COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80203 --- COURT OF APPEALS, STATE OF COLORADO Judges Jones, Graham, and Bernard Appeals Court Case No. 11CA1856 and 11CA1857 Appeal from District Court, Denver County, Colorado The Honorable Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427 --- **Petitioners**: JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON and **Petitioners**: TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child **v.** **Respondents**: DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION and **Respondents**: COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION and **Intervenors-Respondents**: 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	▲ COURT USE▲ ONLY Case Number: 13SC233

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BRIEF FOR ANTI-DEFAMATION LEAGUE; BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY; CENTRAL CONFERENCE OF AMERICAN RABBIS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HINDU AMERICAN FOUNDATION; JEWISH SOCIAL POLICY ACTION NETWORK; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING PETITIONERS

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 those rules. Specifically, the undersigned certifies that:

The brief contains 8,448 words, inclusive of the Appendix.

C.A.R. 28(k) does not apply to *amicus curiae* briefs.

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

/s/ Craig R. May

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INTEREST OF THE *AMICI CURIAE*

Amici represent a wide array of faith traditions and beliefs but are united in their firm commitment to the principle that religious education of children is a matter best left to families and their houses of worship. *Amici* recognize through long experience that the use of tax dollars to fund religious institutions and religious education impedes rather than advances the cause of religious freedom. This same understanding was what motivated Coloradans to adopt Article IX, Section 7, of the state Constitution—the No-Aid Clause.

Amici write to explain that programs like the Choice Scholarship Program encroach on religious liberty by making religion dependent on government, by encouraging sectarian division and strife, and by interfering with free, individual choice in matters of conscience. Accordingly, the voucher program should be struck down as inconsistent with the plain language and spirit of the No-Aid Clause.

Because several *amici* have joined this brief, more detailed descriptions of each appear in the Appendix. The *amici* are:

- Anti-Defamation League, an organization committed to fighting hatred, bigotry, discrimination, and anti-Semitism.
- Baptist Joint Committee for Religious Liberty, a religious-liberty organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation, including in Colorado.

- Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis.

- Disciples Justice Action Network, a network of congregations and individuals within the Christian Church (Disciples of Christ).

- Equal Partners In Faith, a multi-faith network committed to ending racism, sexism, homophobia, and religious intolerance.

- Hadassah, The Women's Zionist Organization of America, Inc., an organization that advocates for the rights of the Jewish community in the United States.

- Hindu American Foundation, a national advocacy organization for the Hindu American community.

- Jewish Social Policy Action Network, an organization of American Jews that seeks to protect the constitutional liberties and civil rights of all Americans.

- Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews.

- Women of Reform Judaism, an organization that represents more than 65,000 women in nearly 500 women's groups in North America and around the world.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since before the founding of the United States, influential philosophers and theologians viewed public funding of religion and religious institutions as inimical to religious freedom. These thinkers believed that reserving questions of conscience to individuals, families, and their houses of worship would protect religion against corruption and prevent government from coercing belief or

distorting theological doctrine and practice—even by the supposedly salutary means of offering financial support. By avoiding financial entanglement, genuine religious belief could flourish, unmolested by governmental intervention, and religious institutions would not be driven to sectarian strife and division through competition for greater shares of the State's largess.

Colorado's No-Aid Clause (COLO. CONST. art. IX, § 7) and other, similar constitutional prohibitions against state aid to religious institutions such as private, religious schools are a central component of the system for ensuring religious liberty, furthering the above goals and helping to maintain strong systems of free, common, public schools in which students of all religious beliefs are equally welcome and no faith is ever favored or disfavored.

In the court below, Defendants argued that Colorado's No-Aid Clause should be held to be "coextensive with the Religion Clauses of the First Amendment," and hence that the U.S. Supreme Court's approval of the school-voucher program in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), should mandate a ruling that the voucher program here comports with the requirements of the state Constitution. *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 2013 WL 791140, at *12 (Colo. App. Feb. 28, 2013), *cert. granted*, 2014 WL 1046020 (Colo. Mar. 17, 2014). Defendants also argued that the No-Aid Clause and other state constitutional provisions touching on religion should be "disregard[ed]" on

the ground that "many of those who proposed and voted for [the provisions] were motivated by anti-Catholic bigotry." *Id.* at *13.

