

1 Mr. Douglas.

2 MR. HALL: Thank you, Your Honor. Your
3 Honor, I'll discuss the merits of the claims, and then
4 Mr. Lyons will speak, and Mr. Bindas.

5 THE COURT: Do you have a plan on how
6 you want to divide your time, Mr. Hall?

7 MR. HALL: I'm going to take about 15
8 minutes. And then they're going to take less than
9 that.

10 THE COURT: Go ahead.

11 MR. HALL: Thank you. The Choice
12 Scholarship Program provides yet another educational
13 choice to families in Douglas County. Parents may
14 choose from this option or an array of other options.

15 If they choose it, and if they receive a
16 scholarship, then they have a further choice. They
17 may choose from among the partner schools.

18 Receiving a scholarship is in no way
19 contingent upon a child being accepted into a private
20 school. Dr. Fagen testified to this directly in
21 response to your question, Your Honor. She's been
22 charged with implementing this program by the board.
23 She also testified that the program is religiously
24 neutral. And in all material respects, the program is
25 identical to the numerous programs for education in

1 Colorado from pre-K to higher ed. You heard testified
2 during this three-day hearing. All of these programs
3 like the Choice Scholarship Program are religiously
4 neutral and have government money flowing to religious
5 and non-religious organizations.

6 Plaintiffs have from time to time tried
7 to distinguish a few of these programs, but their
8 distinctions are empty. For if article 2, section 4
9 means, as plaintiffs suggest, that no taxpayer
10 dollar -- no taxpayer shall be required to pay taxes
11 that eventually end up supporting a ministry, then all
12 of these programs violate this provision.

13 Likewise, if article 9, section 7 means
14 that no governmental body may ever pay anything that
15 results in aid to a church, then all these programs
16 must come off the books. That these programs remain
17 on the books strongly suggests that the plaintiffs'
18 interpretation of them is incorrect.

19 Both parties agree that Americans United
20 is the most closely analogous Colorado case regarding
21 the religion clauses. Americans United time after
22 time after time noted that the state grants in that
23 case were designed to aid the student. And as a
24 result, any aid to Regis College was only incidental
25 and an irrelevant by-product.

1 In the language of article 9, section 7,
2 the state funds were not in aid of Regis College.
3 They were in aid of the student.

4 Now, plaintiffs try and work with
5 Americans United by relying on these other factors.
6 Those factors in Americans United are attributable to
7 two interrelated things. First, in writing the state
8 aid statutes at issue in that case, the legislature
9 was relying on United States Supreme Court precedent
10 at that time. It's right up front at the outset of
11 the opinion.

12 The court says, on the beginning of page
13 1075, quote, in an attempt to conform to First
14 Amendment doctrine developed by the United States
15 Supreme Court, the statutory grant program expressly
16 excludes the institutions which are, quote, sectarian
17 and theological. End quote.

18 To underscore this same point, in the
19 middle of that sentence, the court drops the footnote,
20 footnote 1, and gives a long discussion of legislative
21 history, including a quote from the latest sponsor.
22 And that quote is, "We do have some recent Supreme
23 Court decisions on this particular question."

24 And the key words are pervasively
25 sectarian. The Americans United court then discusses

1 *S the six pervasive sectarian factors from the
2 statutes at issue in that case. Again and again, it
3 draws on those factors throughout its opinion.

4 The second piece that generates these
5 other factors that plaintiffs rely on is the Americans
6 United court itself relied on U.S. Supreme Court
7 precedent at that time. Hence, there's a long
8 discussion about statute clause in cases like Romer
9 and Tilton and Hunt. These two things explain the
10 other factors plaintiffs would like you to rely on.

11 However, now in 2011, the foundations for
12 these other factors have completely disappeared. As
13 I'll discuss in a minute, First Amendment
14 jurisprudence in the school area moved on to Mueller,
15 Witters, Zavrilla, and most importantly Zelman.

16 Second, the 10th Circuit in Colorado
17 University expressly overruled the pervasive sectarian
18 statutes and approach on which these other factors
19 were based. Indeed, the 10th Circuit found that such
20 inquiries into a school's religious views both
21 constitutionally unnecessary and offensive. The 10th
22 Circuit wrote, quote, the First Amendment does not
23 permit government officials to sit as judges of the
24 indoctrination quotient of theology classes.

25 These points I'm making now about these

1 other factors in Americans United are not mine.
2 They're a mere summary of what the 10th Circuit talks
3 about in Colorado christian. The principles that
4 remain from Americans United are government neutrality
5 and student choice. And the Choice Scholarship
6 Program embodies both of them.

