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| COLORADO COURT OF APPEALS<br>101 W. Colfax, Suite 800, Denver, CO 80203<br><br>Appeal from District Court, Denver County, Colorado<br>District Court Judge Michael A. Martinez<br>Case No. 2011CV4424 *consolidated with* 2011CV4427 | |
| **Defendants-Appellants:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION<br>**and**<br>**Defendants-Appellants:** COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION<br>**and**<br>**Intervenors-Appellants:** FLORENCE AND DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANA AND MARK OAKLEY, on their own behalf and as next friends of their child NATHANIEL; and JEANETTE STROHM-ANDERSON and MARK ANDERSON, on their own behalf and as next friends of their child, MAX<br>**v.**<br>**Plaintiffs-Appellees:** JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON<br>**and**<br>**Plaintiffs-Appellees:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child. | ▲ COURT USE ONLY ▲<br><br>Case Number: 2011CA1856<br>2011CA1857 |
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# OPENING BRIEF FOR DOUGLAS COUNTY SCHOOL DISTRICT AND BOARD OF EDUCATION

## CERTIFICATE OF COMPLIANCE

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

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/s/ *Eric V. Hall*
Eric V. Hall

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## STATEMENT OF ISSUES

I. Did the trial court err in holding Plaintiffs had standing to assert violations of the Public School Finance Act of 1994, C.R.S. § 22-54-101 *et seq.*?

II. Did the trial court err in holding the Choice Scholarship Program violated the Public School Finance Act?

III. Did the trial court err in holding the Choice Scholarship Program violated Article V § 34 (the Anti-Appropriation Clause) of the Colorado Constitution?

IV. Did the trial court err in holding the Choice Scholarship Program violated Article IX § 3 (the Public School Trust Fund Clause) of the Colorado Constitution?

V. Did the trial court err in its interpretation of the Contract Schools Statute, C.R.S. § 22-32-122?

VI. Did the trial court err by, among other things, violating the First Amendment when it concluded the Choice Scholarship Program did not satisfy Article II § 4 and Article IX §§ 7 and 8 (the Religion Clauses) of the Colorado Constitution?

VII. Did the trial court err by ignoring the unchallenged legislative history on Colorado's "Blaine Amendments," which demonstrated they were enacted out of religious bigotry?

Given the number and complexity of the issues presented, the Defendants-Appellants have divided briefing between them. Namely, the State Defendants are briefing Issues I-V and the District Defendants are briefing Issues VI-VII. The District Defendants incorporate by reference the other appellants' briefs.

## STATEMENT OF THE CASE

This appeal arises from the Denver District Court's erroneous determination that the Choice Scholarship Program ("CSP" or "Program"), adopted unanimously by the Douglas County School Board on March 15, 2011, violates the Colorado Constitution and the Colorado School Finance Act.[1] This determination was made after a three-day preliminary injunction hearing in an action instituted by persons and groups without standing to bring the Finance Act claim and for which venue was improper. The court below entered a permanent injunction, upon less than the required notice, from which this appeal is taken.

The trial court reached its erroneous result by fundamentally misapplying *Americans United for Separation of Church and State Fund v. Colorado* and relying on obsolete legal concepts that courts have since disavowed, most explicitly in *Colorado Christian University v. Weaver*. Properly understood, *Americans United* stands for the proposition that a neutral government program of genuine private choice, like the CSP, does not amount to aid to religious organizations, even if public funds indirectly reach those organizations. This core holding of *Americans United* was later endorsed by the United States Supreme Court in *Zelman v. Simmons-Harris* and is the law of the land.

[1] The trial court's Order is attached as Addendum 1, while the CSP Policy is attached as Addendum 2.

This Court should construe *Americans United* to avoid the federal constitutional defects created by the trial court's imposition of a religious litmus test on an otherwise neutral school choice program. Faithful adherence to *Americans United* also avoids the constitutionally problematic elements of the Colorado Constitution known as the "Blaine Amendments." As the uncontroverted legislative history presented in this case demonstrates, these amendments were squarely aimed at Catholic schools and other groups deemed to be outside the nineteenth century mainstream. This Court should not breathe life into the invidious discrimination embodied by these provisions.

Furthermore, the effect of the trial court's decision is that Colorado's Religion Clauses require – rather than forbid – religious discrimination. Namely, the trial court struck down the CSP only after it concluded some partner schools offered what the trial court pejoratively called "religious indoctrination."

Imposing such a religious litmus test does violence to our most deeply held constitutional values of religious freedom. This precious freedom is protected by the twin principles that, first, government may not discriminate between religious groups – *e.g.*, preferring the less religious over the more religious – and, second, government may not inquire into the quantity or quality of religious instruction. The trial court violated both these principles, and by doing so, its Order not only

makes a mockery of Colorado's Religion Clauses, it also patently violates the First Amendment.

Finally, the trial court repeatedly ignored the manifest weight of the evidence in making key findings of fact when, in fact, the record either shows the contrary or no evidence at all.

As more fully discussed below, each of these flaws warrant reversal and dissolution of the injunction.

## STATEMENT OF THE FACTS

### A. Origin, Development and Implementation of the Program

Beginning in June 2010, Douglas County convened a series of regular and public meetings by its School Choice Task Force to develop a host of school choice initiatives. [Vol.2 592:8-17.] The Task Force divided into subcommittees to discuss seven discrete areas of school choice: charter schools, contract schools, home education, neighborhood schools, online education, open enrollment, and the Choice Scholarship Program. [Vol.2 592:23-593:6.] This effort aligned with the District's overarching policy of "universal choice," which means creating "multiple pathways for educational success" and then assisting families to select the best educational program for their child. [Vol.2 491:17-493:15; 591:25-592:4.]

During the winter months of 2010-11, the CSP was widely publicized, and both opponents and proponents voiced their opinions at public meetings, in the media, through email, and in formal letters. [Vol.2 595:10-596:5.] For instance, Plaintiff Cindra Barnard made several formal presentations in opposition at town hall meetings February 22-24. [Vol.1 79:19.]

On March 15, the Board formally adopted the Program and directed Superintendent Elizabeth Celania-Fagen to implement it so that it would be operational for the 2011-12 school year. [Policy ¶C.2; Vol.2 597:3; 599:20-22.] As a pilot program, the Board, the Superintendent, and her administration recognized that modifications would have to be made along the way. [Vol.1 240:1-2; Vol.2 365:16-18; 512:18-21; 516:8-10.] Accordingly, the Board expressly delegated to the Superintendent and her administration the authority to make the necessary changes so that the Program could be implemented successfully. [Vol.2 516:20-22; 624:12-22.]