Although the Court of Appeals nominally declined to address those arguments (*see id.* at *12-13), it effectively adopted the first. It distinguished indirect from direct aid to religious schools not just under this Court's decision in *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982), but also under *Zelman* and other federal constitutional rulings. *See, e.g.*, *Taxpayers for Public Education*, 2013 WL 791140, at *14-17. And in doing so, the Court of Appeals declined, based in part on an interpretation of federal law, to apply the careful distinction that this Court drew in *Americans United* between primary and secondary education, on the one hand, and higher education on the other, for purposes of the Religion Clauses of the Colorado Constitution. *Id.* at *17-18; *cf. Americans United*, 648 P.2d at 1084.

Defendants' arguments and the Court of Appeals' functional adoption of federal standards in interpreting the Colorado Constitution are irreconcilable with both the text and the history of Article IX, Section 7. Coloradans enacted the No-Aid Clause precisely to preserve an inclusive system of public schools—not to advantage or disadvantage any individuals or religious denominations—and did so in far stricter terms than the federal First Amendment does.

Voucher programs like the Choice Scholarship Program, which divert tax dollars from the public schools to private religious schools, are precisely what the No-Aid Clause was meant to forbid. By funding religious instruction and making religious institutions beholden to the State, they threaten the social compact that protects the vibrant diversity of religious beliefs and the freedom of conscience that Coloradans currently enjoy. In holding that the challenged program comports with the No-Aid Clause, therefore, the Court of Appeals' decision not only misunderstands and misapplies both the plain language and legislative purpose of the clause, but also threatens religious freedom. The decision should not stand.

ARGUMENT

The Choice Scholarship Program provides 500 vouchers that students may use to attend private schools both within and outside Douglas County. When a student is admitted to the Program, the Douglas County School District takes 75% of the per-pupil allotment that it receives from the State for the education of that student and pays it over to the private school that the student elects to attend; the District retains the other 25% to cover the administrative costs of the Program. *See Taxpayers for Public Education*, 2013 WL 791140, at *2.[1] Although the program

[1] If tuition at the private school is less than 75% of the per-pupil allotment, the School District pays the amount of the tuition. *See Taxpayers for Public Education*, 2013 WL 791140, at *3.

places no restrictions on the use of taxpayer funds for religious instruction and activities, it includes a number of other requirements with which private schools must comply in order to be eligible to participate. Among other things, the schools must satisfy various reporting obligations, meet accreditation standards and District-set standards for academic rigor, and allow the District to administer assessment tests to the voucher students. *See id.* at *1-2. More than three-quarters of the private schools that participate in the program are religious schools, and many have selective admissions criteria that limit enrollment based on religion, compliance with religious doctrine, or other factors. *See id.* at *2.

By diverting money from the public-school fund to private schools with these sorts of admissions criteria, the program significantly depletes the funds available to maintain the public schools in Douglas County, which are meant to provide for all on equal terms, regardless of faith or belief. Meanwhile, although the program gives private, religious schools free rein to use tax dollars to fund religious instruction, religious coercion, and religious discrimination, it imposes facially secular requirements that may force these schools to alter their curricula in ways that might be antithetical to their theological beliefs and doctrines.

The framers of the Colorado Constitution understood that public funding of religious instruction unwisely diverts resources from public schools and public

education in order to redirect them to private schools that selectively serve only a few; that it makes religious institutions beholden to government, creating incentives for them to distort their teachings and practices in order to reap the benefits of governmental largess; and that it risks fomenting religious strife by placing different denominations in competition with each other for scarce public dollars. Article IX, Section 7, was designed to safeguard against these harms. The voucher program here is inconsistent with the clause's plain language and important goals.

A. Our Nation Is Built On the Philosophical, Theological, and Political Understanding That Governmental Involvement With Religion Is A Grave Threat To Religious Liberty.

The principle that religion flourishes best when government is least involved has deep roots in philosophy, theology, and political thought going back well before the founding of this State and the Republic. Grounded in the understanding that freedom of conscience is an essential component of faith, as well as the experience of a long, sad history of religious oppression, the principle of separation recognizes that governmental support for and funding of religion corrodes true belief, makes religious denominations and houses of worship beholden to the state, and places subtle—or not so subtle—coercive pressure on individuals and groups to conform.

