarship Program would withstand constitutional challenge because it falls under the public purpose exception to the absolute control provision.

Article V, Section 34 of the Colorado Constitution states, in pertinent part, that:

> No appropriation shall be made for educational . . . purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

Colo. Const., art. IX, Section 34.

Defendants first argue that Article V, Section 34 does not use General Assembly appropriations, a proposition that is unsustained by the factual record before the Court. Despite Defendants' assertion, the undisputed evidence and testimony presented to the Court in this matter demonstrates that the Scholarship Program is indeed funded by state appropriations. During the injunction hearing, multiple witnesses testifying on behalf of Defendants admitted the Douglas County School District's intention to direct state funds to the participating Private School Partners. That the payment of state funds is made directly to the Private School Partners on behalf of the students does not change the character or origin of the funds. In fact, the uncontroverted evidence before the Court was that the parents of the participating scholarship recipient are required to sign over the check provided to the particular school by restrictive endorsement, thereby completing the somewhat circular process of paying state funds to the participating Private School Partners. Upon receiving the tuition payments, both Messrs. Gehrke and Bignell testified that their schools would use the payments to, among other things, support the school, carry out the school's mission, enhance chapel facilities, and pay down loans funded from other sectarian institutions. Unlike *Americans United,* where the college tuition-assistance program had preventative safeguards to monitor where the funds ultimately wind up, the Scholarship Program has no procedures or safeguards in place to prevent the tuition funds from being used to promote a Private School Partner's sectarian agenda.

In the alternative, Defendants contend that, even if General Assembly appropriations were utilized, the Scholarship Program falls within the "public purpose" exception to the absolute control provision set forth in *Americans United,* 648 P.2d at 1085 (quoting *Bedford* *v. White*, 106 P.2d 469, 476 (Colo. 1940)). The public purpose exception renders perceived constitutional infirmities a nullity if the asserted public purpose is "discrete and particularized" and clearly outweighs "any individual interests incidentally served by the statutory program" when measured against the proscription of Article V, Section 34. *See id.* at 1086.

However, the Scholarship Program at issue here is factually inapposite to the principles enunciated in *Americans United*. Through the testimony of Mr. Hammond, and the various school officials, the Scholarship Program appropriates taxpayer funds for private schools that are not under state control. The Scholarship Program, moreover, does not contain any of the prophylactic measures that led the Court in *Americans United* to find that the college tuition-assistance program satisfied the public purpose exception. In contrast to the college tuition-assistance program that was found to satisfy the public purpose exception in *Americans United*, the Scholarship Program here applies directly to "elementary and secondary education" and thus the risk of religion "intruding into the secular educational function" is significantly higher. *See id.* at 1084 (citations omitted).

The overwhelming undisputed evidence and testimony in the record, most notably the testimony of Messrs. Gehrke and Bignell, confirms that, not only is the risk of religion intruding into the secular educational function great, that risk is inevitable and unavoidable due to the very structure of the Scholarship Program. *See, e.g.,* March 7, 2011 (Ex. 87) ("[I]f a family wanted to opt out of religious instruction, they would have to prepare their child to bolt out of any class and I suspect that would occur frequently."). Students attending a sectarian Private School Partner under the Scholarship Program have no choice but to receive their education with the school's religious theories and theology embedded therein. This factual reality was corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke, Bignell, and Carson, as well as the Private School Partners' Scholarship Program applications. *See, supra,* ¶ 45. As detailed above, Dr. Cutter testified that the original plan for the Scholarship Program envisioned an "opt out" provision which would allow students to remove themselves from both religious services and instruction. However, Mr. Cutter testified, and the evidence reflects, that the Private School Partners thought that such a comprehensive "opt out" provision would be a "deal breaker." *See, e.g.*, March 7, 2011 Email (Ex. 87); March 8, 2011 Email (Ex. 88).

Thus, the totality of the evidence in the record dictates the Court's determination that the core principles implanted in the Scholarship Program are fundamentally at odds with the college tuition-assistance program and the Colorado Supreme Court's holding in *Americans United*. On that basis, the Court finds that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution.