## B. The Choice Scholarship Program

The Choice Scholarship Program adds another educational option for Douglas County families. [Policy ¶A.2.] Any Douglas County family may continue to attend their neighborhood school, or they may choose a charter school, home education, online education, open enrollment, magnet school, or the CSP. The CSP

is but one of about 30 strategies for improving educational choice in the District. [Vol.2 494:22-495:1; Order at 2 ¶3.] If a family is eligible and receives a scholarship, then the parents have a further choice as to the partner school in which to enroll their child. [Policy ¶D.1-2; Order at 3 ¶8.] Scholarships are worth the lesser of either the private school's actual tuition or 75% of the per pupil revenue ("PPR") received by the District for each student (estimated at $6,100); thus, by the latter calculation scholarships were worth $4,575 for 2011-12. [Policy ¶C.6; Order at 3 ¶9.] The District retains the remaining 25%. [*Id.*]

Private schools also have a choice as to whether to apply for the Program. If they apply, they must meet twelve conditions of eligibility. [Policy ¶E.3.] These are safeguards to ensure private schools deliver "student achievement and growth results . . . at least as strong as what District neighborhood and charter schools produce." [Policy ¶E.3.a.] These safeguards address every aspect of school performance, such as the educational program, financial stability, safety, student discipline, assessments (*i.e.*, CSAPs or their equivalent), and non-discrimination. [Policy ¶E.3.] The Superintendent testified that if a partner school were to discriminate against a protected class, the District would terminate that school's contract. [Vol.2 512:7-14.] The Policy provides for ongoing District oversight, and the District has a host of measures with which to ensure performance, including the

power to terminate the contract of any non-performing school. [Policy ¶¶C.5, E.3, E.9; Vol.2 567:3-12.]

The purposes of the Choice 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 DCSD educational spending." [Policy ¶A.3; Order at 3 ¶8.]

The Program is neutral toward religion. "The District in no way promotes one Private School Partner over another, religious or nonreligious." [Policy ¶A.9; Vol.2 361:7; 598:10-20.] "Nonpublic schools shall be eligible without regard to religion. The focus of the Choice Scholarship is not on the character of the Private School Partner but on whether that school can meet its responsibilities under this Policy and its Contract with the District." [Policy ¶E.2.c.] The trial court found "the purpose of the program is to aid students and parents, not sectarian institutions." [Order at 39; *see also id.* at 44 (same).]

### C. The CSP Fits Within the Larger Context of School Choice in Colorado

The CSP is compatible with numerous public-private partnerships throughout the Colorado education system, from pre-Kindergarten through higher education. As discussed at length in the State's Brief (at 5-13), there are dozens of such partnerships, including those whose funding source is the Public School

Finance Act and those that include both secular and religious schools and colleges. [Vol.2 458:9-462:10; 471:16-472:10.]

For instance, the College Opportunity Fund ("COF") provides stipends for Colorado undergraduate students to attend any Colorado institution of higher education, including religious ones like Colorado Christian University or Regis University. C.R.S. § 23-18-102 & -201. [Vol.3 753:24-755:23.] In addition, Colorado permits school districts to purchase educational services from private schools, including operating an entire school. C.R.S. § 22-32-122(1). [Vol.3 757:17-759:5.] These are commonly called "contract schools," and, like the CSP, contract school students can be seen as having dual enrollment – enrolled in the district for funding purposes but also enrolled in the contract school itself, where they receive day-to-day instruction. [Vol.2 459:5-10]. Moreover, charter schools are permitted to purchase services from educational service providers ("ESPs"), which are private entities that typically provide a complete educational and operational package to charter schools – curriculum, supplies, building, employees, accounting, everything (except the governing board). C.R.S. § 22-30.5-104(7)(a) & (b). [Vol.3 750:16-753:21.] Students have dual enrollment in ESP charter schools, as well; they enroll in the school for funding purposes, but they attend the

educational program provided by the ESP. [*Id.*; *see also* Vol.3 750:1-15 (describing dual enrollment at early-college charter school).]

The trial court remarked there were "significant differences" between the numerous public-private partnerships already functioning in Colorado and the CSP, but it never explained what these differences actually were. [Order at 29, 67.] The trial court's Order implicitly overrules all of them.

## SUMMARY OF THE ARGUMENT

The Colorado Constitution contains three religion clauses: Article II § 4 and Article IX §§ 7 and 8.[2] The Colorado Supreme Court in *Americans United for Separation of Church and State Fund v. Colorado*, 648 P.2d 1072 (Colo. 1982), addressed two of the three, Article II § 4 and Article IX § 7, when it upheld public funds flowing indirectly to religious colleges and universities under an indistinguishable state grant program.

[2] While some put Article V § 34 under this heading, most cases and commentators refer to it as the "Anti-Appropriations Clause" because it prohibits legislative appropriations from being used for an exclusively private purpose, regardless whether the purpose is secular or religious. *See In re Interrogatory Propounded by Governor Roy Romer*, 814 P.2d 875, 883-84 (Colo. 1991); Dale A. Oesterle and Richard B. Collins, THE COLORADO STATE CONSTITUTION, A REFERENCE GUIDE 138 (2002). The State's Brief (at 35-42) explains that the CSP does not violate Article V § 34 because this provision restricts state legislative power only (and thus does not apply to school districts) and the public purpose exception applies.

In its interpretation of II § 4 and IX § 7, the trial court fundamentally erred. It misapplied the text and purposes of these provisions and failed to faithfully apply key precedent, in particular *Americans United*. It also deviated from the unbroken jurisprudential principle of following the most analogous federal precedent when interpreting Colorado's Religion Clauses. Here, that deviation meant ignoring *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which the United States Supreme Court upheld a similar scholarship program by applying the same rationale the Colorado Supreme Court used in *Americans United*. In addition, the trial court failed to properly consider *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) and the United States Supreme Court cases on which it relied. In *Colorado Christian University*, the Tenth Circuit held that a state aid program cannot discriminate between "pervasively sectarian" institutions that "indoctrinate" and other religious institutions. Disregarding this directly-applicable federal precedent, the trial court engaged in an unconstitutional inquiry into whether religious private schools purportedly "indoctrinate" their students. In sum, the trial court's analysis of Article II § 4 and IX § 7 is deeply mistaken and must be reversed.

The trial court also erred repeatedly in its analysis of Article IX § 8. It wholly ignored long-standing Colorado law to apply the first sentence of IX § 8 to

the CSP, when that sentence applies only to state higher educational institutions. Moreover, it overlooked the controlling evidence about enrollment in the CSP being available to all students, instead focusing on one mistaken statement in an application, which the Superintendent testified she could and would fix with the stroke of her pen. Most fundamentally, the trial court completely overlooked the fact that the CSP is *a voluntary program*. By definition, there cannot be any compelled attendance at religious services or compelled religious instruction. Without compulsion, there can be no violation of Article IX § 8.