1. Theology.

The notion of freedom of conscience as a moral virtue traces back to the thirteenth-century teachings of Thomas Aquinas, who wrote that conscience must be an important moral guide and that acting against one's conscience constitutes sin. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 356-57 (2002). Martin Luther and the other early architects of Protestantism built on this idea, preaching that the Church does not have the authority to bind believers' consciences on spiritual questions: "the individual himself c[an] determine the content of his conscience based on scripture and reason." *Id.* at 358-59. John Calvin went further, arguing that this robust notion of individual conscience absolutely deprives civil government of the authority to dictate in matters of faith. *See id.* at 359-61.

Their conception of the theological relationship between government and religion found expression in the New World in the teachings of Roger Williams, the Baptist theologian and founder of Rhode Island. Williams preached that, for religious belief to be genuine, people must come to it of their own free will. Coerced belief and punishment of dissent are anathema to true faith; religious practices are sinful unless performed "with[] faith and true persuasion that they are the true institutions of God." ROGER WILLIAMS, *The Bloudy Tennant, Of Persecution for Cause of Conscience* (1644), *reprinted in* 3 COMPLETE WRITINGS

OF ROGER WILLIAMS 12 (Samuel L. Caldwell ed., 1963); *see also id.* at 202 ("[T]he Church of Christ doth not use the Arm of secular power to compel men to the true profession of the truth, for this is to be done with Spiritual weapons."). When government involves itself in matters of religion, Williams warned, the coercive authority of the state impedes the exercise of free will, while also causing bloody civil strife. Thus, Williams taught, keeping church and state separate is crucial both to protect individual religious dissenters against persecution and to safeguard religion and the church against impurity and dilution. *See* WILLIAMS, *The Bloudy Tennant*, *supra*; EDWIN S. GAUSTAD, ROGER WILLIAMS 13, 59, 70 (2005); RICHARD P. MCBRIEN, CAESAR'S COIN: RELIGION AND POLITICS IN AMERICA 248, at note 37 (1987) ("'[T]he Jews of the Old Testament and the Christians of the New Testament 'opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world' . . . [I]f He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world.'") (quoting Williams).

2. Political philosophy.

Not only did the theological doctrine of separation have overriding importance for the development of religion in this country, but it also became the foundation for the political thought on which our Nation was built. Notably, for example, John Locke incorporated it into his argument for religious toleration:

> Whatsoever may be doubtful in Religion, yet this at least is certain, that no Religion, which I believe not to be true, can be either true, or profitable unto me. In vain therefore do Princes compel their Subjects to come into their Church-communion, under pretence of saving their Souls. . . . [W]hen all is done, they must be left to their own Consciences.

JOHN LOCKE, A LETTER CONCERNING TOLERATION 38 (James H. Tully ed., Hackett Pub. Co. 1983) (1689). Based on this understanding of conscience—and the concern he shared with Williams that bloodshed follows when government intrudes into matters of faith—Locke reasoned that "civil government" should confine itself to the secular sphere and should not "interfere with matters of religion except to the extent necessary to preserve civil interests." Feldman, *Intellectual Origins*, 77 N.Y.U. L. REV. at 368.

This Nation's founders took to heart both Williams' theology and Locke's political thought on the proper relationship between religion and government. In the Virginia legislature's debate in 1784 over Patrick Henry's "Bill Establishing a Provision for Teachers of the Christian Religion," for example, these ideas motivated the opposition to Henry's proposal to fund religious education with a property-tax levy (which Henry had proposed as an antidote to a perceived decline in social mores). *See* Vincent Blasi, Essay, *School Vouchers and Religious Liberty: Seven Questions from Madison's* Memorial and Remonstrance, 87 CORNELL L. REV. 783, 783-84 & n.3 (2002). James Madison strenuously objected to Henry's bill on the grounds that it was an offense against individual conscience, a threat to

the health of civil government, and a gross intrusion into church governance and the free development of church doctrine. *See, e.g.*, JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 21, 26 (Ralph Ketcham ed., 2006) (arguing that Henry's bill would be "adverse to the diffusion of the light of Christianity," "tend to enervate the laws in general, . . . slacken the bands of Society," and infringe on "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience").