Moreover, and perhaps more importantly, the Scholarship Program violates the blanket prohibition enumerated in Article V, Section 34 that forbids state funds from being provided to any denominational or sectarian institution or association. This clause, which was not considered in *Americans United*, reflects the conviction that sectarian interests are inherently private. The Court finds, and the record is unquestioned, that 19 of the 23 Private School Partners participating in the Scholarship Program are "denominational or sectarian institutions or associations" for the purposes of Article V, Section 34.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

g. Article IX, Section 3 of the Colorado Constitution

Plaintiffs contend that the Scholarship Program violates Article IX, Section 3 of the Colorado Constitution because the Scholarship "funnels" monies from the "public school fund" to private schools, rather than to "schools of the state."

Article IX, Section 3 directs, in pertinent part, that:

> The public school fund of the state shall . . . forever remain inviolate and intact and the interest and other income theron, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such a manner as may be prescribed by law. No part of this fund, principal, interest, or other income shall ever be transferred to any other fund, or used or

> appropriated, except as provided in this article IX.

Colo. Const., art. IX, Section 3.[7]

Article IX, Sections 3, 5, 9 and 10 of the Colorado Constitution established the "public school fund," which consists of the proceeds of lands granted to the state by the federal government upon statehood. In 1875, the United States Congress passed the Colorado Enabling Act authorizing the admission of Colorado as a state. *See* 18 Stat. 474 (7); *see also Lujan*, 649 P.2d at 1011. Section 7 of the Enabling Act granted the state title to two sections in every township within its boundaries "for the support of common schools." *Id*. This property is referred to as the "state school lands." Section 14 of the Enabling Act further specified that the state school lands: "[S]hall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools." 18 Stat. 474 (14). These provisions of the Enabling Act create a federal trust (the "school lands trust") for the sole and exclusive benefit of the Colorado state public schools.

The legislature additionally created the "public school fund" within the State Treasurer's office which,

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[7] Article IX, Section 3 was amended in 1996 by ballot initiative ("Amendment 16") to add, *inter alia*¸ the following language: Distributions of interest and other income for the benefit of public schools; provided for in this article IX shall be in addition to and not a substitute for other moneys appropriated by the general assembly for such purposes. Thus, Article IX, Section 3 defines "schools of the state" specifically as "public schools."

among other things, consists of the proceeds of the public school lands. Colo. Const. art. IX, Section 17(2)(a); C.R.S. § 22-41-101(2). Income held in the public school fund is transferred "periodically" to the "state public school fund" together with, *inter alia*, moneys appropriated by the General Assembly from the general fund to meet the state's share of the total program funding for all school districts under the Public School Finance Act. C.R.S. § 22-54-114(1).

The Colorado Supreme Court has previously noted that "income from the public school fund is owned by the state and is distributed as a gratuity to the various counties and school districts to supplement local taxation for school purposes" but such funds cannot be distributed in "contravention of constitutional mandates." *See Craig v. People*, 299 P. 1064, 1067 (Colo. 1931).

Generally, when interpreting constitutional and statutory provisions, courts seek to ascertain intent, starting with the plain language of the provision and giving the words their ordinary meaning. *See, e.g., Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005); *Lambert v. Ritter Inaugural Comm., Inc.*, 218 P.3d 1115, 1121 (Colo. App. 2009). Courts additionally interpret constitutional and statutory provisions as a whole and attempt to harmonize all of the contained provisions. *See id.*

According to H.B. 10-1376 (the "2010 Long Bill"), moneys from the "public school fund" account for more than $100 million in public school funding each year in Colorado. *See* H.B. 10-1376 (Ex. R.); *see also* State Def. Resp. at 19. By judicial admission, Defendants acknowledge that interest derived from the investment of the "public school fund" is credited to the "state public school fund," which provides an ongoing source of revenue for the state's share of the districts' total program funding and other educational programs. *Id*. As a result, the "public school fund" is, as Defendants noted, "one component" of public school funding in Colorado. *See id*. at 20. Mr. Hammond additionally testified at the injunction hearing that the state could "claw back" moneys that the state provides to Douglas County for the Scholarship Program students if the Scholarship Program were found to be improper.