Finally, the trial court brushed aside the unrebutted evidence about the disgraceful legislative history of the portions of the Colorado Religion Clauses that expressly discriminate against religious "sects." Rather than confront the constitutional implications of this evidence, it blithely passed over it.

In sum, throughout the trial court's misguided analysis on all three Religion Clauses, it strayed both from the text and binding Colorado precedents interpreting that text. The trial court made factual findings diametrically opposed to the evidence. Its Order must be reversed.

## ARGUMENT

## STANDARD OF REVIEW

The interpretation of constitutional provisions is a question of law reviewed *de novo*. *Danielson v. Dennis*, 139 P.3d 688, 690-91 (Colo. 2006). A trial court's factual findings may be set aside when they are so clearly erroneous as to find no support in the record. *People ex rel. A.J.L.*, 243 P.3d 244, 250 (Colo. 2010).

## I. THE TRIAL COURT ERRED IN ITS ANALYSIS OF ARTICLE II § 4 AND *AMERICANS UNITED*

The trial court concluded the CSP violates the "no compelled support" clause of Article II § 4 by compelling taxpayers to support religious schools. [Order at 43-45.] The trial court's analysis is mistaken for three basic reasons. First, it failed to examine the text and purposes of Article II § 4. Second, it misconstrued *Americans United* and wholly failed to consider any other precedent, state or federal. Third, it violated the First Amendment by distinguishing between religious institutions based on whether or not they are purportedly "indoctrinating" students. A proper analysis of Article II § 4 mandates upholding the CSP.

### A. The Text and Purposes of Article II § 4 Require Upholding the Choice Scholarship Program.

Article II § 4 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.

Article II § 4 contains six clauses. The first and third are affirmative duties, guaranteeing free religious exercise and liberty of conscience (subject to certain limitations). The other four are negative prohibitions. Together they provide the textual foundation for two of the three central purposes of Article II § 4, namely, that government must, first, affirmatively accommodate religious exercise and, second, adopt an attitude of benevolent neutrality toward religion. "The Constitution does not require complete separation of church and state: It affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1020 (Colo. 1995) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)). "[T]he proper attitude of government toward religion [is] one of 'benevolent neutrality.'" *Young Life v. Div. of Employment and Training*, 650 P.2d 515, 520 (Colo. 1982).

Accordingly, Article II § 4 directs governmental bodies affirmatively to accommodate the free exercise of religion while maintaining strict constitutional neutrality, *i.e.*, government should make room for religious people and organizations to practice religion while neither favoring nor disfavoring religion generally or particular denominations. *Americans United*, 648 P.2d at 1081-82; *Conrad v. City and County of Denver*, 656 P.2d 662, 670-71 (Colo. 1982) ("*Conrad I*"). Resting on these bedrock constitutional principles, the Colorado Supreme Court upheld taxpayer funds flowing to Regis College, a private Jesuit institution, in *Americans United*, 648 P.2d at 1082; approved the placement of a monument of the Ten Commandments in Lincoln Park, *Freedom from Religion Found.*, 898 P.2d at 1025-26; and allowed Denver's purchase and display of a nativity scene on the steps of the Denver City and County Building, *Conrad v. City and County of Denver*, 724 P.2d 1309, 1317 (Colo. 1986) ("*Conrad II*"). The CSP falls squarely in this tradition: it permits families to select a religious school *if they choose*, and it permits religious private schools to participate in the CSP *if* they can satisfy the twelve neutral eligibility criteria. [*See* Policy ¶E.2.c & ¶E.3.]

The third overarching purpose of Article II § 4 is preventing the establishment of a "state church." The Colorado Supreme Court in *Americans United* explained that "the mischief at which [both the 'no compelled support' and

'no preference' clauses were] aimed" was "prevent[ing] an established church" through either government taxation or government preference. *Id.* (quoting *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927)).[3] The CSP, created by one school district as one of many educational options for families, and with legitimate, secular educational purposes, does not in any way tend to establish a "state church." In fact, the grant program from *Americans United* – upheld by the Colorado Supreme Court – presented a *greater risk* of establishing a "state church" than the CSP does in two respects: (1) it was (and is) a statewide program, whereas the CSP is limited to Douglas County only, and (2) at the time the *Americans United* court considered it, it discriminated in favor of "merely sectarian" institutions and against "pervasively sectarian" ones.

The CSP does not violate the fourth clause – no compelled attendance. The CSP is entirely voluntary. A voluntary program never compels attendance. No students or teachers are required, against their consent, to participate in the CSP or attend the religious partner schools.

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[3] *Vollmar* permitted Bible readings in public schools. The United States Supreme Court held such a practice violated the Establishment Clause in *Abington School District v. Schempp*, 374 U.S. 203 (1963). Six months after *Americans United* was decided, *Conrad I* overruled *Vollmar* "to the extent that it is inconsistent with the Establishment Clause standards set forth in *Abington*." 656 P.2d at 670 n.6. The propositions cited in this portion of *Americans United* – regarding the purposes of the "no compelled support" and "no religious preference" clauses – remain good law.

Nor does the CSP violate the fifth clause – no compelled support. The indirect nature of the funding dispels any concerns about violating this provision. Identical to the funding mechanism in *Americans United*, the CSP was "designed for the benefit of the student, not the educational institution." 648 P.2d at 1082. The trial court recognized this, explaining that "the purpose of the Scholarship Program was for the benefit of the students, not the benefit of the private religious schools." [Order at 44.] As a result, "[a]ny benefit to the institution" is a mere "by-product" and so "remote and incidental" that it does not constitute "aid to the institution" within the meaning of the Colorado Constitution. *Americans United*, 648 P.2d at 1083-84 (explaining this rationale when discussing Article IX § 7); *see also id.* at 1082 (finding the grant program "exacts no form of support for religious institutions" within the meaning of Article II § 4).

Moreover, it is logically impossible for such "remote and incidental" indirect aid to constitute a violation of the "no compelled support" clause when the Colorado appellate courts have rejected such challenges when government support has been direct. For instance, the Colorado Supreme Court rejected a "no compelled support" challenge even though Denver used taxpayer funds to buy and display a full-size nativity scene during December for years on the steps of the City and County Building. *Conrad II*, 724 P.2d at 1312, 1317 (describing taxpayer

funds spent on nativity display and holding no violation). Likewise, the Court in *Freedom from Religion Foundation* held there was no violation despite evidence that over the decades State employees had cleaned and maintained the Ten Commandments monument in Lincoln Park. 898 P.2d at 1017. In addition, this Court rejected a "no compelled support" challenge despite evidence that public funds were spent on police, sanitation, and other public services during the Pope's 1993 visit to Denver. *Freedom from Religion Found. v. Romer*, 921 P.2d 84, 91 (Colo.App. 1996).