Drawing on Locke's views on toleration (*see* Blasi, *School Vouchers*, 87 CORNELL L. REV. at 789-90 & n.28), Madison argued that religion "must be left to the conviction and conscience of every man." MADISON, *supra*, at 22. Governmental support for religion and religious instruction would only "weaken in those who profess [the benefited] [r]eligion a pious confidence in its innate excellence" while "foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." *Id.* at 24.

Madison's arguments not only led to the defeat of Henry's bill but also spurred the passage in its place of Thomas Jefferson's Bill for Establishing Religious Freedom. *See* Merrill D. Peterson, *Jefferson and Religious Freedom*, ATL. MONTHLY (Dec. 1994), *available at* http://www.theatlantic.com/past/docs/issues/96oct/obrien/peterson.htm. Jefferson's Bill forthrightly declared that "to

compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in* FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 94, 95 (John J. Patrick ed., 1995). In Jefferson's view, religious liberty suffers even when the state asks citizens to support teachers of their own faith, because the individual should be absolutely free to contribute to "the particular minister, whose morals he would make his pattern." *Id.* And, Jefferson explained, religion itself neither requires nor benefits from the support of the state: "truth is great and will prevail if left to herself." *Id.* Thus, the Virginia Bill mandated "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Id.*

Jefferson and Madison's vision sowed the seeds for a deeper political, social, and cultural understanding of the relationship between religion and government that would permeate and define the new Nation. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284 (Harvey C. Mansfield & Delba Withrop eds. & trans. 2000) (1835) (observing American understanding that "[r]eligion . . . cannot share the material force of those who govern without being burdened with a part of the hatreds to which they give rise"); *id.* at 285 ("Insofar as a nation takes on a democratic social state, and societies are seen to incline toward republics, it becomes more and more dangerous for religion to unite with

authority. . . . [I]f the Americans, who have delivered the political world to the attempts of innovators, had not placed their religion somewhere outside of that, what could it hold onto in the ebb and flow of human opinions? In the midst of the parties' struggle, where would the respect be that is due it? What would become of its immortality when everything around it was perishing?").

3. Educational policy.

This distinctly American political and cultural context also gave rise to another critical development in nineteenth-century America—the birth and growth of free, universal public schooling, which came to be recognized as essential to the functioning of representative government in an increasingly diverse and pluralistic society. As the U.S. Supreme Court would later explain in *Brown v. Board of Education*, Americans came to understand that public schools were critical because they enabled students of every background to learn to live and work together, and therefore also to acquire the skills and virtues necessary to participate in governance as equal citizens. *See* 347 U.S. 483, 493 (1954) (stating that education is "required in the performance of our most basic public responsibilities" and is "the very foundation of good citizenship").

The effort to provide free public education for these civic purposes dates back to the early days of the Republic. In 1787, for example, Thomas Jefferson proposed a system of free public schooling for Virginia, *see* THOMAS JEFFERSON,

NOTES ON THE STATE OF VIRGINIA (1787), *available at* http://avalon.law.yale.edu/18th_century/jeffvir.asp, and the Free School Society of New York opened its first school in 1806, *see* DIANE RAVITCH, THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS 11 (3d ed. 2000). As the Free School Society's trustees explained when they began seeking public funding for their "charity" schools (i.e., privately funded free schools for the poor), the drive toward public education was a political one rooted in the American notion of participatory citizenship. Because the people themselves possessed the true political power, it was vitally important that education be provided to all, in order to "enable them to exercise [that power] with wisdom." *Id.* at 24 (internal quotation marks omitted). As Tocqueville observed, "[o]ne cannot doubt that in the United States the instruction of the people serves powerfully to maintain a democratic republic." TOCQUEVILLE, DEMOCRACY IN AMERICA, *supra*, at 291.

With those concerns as the driving force, the common-school movement dominated educational reform in nineteenth-century America, with free, universal public schooling increasingly replacing charity schools for the poor. WILLIAM J. REESE, AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND" 26 (2011). A central mission of the movement was to prepare students for participatory citizenship. *See* Noah Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. 65, 72 (2002).