Although Defendants allege that income for the "public school fund" accounts makeup an insignificant amount of public school funding, Defendants' argument misses the mark. Giving Article IX, Section 3 its plain and ordinary meaning, funds from the "public school fund," regardless of amount, must "forever remain inviolate" and can be disbursed only to public "schools of the state." Based on the 2010 Long Bill, the judicial admission by Defendants, and the testimony of Mr. Hammond, the undisputed facts confirm that, under the Scholarship Program, money from the "public school fund," which flows into total public school funding, will ultimately end up being disbursed to non-public schools in "contravention of constitutional mandate" as part of the Scholarship Program tuition payments. *See Craig*, 299 P. at 1067.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that that funds from the "public school fund" will be used, in part, to pay tuition to private schools, in violation of Article IX, Section 3 of the Colorado Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

h. Article IX, Section 15 of the Colorado Constitution

Plaintiffs allege that under the Scholarship Program, Defendants will violate the local control provision, Article IX, Section 15 of the Colorado Constitution by abdicating control over the instruction of participating students and sending locally raised funds and state funds outside the district.

Article IX, Section 15 of the Colorado Constitution provides

> The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.

Colo. Const. Art IX, Section 15.

Plaintiffs' argument that Defendants' alleged abdication of control over instruction of students in the Scholarship Program violates Article IX, Section 15 of the Colorado Constitution is an issue of first impression in Colorado. Plaintiffs ask the Court to distinguish the facts in this case to the other Colorado cases having already previously adjudicated this same provision.

Relying on *Owens v. Colo. Cong. of Parents,* where the Colorado Supreme Court rejected an unconstitutional state-wide school voucher program because the program directed school districts to turn over a portion of their locally-raised funds to nonpublic schools over whose instruction the districts had no control, Plaintiffs contend that the "local control" provision contained in Article IX, Section 15 of the Colorado Constitution requires that local school boards "have control of instruction in the public schools of their respective districts" and the "responsibility for the instruction of their students." *See* 92 P.3d 933, 938 (Colo. 2004). Relying on this statement, Plaintiffs contend that Defendants in this action have violated Article IX, Section 15 because the Douglas County School District exercises no control over the curricula, educational goals, hiring policies, or enrollment procedures of the Private School Partners.

As argued by Defendants, the primary case law in this area focuses on interactions between local districts and the state. These cases generally discuss whether the state has excessively encroached into the local control of a district. In light of the Scholarship Program's inability to overcome constitutional muster on other grounds, the Court is not now inclined to undertake Plaintiffs' position that is unsupported by any case law in Colorado.

Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 15 of the Colorado Constitution as it is not dispositive of the issues in dispute.

i. The Contracting Statute, Colorado Revised Statute, Section 22-32-122

Finally, Defendants contend that the Scholarship Program is authorized under C.R.S. § 22-32-122 (the "Contracting Statute") which allows school districts to contract for "educational services." *See* C.R.S. § 22-32-122. More specifically, Defendants assert that the Contracting Statute grants school districts the broad authority to contract with private schools for the provision of a public education to public school students. The Court finds that this interpretation is exceedingly broad and inconsistent with the underlying legislative intent of this statute.

The Contracting Statute states, in pertinent part, that:

> Any school district has the power to contract with another district or with the governing body of a state college or university, with the tribal corporation of any Indian tribe or nation, with any federal agency or officer or any county, city, or city and county, or with any natural person, body corporate, or association for the performance of any service, including educational service, activity, or undertaking which any school may be authorized by law to perform or undertake . . . . Any state or federal financial assistance which shall accrue to a contracting school district, if said district were to perform such service, including educational service, activity, or undertaking individually, shall, if the state board finds the service, including educational service, activity, or undertaking

> is of comparable quality and meets the same requirements and standards as would be necessary if performed by a school district, be apportioned by the state board of education on the basis of the contractual obligations and paid separately to each contracting school district in the manner prescribed by law.