In sum, a proper evaluation of the text and purposes of Article II § 4 requires holding that the CSP does not violate any part of it, including the "no compelled support" clause. To the contrary, Article II § 4 mandates affirmative accommodation of religion and an attitude of benevolent neutrality, both of which commend upholding the CSP.

### B. The Trial Court Erred By Improperly Interpreting *Americans United* and Reinterpreting It Contrary to State and Federal Precedent.

As demonstrated above, a proper understanding of Article II § 4 requires consideration of all six of its clauses as well as the other Colorado cases interpreting Colorado's Religion Clauses. Failing to do this, the trial court misapplied *Americans United* by giving short shrift to its core principle of private choice, while simultaneously overemphasizing parts of the case that were an

unfortunate by-product of an anachronistic and now-discredited federal constitutional doctrine. Ultimately, the trial court ended up applying a legal rule that is, at once, inconsistent with the key holding of *Americans United*, at odds with other Colorado precedent, and on a collision course with the First Amendment.

### 1. Colorado Appellate Courts Have Always Followed Analogous Federal Precedent When Interpreting the Religion Clauses.

As in this case, in *Americans United* only state law claims were pled. 648 P.2d at 1074, 1077. In that context, the Court engaged in a detailed review of federal precedent, noting that "First Amendment jurisprudence cannot be totally divorced from the resolution of these [state law] claims." *Id.* at 1078. *See also id.* at 1078-81. When the Court turned to analysis of Article II § 4, it noted that while the six clauses are "considerably more specific than the Establishment Clause of the First Amendment, we read them to embody the same values of free exercise and governmental noninvolvement secured by the religious clauses of the First Amendment." *Id.* at 1081-82.

*Americans United* is not alone in following the most analogous federal precedent. In *every case* in which the Colorado Supreme Court has interpreted Colorado's Religion Clauses, it has looked to *and followed* prevailing federal

precedent.[4] This is especially true, as here, when "striking similarities" exist between the facts of the case at hand and federal precedent. *Freedom From Religion Found.*, 898 P.2d at 1019. Indeed, the Court has warned that deviating from analogous federal precedent "should not be undertaken lightly." *Conrad II*, 724 P.2d at 1316. Even when explicitly asked to do so by the parties, the Court has consistently declined. *Id.*; *Young Life*, 650 P.2d at 526. The trial court erred when it flatly refused to follow the guidance of federal case law. [Order at 33-34.]

The federal case with "striking similarities" to this one is *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which the United States Supreme Court upheld an Ohio scholarship program focused on Cleveland schools. In *Zelman*, 96% of participating students enrolled in religious partner schools, and 82% of the participating private schools were religious. *Id.* at 647. The U.S. Supreme Court held the program was constitutional despite the fact that public money flowed indirectly to religious schools because the program was "neutral with respect to religion, and provide[d] assistance directly to a broad class of citizens who, in turn,

[4] *See Zavilla v. Masse*, 147 P.2d 823, 825 (Colo. 1944) (following *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)); *Conrad I*, 656 P.2d at 672-76 (following *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Conrad II*, 724 P.2d at 1314 (following *Lynch v. Donnelly*, 465 U.S. 668 (1984)); *Young Life*, 650 P.2d at 519-20, 526 (following *Larson v. Valente*, 456 U.S. 228 (1982) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)); *Freedom From Religion Found.*, 898 P.2d at 1019-27 (following *Allegheny County v. ACLU*, 492 U.S. 573 (1989)).

direct[ed] government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652. The Supreme Court rejected the argument that public money was impermissibly being used to aid religion, explaining that any "incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the *individual recipient, not to the government*, whose role ends with the disbursement of benefits." *Id.* (emphasis added).

Two decades earlier, the Colorado Supreme Court had already applied precisely the same rationale in upholding the scholarship program in *Americans United*. That is, when a neutral government program distributes benefits even-handedly to families, who then make an independent choice to direct those funds to private schools, secular or religious, the advancement of any school's religious mission is too "remote and incidental" to offend Colorado's Religion Clauses. *See Americans United*, 648 P.2d at 1082, 1083-84. The trial court erred when it ignored this holding to wrongfully conclude Douglas County was compelling taxpayer support of religion.

**2. The Trial Court Misconstrued *Americans United.***

The core principle in *Americans United* – the principle that permeates the opinion, forms the primary basis for its holding on each of Colorado's Religion

Clauses, and is wholly consistent with federal constitutional doctrine – is that scholarship money directed to religious institutions by the independent choice of individual students is not "constitutionally significant aid" or "support" of those institutions. 648 P.2d at 1081-85. Had the trial court properly applied this principle from *Americans United*, instead of getting caught up with now-discarded and unconstitutional inquiries about "indoctrination," it would have upheld the CSP.

The Court in *Americans United* upheld the grant program after applying several factors, *i.e.*, that the program (1) was "designed for the benefit of the student, not the educational institution," (2) was "non-restrictive in the sense it [was] available to [all] students," and (3) had adequate safeguards. *Id.* at 1082. The trial court found the CSP's purpose is to benefit students, not private religious schools. [Order at 44.] As to the second factor, there was no evidence that the CSP was off-limits to any Douglas County students – it was "available to all students" just as much as the grant program was under *Americans United*. As to the third, the trial court also acknowledged the "significant language" about safeguards in the CSP, designed "to alleviate concerns regarding how public finances are to be used, *e.g.*, an annual audit [and other safeguards]." [*Id.*; *see also id.* at 40 (discussing the Program's "checks and balances").]

The *Americans United* Court concluded its analysis of Article II § 4 by summarizing the basis for its holding – a basis that is equally applicable to the CSP here:

> For constitutional purposes we view the statutory grant program as a governmental attempt to alleviate some of the financial barriers confronting Colorado students in their quest for a higher educational experience. As such, it falls within the area of legitimate legislative discretion. It 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.

648 P.2d at 1082.

Indeed, these rationales apply with even more force here. The *Americans United* Court noted that *not* upholding the grant program would burden the "principle of voluntarism underlying the Free Exercise Clause," and thus, by extension, Article II § 4. 648 P.2d at 1082 (citing *Note*, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV.L.REV. 696, 709-712 (1979) The Court recognized that the value of religious free exercise mandates that government affirmatively accommodate private religious choices, especially in an area where the "government becomes the dominant provider of a particular service," such as K-12 public education. *Note, Government Neutrality*, 92 HARV.