It was thus crucial for the new common schools to eschew teaching religious doctrine that was particular to one denomination. As Horace Mann and his fellow educational reformers of the mid-nineteenth century recognized, our Nation was becoming ever more religiously diverse, and nonsectarianism in our schools would therefore be essential to instructing students in civic morality while respecting their "religious heterogeneity." *Id.* at 112. Mann and his contemporaries explained that by avoiding doctrinal disputes and other controversial matters of belief that might be particular to one or another denomination, public schools could pursue their mission to teach the moral lessons needed for citizenship while adhering to the American principle of freedom of conscience and avoiding strife between religious communities over whose religion would be instilled in the young. *Id.* at 74.

Thus, for example, a critical early development in the common-school movement was the effort to replace religious instruction in the curriculum with "unmediated" Bible reading. The idea was that the public schools should "emphasize universal religious *values*," not particular and possibly controversial religious *doctrine*. STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 21 (2012) (emphasis added). The Bible was to be read as a "source-book for . . . universal religious truths," unembellished by explanation or interpretation that would alienate some groups. *Id.* As Mann, a Unitarian, saw it, this system of

instruction "would appeal to all well-meaning Christians, including Catholics." *Id.* at 23; *see also* Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. at 80-81. In a nation that was still almost wholly Christian but comprised many different, competing Christian denominations, this approach—though undoubtedly unconstitutional today, and certainly inadequate to encompass the pluralism that defines our twenty-first century society—was a clear "break from the status quo" and an important first step toward religious inclusivity in the public schools. GREEN, THE BIBLE, *supra*, at 18, 23.

B. Colorado Adopted The No-Aid Clause To Promote Religious Liberty And Preserve Strong, Inclusive Public Schools.

1. Colorado's adoption of the No-Aid Clause was an expression of both the philosophical and political traditions of freedom of conscience and the developing national consensus that secular public schools are essential for ensuring civic virtue, civic participation, and freedom of conscience in an increasingly pluralistic society. Indeed, no-aid provisions like Article IX, Section 7, were "one of the most salient features" of this consensus. Tom I. Romero II, *"Of Greater Value than the Gold in Our Mountains": The Right to Education in Colorado's Nineteenth-Century Constitution*, 83 U. COLO. L. REV. 781, 800 (2012). They helped to preserve, protect, and foster the growth of the common schools—and the civic virtues that they promoted—by ensuring that whatever public money was

available for education would go to public institutions open equally to all regardless of their religion, rather than to private schools that might restrict access to persons of one particular faith.

By the latter half of the nineteenth century, no-aid clauses had become a "common feature" of state constitutions across the country. *See id.* at 800-01 & n.82. Thus, some 35 states, including Colorado, have them in their constitutions today. *See* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 58 (2005). Although the specific language—and therefore the precise reach—of the clauses may vary, most "draw[] a more stringent line than that drawn by the United States Constitution" in order to protect "antiestablishment interests." *Locke v. Davey*, 540 U.S. 712, 722 (2004); *see also, e.g.*, *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121-22 (Wash. 1989) (Washington Constitution); *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976) (Missouri Constitution); *McDonald v. Sch. Bd. of Yankton Indep. Sch. Dist. No. 1*, 246 N.W.2d 93, 98 (S.D. 1976) (South Dakota Constitution).

2. That is particularly true of Colorado's No-Aid Clause, which unambiguously declares 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

> 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. This language is broad and unequivocal, and there is no reading under which the Douglas County program can be squared with it. On its face, the clause bars diverting public money to "sectarian purposes" such as supporting private schools that are "controlled by" a church or denomination. Yet that is just what the program here does.

3. In drafting and adopting this strict No-Aid Clause, the delegates to Colorado's constitutional convention expressly sought to promote religious freedom and protect the public schools and the public-school fund by imposing an absolute prohibition against the use of public dollars for religious instruction. These objectives were clear from the second day of substantive business at the constitutional convention, when William Beck offered a resolution containing an expansively worded no-aid clause, which the delegates thought vitally important to the future of the State. *See* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875 TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO ("CONVENTION PROCEEDINGS") 43 (1907). The proponents of the No-Aid Clause deemed it critical to "maintaining the principle of the democratic

public school open to and attended by all children of school age, irrespective of race or faith." Colin B. Goodykoontz, *Some Controversial Questions Before the Colorado Constitutional Convention of 1876*, 17 COLO. MAG. 1, 8 (Jan. 1940). Their conviction was unwavering throughout the long and often contentious convention debates. The language eventually adopted as Article IX, Section 7, was virtually identical to Beck's original proposal. *Compare* CONVENTION PROCEEDINGS at 43 *with* COLO. CONST. art. IX, § 7.