C.R.S. § 22-32-122.

If a statute is ambiguous, courts may determine the intent of the General Assembly by considering the statute's legislative history and the problem intended to be addressed by the legislation. *See Rowe v. People,* 856 P.2d 486 (Colo. 1993). Here, Defendants argue that the General Assembly amended the Contracting Statute to specifically authorize local school boards to contract with private schools to provide educational services. *See* H.B. 93-1118. Defendants contend that H.B. 93-1118 was drafted by the Colorado House of Representatives to overturn an opinion of the Attorney General's Office that prohibited state funding of public school students who attended private schools.

A review of the legislative history provides clarity on this issue. Although the original House version of H.B. 93-1118 sought to allow such outsourcing to private schools for educational services, the Senate felt that the House bill had "really taken a wrong turn" and revised its language significantly. *See* Trans. of Senate 2nd Reading, 46:13-19; Versions of H.B. 1193. When asked if the revised bill would allow a school district to enroll public school students in private schools and "count them" in the school district's enrolled student count for funding, Senator Dottie

Wham (R-Denver), the sponsor of the bill, stated: "It does not do that anymore. Or allow it. *As the language in the law does not allow it*." *Id*. at 47:22-23 (emphasis added). Senator Wham additionally affirmed Senator Tebedo's (R-Colorado Springs) comment that "if the kids want to go to the private school, they can, but [the school districts are] not going to get to keep their enrollment count." *Id*. at 48:3-4.

Thus, the legislative history of the Contracting Statute compels the conclusion, and the Court finds, that the final version of the Contracting Statute does not confer upon a public school or school board the broad authority, as Defendants suggest, to exclusively contract with a private school to provide *all* educational services rendered to select students. Rather, the legislative history confirms that the General Assembly intended that the Contracting Statute implemented into law would merely allow school districts to contract for particular educational services not offered by the public schools, such as foreign-language instruction. *See* Trans. of Senate 2nd Reading, 47:8-13.

In a further effort to bolster its viability, Defendants attempt to align the Scholarship Program with other statutory schemes that appropriately apply the provisions of the Contracting Statute, e.g., *inter alia*, the Colorado Preschool Program, C.R.S. §§ 22-28-101, *et seq*.; the Exceptional Children's Educational Act, C.R.S. §§ 22-20-101, *et seq*.; the Gifted and Talented Students Act, C.R.S. § 22-26-101, *et seq*., and the Concurrent Enrollment Programs, C.R.S. §§ 22-35-101, *et. seq*. Each of these unique or specialized programs, however, are factually disparate from the

Scholarship Program Defendants have implemented here. Each of these comparative programs is limited in scope and narrowly tailored to a specific educational issue or concern thereby comporting with the Contracting Statute which grants school district's the authority to contract with private entities for educational services.

The Court is not persuaded by Defendants' sweeping generalization that enjoining the Scholarship Program will put these programs in jeopardy. The Court finds that these statutorily enacted programs are factually and legally dissimilar to the Scholarship Program at issue here. Accordingly, the Court will not delve into the merits of Defendants' argument comparing the Scholarship Program to other statutorily created programs. The Court finds that the dissimilarities between these programs and the Scholarship Program are sufficiently significant so as not to place these other statutory schemes at risk of legal challenge or rendering them constitutionally infirm.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Contracting Statute does not permit school districts the broad authority to contract with private schools for the provision of a public education to public school students, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

WHEREFORE, in light of the reasoning above, Plaintiffs' Motions for Preliminary Injunction are GRANTED.

IV. Order

WHEREFORE, based on the above findings of fact and conclusions of law, Defendants' Motion to Dismiss is DENIED and Plaintiffs' Motions for Preliminary Injunction are hereby GRANTED and hereby made permanent.

Dated this 12th day of August, 2011.

BY THE COURT:
s/Michael A. Martinez
MICHAEL A MARTINEZ
District Court Judge

Appendix D

U.S. CONST. AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix E

U.S. CONST. AMEND. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Appendix F

COLO. CONST. ART IX, § 7

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, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.