L.REV. at 699. In short, the trial court's interpretation of *Americans United* was erroneous; a proper interpretation would uphold the CSP.

### C. The Trial Court Engaged in an Unconstitutional Analysis of Whether Public Funds Are Being Used for "Religious Indoctrination."

The trial court's primary concern – specifically under Article II § 4 but also throughout its entire Order – is that public funds are subsidizing the "indoctrination" of CSP students enrolled in religious schools. [Opinion at 38, 40, 42-43, 45, 51.] This approach brings the Order into direct conflict with the First Amendment and *Colorado Christian University*. Just a small sampling of the trial court's findings illustrates its improper fixation on this irrelevant and unconstitutional concern:

- "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." [Order at 12 (¶45).]

- "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." [*Id.* at 11 (¶44).]

- "The governing entities of many participating Private School Partners reflect, and are often limited to, persons of the schools' particular faith." [*Id.* at 9 (¶39).]

- "Many of the participating Private School Partners are funded primarily or predominantly by sources that promote and are affiliated with a particular religion." [*Id.* at 10 (¶40).]

- "Most of the Private School Partners that have been approved to participate in the Scholarship Program require students to attend religious services." [*Id.* at 10 (¶41).]

These findings, intended to support the trial court's conclusions about "indoctrination," are indistinguishable from past concerns about whether a religious institution is "pervasively sectarian." The First Amendment no longer permits such an inquiry into a school's religiousness. Indeed, the "Supreme Court has recently criticized" the pervasively sectarian exclusion and it is "now-discarded doctrine." *Colorado Christian University*, 534 F.3d at 1258 (citing cases). *See also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) ("the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity"); *Columbia Union College v. Oliver*, 254 F.3d 496, 502-04 (4th Cir. 2001) (holding that the pervasively sectarian test is unconstitutionally discriminatory); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("[A]n exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns – discriminating between kinds of religious schools.").

While the Colorado Supreme Court in *Americans United* did discuss whether institutions were "pervasively sectarian" or engaged in "indoctrination," even the trial court acknowledged that those parts of *Americans United* were a vestige of a by-gone era and that it could "not analyze the religiousness of a particular institution." [Order at 37, 39 & n.4.] Yet, that is precisely what it did. The court sought to distinguish this case on the basis that, in contrast to the "merely sectarian" religious school in *Americans United*, some of the partner schools here are *so* religious or *so* sectarian that they "indoctrinate" students.

The Tenth Circuit identified such an "indoctrination analysis" as the "potentially most intrusive element" of the "pervasively sectarian" inquiry, which has "long been condemned by the Supreme Court." *Colorado Christian University*, 543 F.3d at 1261-62 (citing cases). As the Tenth Circuit explained at some length, "The First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes." *Id.* at 1263. Yet the trial court sat precisely as such a judge.

Part of the trial court's discomfort with "indoctrination" appears to be that the CSP did not contain enough safeguards to, in its view, limit public funds to "mere education" rather than "religious indoctrination." [Order at 44-45.] But no such safeguards were present in *Americans United*. 648 P.2d at 1084 (noting that

"the statute does not expressly limit the purpose for which the institutions may spend the funds distributed under the grant program"). In any event, this attempted distinction is not constitutionally tenable, as explained by the Tenth Circuit:

> The line drawn . . . between 'indoctrination' and mere education[] is highly subjective and susceptible to abuse. Educators impart information and perspectives to students because they regard them as true or valuable. Whether an outsider will deem their efforts to be 'indoctrination' or mere 'education' depends as much on the observer's point of view as on any objective evaluation of the educational activity. . . . Many courses in secular universities are regarded by their critics as excessively indoctrinating, and are as vehemently defended by those who think the content is beneficial.

*Colorado Christian University*, 534 F.3d at 1262-63. *See also Lanner v. Wimmer*, 662 F.2d 1349, 1352 (10th Cir. 1981) (discussing as inevitable the conflict of world views between public and religious education and rejecting the trial court's distinction as a "shallow definitional approach").

Equally problematic is the trial court's distinction between "indoctrination" in higher education and in K-12 schools, as if the inquiry becomes less unconstitutional depending on grade level. It does not. Consider how much religious instruction was at issue in *Colorado Christian University*. As described by the Tenth Circuit, CCU requires its undergraduates to attend chapel weekly, pledge to "emulate the example of Jesus Christ and the teachings of the Bible," and take four courses in theology or Biblical studies. *Colorado Christian University*,

534 F.3d at 1252. It requires its faculty and trustees to sign a statement of faith which affirms, among other things, "the Bible as the infallible Word of God, the existence of God in the Father, Son and Holy Spirit, the divinity of Jesus Christ, and principles of salvation, present ministry, resurrection, and the spiritual unity of believers in our Lord Jesus Christ." *Id.* In short, "[i]t offers education framed by a Christian world view." *Id.* (internal quotes omitted). Whether this sort of higher education "indoctrinates" was precisely the question raised in *Colorado Christian University*. The Tenth Circuit held squarely that *the very inquiry* to try to answer that question *itself* violated the First Amendment. *Id.* at 1261-66.

*Zelman* further confirms these conclusions. In that case, the U.S. Supreme Court spent not a word trying to divine "how religious" these schools were or how many public dollars would be spent on "indoctrination" versus "education." 536 U.S. at 643-63. Justice Thomas, in his concurring opinion, warned against "indoctrination" inquiries: "The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children. This is a choice that those with greater means have routinely exercised." *Id.* at 680 (Thomas, J., concurring). The same is true about the CSP.

The CSP does not violate any part of Article II § 4. The trial court's decision must be reversed and the CSP upheld.

## II. THE CSP DOES NOT VIOLATE ARTICLE IX § 7

Article IX § 7 provides,

> 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.

The trial court erroneously concluded that the CSP violated this provision. [Order at 36-43.] The overarching thrust of the trial court's analysis, as with Article II § 4, was a concern that public funds might be used to subsidize "indoctrination." [*Id.*] The trial court was especially concerned given that the CSP is for primary students, not those in higher education. [*Id.*] This analysis, which prefers some religious institutions over others based on the content and intensity of their religious message, plainly violates the First Amendment for the reasons already explained. It is also contrary to the "no preference" clause of Article II § 4 in that it gives preference to "less sectarian" religious institutions that do not

purport to "indoctrinate." For many of the same reasons discussed above, the trial court erred in concluding the CSP violates Article IX § 7.