7 Now, note further that when Americans
8 United looked to the closest First Amendment
9 precedent, that was not unique under Colorado law.
10 Far from it. Rather, in every Colorado appellate
11 court case interpreting our state's religion clauses,
12 our courts have looked to the closest federal
13 precedent and interpreted our religion clauses in
14 harmony with the First Amendment. The cases,
15 Zavrilla, Young life, Conrad 1, Conrad 2, Freedom From
16 Religion Foundation and Americans United, just to name
17 a few, all take this approach.

18 Now, plaintiffs ask you to disregard this
19 precedent and strike out in a new direction. That new
20 direction takes you into the Blaine thicket. You
21 heard the testimony today from Professor Glenn,
22 anti-Catholic and anti-immigrant, bias has left a
23 stain on our constitutional history, which our courts
24 up to now have not followed.

25 And rather than follow the plaintiffs

1 into that unchartered territory, this court should
2 follow Colorado precedent, and that means looking to
3 Zelman. There the United States Supreme Court
4 addressed a materially indistinguishable elementary
5 and secondary school Choice Program. The Zelman court
6 upheld that Ohio program, because there is no
7 constitutional bar to, quote, neutral government
8 programs that provide aid directly to a broad class of
9 individuals who, in turn, direct the aid to religious
10 schools or institutions of their own choosing. Close
11 quote.

12 Similarly, when, quote, parents are the
13 ones to select a religious school as the best learning
14 environment for their child, the circuit between
15 government and religion is broken.

16 The payment mechanism in Zelman, like the
17 Choice Scholarship Program, is to make the checks
18 payable to the parents, who then endorse them over to
19 the chosen school. The point of that whole exercise
20 is parent choice. It's the parents that are making
21 the choice.

22 Zelman is also instructed on the facts.
23 For instance, in Zelman, 96 percent of students
24 attended religiously affiliated schools. The court
25 found this fact constitutionally irrelevant, saying,

1 quote, the constitutionality of a neutral educational
2 aid program simply does not turn on whether and why in
3 a particular area at a particular time most private
4 schools are run by religious organizations or most
5 recipients choose to use the aid at a religious
6 school. Close quote.

7 I'll make one more point on the religion
8 clauses. It's about article 9, section 8. It forbids
9 imposing religious tests as a condition of admission
10 into any public school.

11 Again, Your Honor asked this question
12 directly to Dr. Fagen: Does Choice Scholarship
13 Program do that? And she answered directly, no, it
14 doesn't. A student may receive a scholarship without
15 regard to religion and without regard to being
16 admitted to any of the schools.

17 And you heard the testimony clearly from
18 both Mr. Carson and Dr. Fagen that she was directed by
19 the board to implement this program.

20 Article 9, section 8 also forbids public
21 schools from requiring attendance or participation in
22 religious services or teaching sectarian tenets.
23 Neither the Choice Scholarship school nor any other
24 public school in Douglas County does either of these
25 things. It does not require attendance at religious

1 services, and neither is it teaching any sectarian
2 tenets. Religious partner schools do these things if
3 a student chooses them. And the evidence is
4 undisputed that the partners are private schools, and
5 that students may choose these things if they want to.

6 The evidence has been clear throughout
7 that there's no compulsion sending any of these
8 children to any religious schools.

9 Now to turn to the school finance control
10 provisions. I want to begin with article 9, section
11 2. The language that plaintiffs put up in opening in
12 the PowerPoint says this: The general assembly shall
13 provide for the establishment and maintenance of a
14 thorough and uniform system of free public schools.

15 Note that 9.2's actor is the general
16 assembly. It is the one that owes a duty to maintain
17 a thorough and uniform system of free public schools.

18 Plaintiffs have repeatedly tried to
19 conflate this duty of the legislature with not even a
20 local school district but with one individual school
21 program, the Choice Scholarship Program. They argued,
22 in essence, that since the scholarship program isn't
23 comprehensive in every way they could imagine, it
24 wasn't thorough. And again, the duty is about
25 maintenance of a school system, not one school

1 program.

2 The testimony has been that Douglas
3 County has over 80 traditional public schools, 11
4 charter schools, two online schools, among other
5 options. The Choice Scholarship Program is simply one
6 more choice. If it has any effect on Douglas County
7 schools as a whole, it benefits them.

8 Now, it just so happens, as this court
9 well knows, that genuine article 9, section 2
10 litigation is happening down the hall in the Lobato
11 case. There there are proper plaintiffs talking about
12 whether the general assembly has fulfilled its duty to
13 provide a thorough, uniform system of free public
14 schools. This is not a 9.2 case.