The weight of public sentiment was also behind protecting the public schools and the public-school fund through a broad no-aid clause. The delegates received 45 separate petitions addressing public funding of religious schools, 38 of which "called for prohibition of any school fund division." DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION 222 (2011). Virtually all requested that the constitutional convention adopt a broad, categorical provision that would "forever settle the question of a non-sectarian character and non-division of the sacred school fund, thus taking the question out of [Colorado] politics entirely." *See* CONVENTION PROCEEDINGS at 277; *see also id.* at 87, 174, 261, 277-78, 295-96, 309, 313, 320, 347. The public sentiment was that only a categorical prohibition would suffice because "the basis of our free institutions is a free, uniform and non-sectarian school system, and . . . the permanency of the free schools depends upon the establishment of such system." *Id.* at 295.

The breadth of the No-Aid Clause was equally apparent to its relatively few critics, who opposed it precisely because it so definitively barred diversion of public money to religious schools. Recognizing that the provision would "prohibit[] forever any division of the public school funds," these critics petitioned the delegates to leave the question open for future legislatures rather than entrenching the no-aid principle in the state Constitution. *See* CONVENTION PROCEEDINGS at 235.

What is more, in *In re Kindergarten Schools*, 32 P. 422 (Colo. 1893) (per curiam)—the first case to address the No-Aid Clause after the state Constitution was ratified, and the only one that was decided close in time to ratification—this Court confirmed the clause's breadth. The Court held that another constitutional provision, Article IX, Section 2—which requires the legislature to provide for a system of free public schools to all children ages six to 21—did not prohibit the legislature from also authorizing the creation of public-school kindergartens for children younger than six. *See id.* at 423. In doing so, the Court explained that the challenged bill would be constitutional as long as the kindergartens complied with all applicable constitutional requirements, including the No-Aid Clause's mandate that "neither the legislature nor any public corporation shall pay from any public fund anything to sustain any school controlled by any church." *Id.* at 423 & n.1. The Court's exegesis of the No-Aid Clause in that context reinforces that the intent

of the clause was to ensure categorically that public dollars are spent only on public education that is made available to all regardless of faith or belief.

4. The court below relied on an exception to the No-Aid Clause recognized in *Americans United*, but that case is fundamentally different. There, the payments went to students attending institutions of *higher education*—where "religious indoctrination is not a substantial purpose" and the "statutory criteria 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." 648 P.2d at 1083. Here, by contrast, tax dollars often fund "parochial elementary and secondary education"—where the governing church controls the curriculum and the "risk of religion intruding into the secular educational function of the institution" is high. *Id.* That is just what the No-Aid Clause was designed and intended to prevent.

* * *

In sum, both the delegates who voted to propose the No-Aid Clause and the citizenry that ratified it understood and intended that the clause would protect the public schools and promote religious liberty by denying the legislature any power to divide the public-school fund or otherwise to divert public money to religious schools. And this Court has likewise understood the clause that way.

C. Colorado's No-Aid Clause Was Not Anti-Catholic.

In the face of the strong textual and historical evidence that the No-Aid Clause was intended strictly to bar the provision of any public funds to religious schools, Defendants insisted below that the clause should be invalidated or simply ignored because it was the product of constitutionally impermissible (and unsavory) anti-Catholic prejudice. The Court of Appeals declined to decide the issue because it held that the No-Aid Clause does not bar the challenged voucher program regardless of the clause's underlying purpose or history. *See Taxpayers for Public Education*, 2013 WL 791140, at *12-13. We anticipate that Defendants and their *amici* will renew the bias argument in this Court. The historical record does not support their position.

1. As explained above, the "impulse toward nonsectarian public education" that led to the adoption of no-aid provisions in state constitutions was most of the time and in most places based on the "noble, republican ideals" of egalitarianism and government by the people. Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 FIRST AMEND. L. REV. 107, 113 (2004). The provisions were generally seen as a "sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation," not as imposing the religious choices of the majority on religious minorities. *Id.* at 114. Indeed, "the

no-funding principle and its corollary, nonsectarian education, predate the nineteenth century influx of Catholic immigration, the advent of parochial schooling as a 'threat' to the common schools, and the rise of organized nativism." *Id.* at 113.