The trial court initially recognized that the CSP satisfied the textual core of Article IX § 7, namely, that CSP funds are not "in aid of" any church or sectarian purpose. The court "agree[d] with Defendants" that "the purpose of the program is to aid students and parents, not sectarian institutions." [Order at 39.] Accordingly, the trial court acknowledged that, as in *Americans United*, the indirect nature of the aid makes it too "remote and incidental" to violate Article IX § 7. *Americans United*, 648 P.2d at 1083-84. The trial court also found the CSP had an appropriate "check and balance system." [*Id.* at 40.] These key factors weighed in favor of constitutionality under *Americans United*. [*Id.* at 38 (citing 648 P.2d at 1083-84).]

Ultimately, however, the trial court gave little emphasis to these important similarities between this case and *Americans United*, focusing instead on an impermissible inquiry into "indoctrination." Again, the trial court faulted the CSP for not having an "express provision . . . that prevents the Private School Partners from using public funding in furtherance of a sectarian purpose." [*Id.* at 40.] As noted, however, the grant program in *Americans United* did not have any such "express provision" either. 648 P.2d at 1084. Even today, neither the grant program at issue in *Americans United* nor the College Opportunity Fund ("COF")

has such an "express provision," even though "pervasively sectarian" institutions like CCU now participate in these programs.

The trial court also sought to distinguish *Americans United* on the ground that one of the participating CSP schools allegedly "reduced its aid award" in the amount of the scholarship. [Order at 41 (noting that *Americans United* disapproved this, 648 P.2d at 1084).] However, Assistant Superintendent Dr. Christian Cutter testified that Douglas County prohibited this, just like the grant program in *Americans United*. The trial court should not have faulted the CSP or Douglas County for an action by one school in violation of the Program. [*Id.*] Such a factual finding – which is diametrically opposed to the evidence – must be set aside as clearly erroneous. *People ex rel. A.J.L.*, 243 P.3d 244, 250 (Colo. 2010).[5]

[5] The trial court made another factual finding directly contrary to the evidence when it found that partner schools could "engage in other forms of discrimination." [Order at 13 ¶50; *see also id.* at 6 ¶30.] However, under Policy ¶E.3.f, the CSP specifically prohibits discrimination "on any basis protected under applicable federal or state law." The Superintendent testified that if a partner school were to discriminate against a protected class, the District would terminate that school's contract. [Vol.2 512:7-13.] The Policy's sole exception permits religious schools to make decisions based upon religious beliefs, accommodating religion in accord with constitutional principles of religious liberty. *See Hosanna-Tabor v. EEOC*, 565 U.S. __ (Jan. 11, 2012) (religious schools have constitutional right to select teachers free from governmental interference); 42 U.S.C. § 2000e-1(a), § 2000e-2(e)(2) (exception for religious schools under Title VII); C.R.S. § 24-34-402(6) (same under Colorado Anti-Discrimination Act). It is clear error to ascribe illegal discrimination to the District when the CSP expressly forbids it.

The trial court also briefly criticized the CSP's "opt out" on the ground that it "does not include [religious] instruction." [*Id.* at 42 (brackets in original).] Here again, however, the trial court, by trying to distinguish *Americans United* on this basis, launched itself back into constitutionally forbidden territory. The court's criticism seemed to be that the opt out should have been broader, extending to religious instruction as well. The trial court's reason for this was "religious instruction [at religious partner schools] is the foundation of their core educational curriculum and religious theology is embedded in many of their classes." [*Id.* at 42.] But these very conclusions – about whether religion is "embedded" at the "foundation" and "core" of their curricula, and whether a broader opt out would ameliorate this – are precisely the sort of inquiry the Establishment Clause forbids. *Colorado Christian University*, 534 F.3d at 1262 ("Such inquiries [into whether CCU courses tended to indoctrinate or proselytize] have long been condemned by the Supreme Court.") (citing cases). Indeed, the Tenth Circuit remarked how constitutionally "troublesome" it was for the State of Colorado to try to determine whether CCU, or any school, mandated attendance at religious services. *Id.* at 1265. As part of a series of rhetorical questions demonstrating the troubles involved, the Tenth Circuit asked, "Does it matter if the student is required to attend [a religious service], but not required to partake of the sacrament?" *Id.* The

trial court's concern with the substantive answer to that question for the CSP is exactly why its Order transgresses constitutional boundaries. Instead, the trial court should have taken its own advice and avoided this entangling inquiry into how "embedded" religion is in the curricula of the partner schools and whether a broader opt out would have lessened the "indoctrination quotient." *Id.* at 1263.

Following the Colorado Supreme Court's lead in *Americans United*, and consistent with the limits imposed by the First Amendment, this Court should uphold the CSP against the Article IX § 7 challenge on the ground that it is not "in aid of" religious schools or purposes, but rather "the aid is designed to assist the student, not the institution." *Americans United*, 648 P.2d at 1083. The indirect nature of the aid makes it too "remote and incidental" to be a violation of Article IX § 7. *Id.* at 1083-84. As explained by *Zelman*, "The incidental advancement of a religious mission . . . is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." 536 U.S. at 652. The trial court's misapplication of Article IX § 7 must be reversed.

## III. THE CSP DOES NOT VIOLATE ARTICLE IX § 8

Article IX § 8 has two sentences:

> 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, 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.

## A. The First Sentence of Article IX § 8 Applies to State Institutions of Higher Education, Not Douglas County and the CSP.

The trial court found the CSP violated Article IX § 8. [Order at 46-51.] The trial court began its analysis by citing *Vollmar v. Stanley*, 255 P.610, 615 (Colo. 1927), properly noting that *Vollmar* had been "reversed on other grounds" by *Conrad I*.[6] [Order at 46.] The trial court's first error occurred at this point, when it failed to recognize that *Vollmar*, like a host of other Colorado cases, expressly distinguishes between the first sentence of IX § 8 which applies to "public educational institutions *of the state*," *i.e.*, "state institutions, *e.g.*, University of Colorado, School of Mines, or State Teachers' College," and "the last sentence of [IX § 8] that refers to *public schools*." 255 P. at 615 (emphasis added).