15 If parents want to choose a scholarship
16 program, they can, like other options they can choose.

17 Article 9, section 3. First, we maintain
18 plaintiffs lack standing to bring this claim. On the
19 merits, 9.3 is fundamentally about protecting the
20 statewide Public School Fund from raiding by the
21 general assembly when statewide the entire text of
22 9.3, which is somewhat long, makes that clear.

23 Also, the enabling statute contemplated
24 in 9.3, 22-41-101 and following, if you read that,
25 that also makes clear that what this is about is

1 making sure that funds aren't diverted from the Public
2 School Fund to other parts of the state budget.

3 There is nothing that prohibits districts
4 from spending this money to purchase services from
5 private entities, including private schools. Once
6 distributed to districts, school districts have the
7 discretion, under the Public School Finance Act,
8 22.54-104-1 A to spend the moneys as they wish, *S
9 including paying private schools.

10 And we looked at numerous statutes where
11 this happens again and again and again. If plaintiffs
12 are correct about the interpretation of 9.3, all of
13 those statutes must come off the books.

14 Even if plaintiffs' unprecedented
15 traceability argument about somehow interest from this
16 fund was actually quite small, less than 2 percent,
17 makes its way to a private school, there's
18 unconstitutional action, recall, the percentage is *S
19 less than 2 percent. That was the testimony. Douglas
20 County holds back 25 percent of the funds.

21 Legislation must be presumed
22 constitutional and, therefore, it must be presumed, if
23 we're going to go down this road, that that tiny
24 fraction of the moneys is withheld within the 25
25 percent.

1 Which brings us to article 9, section 15,
2 local control provision. The cases in this area do
3 just two things. First, local school districts are
4 the actors primarily responsible for providing
5 education to children. Lujan, Owens, Booth, and many
6 other cases emphasize that education initiatives are
7 to come from the bottom up in Colorado. We heard the
8 commissioner of education testify to that effect.

9 Local school boards elected by local
10 voters have the constitutional authority and
11 responsibility, under article 9, section 15, to
12 develop programs to educate children.

13 The second thing these cases teach us is
14 that the tension in this area is between local school
15 districts and the state. 9.15 cases are about whether
16 the state has encroached too far into local control.
17 Plaintiffs offer another novel theory or
18 interpretation of 9.15 calling it abdication of
19 authority. But this is wrong for at least four
20 reasons. First, no case law supports it.

21 Second, plaintiffs' theory is exactly
22 backwards. Douglas County has absolute control over
23 this program. Douglas County school choice task force
24 developed it. The Douglas County administration
25 refined it. The Douglas County board adopted it it.

1 The Douglas County board may amend the policy *S at
2 any time. This is total control, not an abdication of
3 control.

4 Third, Dr. Fagen testified that Douglas
5 County has at least equivalent, if not greater,
6 control over the partner schools than over charter
7 schools. In both cases, charter schools and partner
8 schools, the district decides who to partner with. In
9 both cases, districts have a contract with those
10 schools. In both cases, the districts hold the
11 schools accountable to achieving at least as good or
12 better educational results as traditional schools. If
13 not, the districts have the authority to terminate the
14 relationship.

15 Fourth, Colorado cases make this point
16 even stronger. The Supreme Court in Booth held that
17 the state board may require a school district to
18 negotiate with a charter applicant until a charter
19 school is created. And the court of appeals in
20 Boulder Valley said that the state can create another
21 system of schools, charter schools authorized by a
22 state charter authority, without a 9.15 violation.

23 If the state can require districts to
24 accept charter schools on terms not set by the schools
25 themselves -- not set by the districts themselves,

1 then it cannot be a violation of 9.15 if a district
2 creates its own program and puts in place control
3 mechanisms at least as strong as with charters.

4 Your Honor, I'll end with this principle
5 of local control, because this case is the embodiment
6 of local control. Douglas County took the Owens
7 decision to heart. There is no constitutional nor
8 statutory impediment for the Choice Scholarship
9 Program. Plaintiffs cannot carry their burden on the
10 merits.

11 THE COURT: Thank you, Mr. Hall.
12 Mr. Lyons.

13 MR. LYONS: Thank you Your Honor. I'm
14 going to pick up with the other Rathke standards and
15 move forward from there, because, as the court knows,
16 all of the Rathke standards must be satisfied in order
17 for this court to enter an injunction.

18 Let's take irreparable injury. The
19 plaintiffs have presented no evidence whatsoever of
20 irreparable injury to the individual plaintiffs, let
21 alone to the organizations for plaintiffs in this
22 case, other than a generalized interest in
23 constitutional issues. That's insufficient as a
24 matter of law.

25 You have to find next that these