2. Nor is use of the term "Blaine Amendment" as an epithet historically accurate. James Blaine, Speaker of the U.S. House of Representatives, introduced an amendment in 1875 that would have added a no-aid clause to the U.S. Constitution; and some today decry that effort as anti-Catholic because of the biases of some—but only some—of its supporters.

But states had begun enacting no-aid provisions long before Blaine made his proposal. Goldenziel, *Blaine's Name in Vain*, 83 DENV. U. L. REV. at 66; Green, *Blaming Blaine*, 27 FIRST. AMEND. L. REV. at 113. And historical research now shows that Blaine's effort was not the nefarious scheme that some may contend. "[N]o evidence suggests that [Blaine] had any personal animosity toward Catholics." Goldenziel, *Blaine's Name in Vain*, 83 DENV. U. L. REV. at 63. Indeed, his "mother was Catholic and his daughters were educated in Catholic schools." *Id.* His proposal instead reflected a sincere attempt to grapple with long-standing controversies over the proper role of public schools and their place in our increasingly pluralistic society, which "colored the debate [over Blaine's amendment] as much as . . . anti-Catholicism" did. Green, *Blaming Blaine*, 27

FIRST AMEND. L. REV. at 146; *see also* Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. at 68 (although Blaine's movement had some anti-Catholic supporters, it "also represented an attempt to institutionalize and constitutionalize a principled nonsectarian model for separation of church and state"); Goldenziel, *Blaine's Name in Vain*, 83 DENV. U. L. REV. at 63 ("Blaine maintained that the amendment was merely meant to settle the 'School Question'"). In short, although some supporters of no-aid clauses may have had anti-Catholic sentiments, it is inaccurate to say that those individuals' biases are the defining characteristic of the no-aid principle and the state-level efforts to implement it.

3. That is particularly true for Colorado's No-Aid Clause. According to the available historical evidence, the clause was an expression of Coloradans' desire for inclusive public education and "what was regarded as the established American principle of complete separation of church and state," not a product of denominational favoritism or anti-Catholicism. Goodykoontz, *Some Controversial Questions*, 17 COLO. MAG. at 10.

The text of the clause is expansive: It prohibits all appropriations to "any church or sectarian society" or to any school "controlled by any church or sectarian denomination." COLO. CONST. art. IX, § 7. As the dissent below noted, the clause on its face "applies to all religious institutions, not only the Catholic Church," and nothing about its language so much as hints at any denominational preference.

Taxpayers for Public Education, 2013 WL 791140, at *38 (Bernard, J. dissenting).[2]

Support for the No-Aid Clause came from a broad interfaith coalition. To the extent that there was opposition, it did not break along denominational lines. Rather, there were both Catholics and Protestants on each side of the "School Question." For example, a large group of non-Protestants urged approval of the clause, praising it for "contain[ing] all that justice and honor dictate" and predicting that "wrong will be done to no one and equal rights secured to all by [its] adoption." CONVENTION PROCEEDINGS at 278. A group of non-Catholics petitioned the convention to reject the no-aid provision and allow the legislature to retain the ability to direct money from the school fund to private schools. *See id.* at 228. And Catholics rallied in Denver in support of ratification of the state Constitution—including the no-aid provision. *See* Donald Wayne Hensel, A History of the Colorado Constitution in the Nineteenth Century 224 (1957) (unpublished Ph.D. dissertation, Univ. of Colo.).

The Catholic delegates to the convention were similarly split on the issue, with fewer than half opposing the provision. Although existing records are not

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[2] The attempt to redescribe the term "sectarian" as code for "Catholic" is also wrong. The word has its origins in the differentiation of Protestant groups, not in anti-Catholic animus. *See generally, e.g.*, WEBSTER'S THIRD NEW INT'L DICTIONARY 2052 (2002).

terribly detailed, it is clear that approximately eight delegates were Catholic, yet the No-Aid Clause was approved over only three nay votes. *See* OESTERLE & COLLINS, THE COLORADO STATE CONSTITUTION, *supra*, at 11, 222; *see also* Hensel, History of the Colorado Constituiton, *supra*, at 224 (delegates from Catholic southern Colorado "fail[ed] to act as a bloc" on the question). And the one delegate of Spanish descent—likely a Catholic—who voted on the clause supported it. *See* Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 CHURCH HISTORY 349, 355 (1961).