This distinction between the first and second sentences of IX § 8 has been drawn by Colorado courts for decades, based on the plain language of IX § 8 itself and the principle that "a word repeatedly used in a constitution will generally be given the same meaning throughout the instrument." *Wilmore v. Annear*, 65 P.2d 1433, 1435 (Colo. 1937). In *Wilmore*, for instance, the court drew this distinction

[6] *Vollmar*'s limited reversal is discussed above at page 15 n.3.

based upon the fact that Article VIII § 1 "of the Constitution uses the term 'educational . . . institutions' in referring to schools other than the constitutionally required public schools. . . . [Whereas] 'Public Schools' is the term used in sections 2 and 15 of article 9 and as so used . . . clearly applies there to schools that serve only those between the ages of 6 and 21 residing in the district." *Id.* at 1434-35. *Cf. Jones v. Newlon*, 253 P. 386 (Colo. 1927) (racial discrimination occurring at a junior high and high school held to violate the second sentence of IX § 8); *Bd. of Educ. v. Spurlin*, 349 P.2d 357, 365 (Colo. 1960) (Frantz, J., dissenting) ("Beside the several sections [of the Constitution] cited, other sections lucidly recognize the distinction between 'educational institutions' and 'public schools.'") (citing *Vollmar*, *Wilmore,* and numerous constitutional provisions). In the case cited by *Vollmar* as "analogous," 255 P. at 615, *People ex rel. Walker v. Higgins*, 184 P. 365 (Colo. 1919), the Court interpreted the term "civil service of the state" to mean "officers and employees of the state only." *Id.* at 365.

Thus, the first sentence of Article IX § 8 is simply irrelevant to this case. It was error for the trial court to ignore the clear and unbroken line of Colorado precedent.

## B. The CSP Does Not Violate Article IX § 8.

Even if one wrongly assumes, as the trial court did, that both sentences of IX § 8 apply to the CSP, there is still no violation. The trial court appears to have concluded that there were two violations of the first sentence (regarding admission qualifications and compelled attendance at religious services) and one of the second (regarding teaching sectarian doctrines). [Order at 47-51.] There were none.

### 1. The CSP Does Not Require A Religious Test For Admission.

The trial court erroneously concluded the CSP violated IX § 8 on the basis that enrollment in the CSP is "predicated on a student's admittance into one of the Private School Partners." [Order at 47-48.] This was incorrect and contrary to the record.

The trial court, *sua sponte,* asked the Superintendent this question directly at the close of her testimony. [Vol.2 571:11-572:2.] She answered it clearly and unequivocally:

> THE COURT: "[I]s [enrollment in the CSP] predicated on gaining admission into one of the private partner schools . . . ?"
>
> THE WITNESS: "No."

[Vol.2 571:13-15.] She explained that just because a student might enroll in the CSP and receive a scholarship does not mean the student will decide to enroll in or

be accepted by a partner school; enrollment in the CSP and enrollment in a partner school are independent. [Vol.2 571:18-572:13.] In a similar way, a student might apply to a charter school but not be able to enroll because it is over-subscribed, and so end up on the school's waiting list. [Vol.2 502:5-11.] The Superintendent testified that given the high demand for the CSP, many families rushed to enroll, were enrolled, received scholarships, but then decided they did not like any of the partner schools, and so dropped out again. [Vol.2 506:19-23.]

While the trial court expressly noted Dr. Fagen's testimony, it disregarded it and instead relied on a single, incorrect statement in the student application. [Order at 48; *see also id.* at 5 ¶20.] However, the testimony was undisputed that the Superintendent had express authority to make changes to the Program to ensure it was implemented properly. [Vol.2 512:21; 516:20-22; 624:12-13, 22.] Further, the evidence was uncontested that the Board could, if necessary, change anything about the Policy to ensure it was successful and legally compliant. [Vol.2 569:23; *see also* Policy H (severability clause).] To seize upon a single mistaken statement, which the Superintendent testified she could and would fix with the stroke of her

pen, is manifest error which cannot be sustained on appeal. *People ex rel. A.J.L.*, 243 P.3d at 250 (clearly erroneous factual findings must be set aside).[7]

### 2. The CSP Does Not Compel Attendance At Religious Services.

The trial court erroneously found a violation of the following clause of IX § 8: "no teacher or student of any [public educational institution of the state] shall ever be required to attend or participate in any religious service whatsoever." [Order at 49-51.] As discussed above, this provision applies only to state higher education institutions, not public school districts. Even if it did apply to the CSP, Douglas County does not require attendance at any religious services. The CSP is a choice. Parents must affirmatively choose to participate in the CSP at all, and then, if their child receives a scholarship, parents independently choose where to enroll their child. If a CSP family elects a religious partner school, it is because they *want* their child educated there, not because Douglas County or the CSP requires it. As in *Americans United* and *Zelman*, the CSP is absolutely neutral with regard to religion.

The absurdity of any conclusion to the contrary is illustrated by considering the public schools themselves. When public schools offer religious options, they

[7] The trial court erred in a similar way when it cited a statute that has been repealed since 2003. [Order at 47 (citing C.R.S. § 22-30.5-204(2)(a)).]

are not compelling religious choices. For instance, public schools are permitted to offer release time programs, in which public schools release students during the school day to receive religious instruction or participate in worship services. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981). Further, public schools may open their buildings during lunch or after school to religious groups, who may use the space for religious teaching or worship. *Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act, 20 U.S.C. § 4071 *et seq.*); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (Free Speech Clause requires equal use by religious groups). In both circumstances, it is the parents who choose whether they want their children to participate in any religious activity – just like the CSP.

In its analysis, the trial court focused almost exclusively on the religious opt out. [Order 49-50.] This misses the point entirely. The opt out is an *additional* protection, which attempts to strike a balance between a student's liberty of conscience and a school's rights of association and religious exercise. Moreover, as described above, the trial court may not attempt to evaluate how much "indoctrination" occurs at a religious school and prescribe what sort of opt out would properly remedy that invented illness.

### 3. The CSP Does Not Violate the "No Sectarian Doctrines" Clause.

It appears the trial court may also have found a violation of that part of IX § 8 that reads: "No sectarian tenets or doctrines shall ever be taught in the public school . . . ." [Order at 49-51.] The CSP does not violate this provision either.

First, nothing about the CSP requires the public schools of Douglas County to start teaching religious doctrine. Further, no one in this case, including the trial court and the Plaintiffs, has ever contended that the private partner schools are "public schools." The Policy specifically defines them as "private school partners" which are "nonpublic schools." [Policy ¶B.6.] Thus, they have as much freedom to teach religious doctrine as any other private school in Colorado.

Second, the CSP is neutral toward religion. In no way has Douglas County encouraged or discouraged the teaching of any "sectarian tenets" at any partner school. Rather, it has left to the partner schools what tenets and doctrines they teach, as it must under our constitutional system. Douglas County evaluates which private schools may participate in the CSP based upon neutral, educational criteria that have nothing to do with religion. *See Freedom from Religion Found. v. Cherry Creek Sch. Dist.*, 2008 WL 4197618 *5 n.6 (D. Colo.) (holding a program does not violate the "no sectarian doctrines" clause because it was "entirely neutral as to what type of religious instruction children should receive").

Third, the trial court seems concerned that "public school students" are receiving religious instruction. But, as discussed above, parents may elect to have public school students receive religious instruction in release time or after school programs. Just because students are "counted" for funding purposes does not mean they are prohibited from receiving religious instruction *voluntarily*.

Finally, the trial court claimed it was "protect[ing] the religious liberty of [CSP] students" by holding that the Program violated IX § 8. [Order at 47.] The reverse is true. The CSP *increases* religious liberty because it assists families, if they so choose, to attend a religious school of their choice. The trial court's ruling *decreases* their religious liberty and contravenes the benevolent neutrality that Colorado governmental bodies, like Douglas County, are required to embody under our Religion Clauses. *Conrad I*, 656 P.2d at 671. The trial court's misapplication of Article IX § 8 must be reversed.

## IV. THE TRIAL COURT WRONGLY IGNORED THE UNCONTESTED LEGISLATIVE HISTORY ABOUT COLORADO'S BLAINE PROVISIONS.

The Colorado Constitution includes several provisions whose legislative history shows were intended to discriminate against Catholics. These so-called

"Blaine" provisions[8] were born of religious bigotry and anti-Catholic nativism in particular. [Vol.3 697:15-698:17.] The U.S. Supreme Court has described similar state constitutional provisions as having "a shameful pedigree" that "should be buried now." *Mitchell v. Helms*, 530 U.S. 739, 828-29 (2000) (plurality opinion). Using expert testimony, the Defendants put on extensive and unchallenged evidence of the Colorado Blaine provisions' shameful, discriminatory legislative history. These provisions are unconstitutional vestiges of a bygone and disgraceful era. The trial court erred when it dismissed this evidence as irrelevant history, apparently drawing a specious distinction between history and legislative history. [Order at 35.] This Court may interpret these provisions to avoid the constitutional problems they present or it must confront their facial unconstitutionality. *Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo.App. 2008) (courts should construe constitutional provisions to avoid conflict with the federal Constitution). They cannot be ignored.

The overwhelming and uncontroverted evidence at trial demonstrated the discriminatory anti-Catholic motivation behind the Colorado Blaine provisions. [Vol.3 686:8-687:11.] The unrebutted testimony of Defendants' expert witness

[8] Article IX § 7 and the second sentence of Article IX § 8 are classic Blaine provisions. If Articles V § 34 and IX § 3 are not interpreted in the light of their plain meaning and the doctrine of constitutional avoidance, they could be misinterpreted to have Blaine-like effect. [*See* Vol.3 704:9-711:6.]

Professor Charles Glenn confirmed how Colorado's Blaine provisions were enacted to "knowingly discriminat[e] against Roman Catholics" and to discriminate among different religious groups. [Vol.3 698:12-15.]

Moreover, after enactment, Colorado's Blaine provisions were applied in a discriminatory fashion. One of the Blaine movement's discriminatory goals was to preserve generic Protestant culture in the public schools, including the reading of the King James Bible, while barring Catholic schools from receiving government funds. *See* Phillip Hamburger, *Separation of Church and State* 298 n.30 (2002). Colorado followed this practice, as affirmed in 1927 by the Colorado Supreme Court. *Vollmar*, 255 P. at 618.

The evidence at trial chronicling the Blaine movement's discriminatory animus and invidious objectives was fully consistent with the U.S. Supreme Court's discussion of Blaine amendments. *See Mitchell*, 530 U.S. at 828 (plurality) ("it was an open secret that 'sectarian' was code for 'Catholic'"*)*; *Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting) (discussing Blaine amendment history); *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004). Many scholarly books and articles document this dark history of anti-Catholicism and discriminatory laws. *See, e.g.*, Hamburger, *Separation of Church and State* 322-23; Meir Katz, *The State of*

*Blaine: A Closer Look at the Blaine Amendments and their Modern Application*, 12 Engage 111, 112 (June 2011).

Faced with this uncontroverted evidence, the trial court simply refused to consider the origins and discriminatory intent of the Blaine provisions, claiming there was "no legal authority" making that history relevant. [Order at 35.] This was clear error. The Colorado Constitution cannot violate the First and Fourteenth Amendments, either facially or as applied. In *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), the U.S. Supreme Court expressly rejected the notion that the discriminatory origins of a state constitutional provision are irrelevant. The Supreme Court struck down a racially discriminatory portion of the Alabama Constitution on the basis of its discriminatory genesis, even though at least 80 years had passed since the provision had been enacted, and one of the parties challenging the facially neutral provision was white. *Id.* Rather, it held that when the historical motive in enacting a facially neutral law was "a desire to discriminate against blacks on account of race and the section continues . . . to have that effect[, the state constitutional provision] violates equal protection. . . ." *Id.* The provisions were unconstitutional based on their origin, not modern application. Mere passage of time does not cure a constitutional violation.

Compounding this legal error, the trial court ignored the substantial evidence of anti-Catholic bias and instead commented on one snippet of Professor Glenn's testimony about a Catholic "pro-Constitution rally" to draw the completely unwarranted conclusion that, in the court's view, there must have been "at least some Catholic support of the [Blaine] provisions." [Order at 35.] This is legally irrelevant. Moreover, nothing in the record supports this conclusion, especially not the one-line exchange that the trial court referenced. [Vol.3 741:9-17.] Rather, the overwhelming evidence in the record speaks loudly of anti-Catholic bigotry permeating the legislative history of these provisions – and the record made by Defendants here stands unchallenged.

In short, the trial court erred both legally and factually. Any interpretation of these Blaine provisions that breathes life into their facial distinction between, on the one hand, "sectarian" doctrine and "sects," and, on the other, "general" or "mainstream" religious doctrine or denominations violates the First Amendment. *Larson v. Valente*, 456 U.S. 228, 244 (1982) (holding the Establishment Clause forbids denominational preference). Alternatively, instead of interpreting the Colorado Constitution to discriminate against Catholic and "sectarian" schools, this Court should avoid the constitutional conflict – just as the Colorado Supreme Court has done consistently – by following *Americans United* interpreted in light

of *Zelman* as the most closely analogous federal case. This offers the dual benefit of conforming to the unbroken jurisprudential practice by Colorado appellate courts when interpreting Colorado's Religion Clauses and avoiding this deeply-rooted constitutional problem.

## CONCLUSION

For the reasons stated herein and in the Opening Briefs of the other appellants and supporting *amici*, the trial court's Order must be reversed and the permanent injunction against implementation of the CSP must be vacated.

Respectfully submitted,

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