Finally, scholars agree that the delegates modeled Article IX, Section 7, on the no-aid provision in the Illinois Constitution of 1870. *See, e.g.*, OESTERLE & COLLINS, THE COLORADO STATE CONSTITUTION, *supra*, at 222 n.987. The wording of the two provisions is virtually identical. *Compare* ILL. CONST. of 1870, art. VIII, § 3, *with* COLO. CONST. art. IX, § 7. And not only was the Illinois provision enacted five years *before* Blaine proposed a federal amendment—so any perceived anti-Catholic bias in the latter cannot be ascribed to the former—but there is no suggestion whatever in the historical record that the Illinois provision was the product of any anti-Catholic bias. *See, e.g.*, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 622, 625-26 (1870) (Catholic delegates to Illinois Convention explaining that they and their constituents supported a no-aid clause). Accordingly, any evidence of prejudice or

animus being a factor in Blaine's proposal or the drafting or passage of some *other* state's no-aid provision is simply irrelevant here; the bad motives cannot be ascribed to Article IX, Section 7. *Cf. Locke*, 540 U.S. at 723 n.7 (concluding that any anti-Catholicism in federal Blaine Amendment's history is irrelevant to consideration of a state no-aid provision if no "credible connection" between the two is shown).

4. The only thing that might be cited as evidence that the No-Aid Clause was anti-Catholic is the fact that Joseph Machebeuf, the Bishop of Denver, opposed it. *See* Goldenziel, *Blaine's Name in Vain*, 83 DENV. U. L. REV. at 87 (aside from Machebeuf's opposition, "[n]o evidence exists of more widespread anti-Catholic animus behind [Colorado's] no-funding provision"). To be sure, Machebeuf and some followers wrote two letters to the delegates about the clause, one of which threatened to oppose ratification if the clause were not defeated. *See* CONVENTION PROCEEDINGS at 235. But the convention records as a whole and the Catholic ratification rally show that Machebeuf did not speak for the whole Catholic community in Colorado.

Moreover, as the dissent below explained, there is good reason to think that Machebeuf's concerns were "financial," not spiritual, and did not reflect any perception that the clause was the product of anti-Catholic prejudice. *Taxpayers for Public Education*, 2013 WL 791140, at *39 (Bernard, J., dissenting). The federal

Enabling Act that organized Colorado as a State set aside one-eighteenth of the entire Colorado Territory to support the public-school fund; the wealth of more than three and a half million acres of land was thus at stake in the debate over the School Question. *See* Goodykoontz, *Some Controversial Questions*, 17 COLO. MAG. at 8. As the leader of a group that favored having its own private, religious schools, Machebeuf might quite understandably have been interested in securing large annual infusions of cash from that huge public fund, regardless of why the No-Aid Clause was proposed or what its objective was. The available evidence suggests that, far from responding to perceived anti-Catholic bias, Machebeuf himself "fanned the flames of the dispute." *Taxpayers for Public Education*, 2013 WL 791140, at *39.

D. Colorado's No-Aid Clause Is An Important Protection For Religious Freedom.

Upholding the strict requirements of the No-Aid Clause implies no disrespect for religion. It is not now, nor has it ever been, antireligious to say that decisions about the religious education and spiritual life of children should be left to their families and houses of worship, without either governmental support or intrusion. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421, 435 (1962). Quite the contrary; maintaining that principle is critical to ensuring religious liberty for all. As Roger Williams, John Locke, Thomas Jefferson, James Madison, and the U.S. Supreme

Court all recognized, "a union of government and religion tends to destroy government and to degrade religion." *Id.* at 431; *see also, e.g.*, *Illinois ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 212 (1948) ("both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere"). The principle is one that the framers of the Colorado Constitution took to heart.

It is also one that has served Colorado well. Religion has flourished here and throughout the nation. In 1963, the U.S. Supreme Court observed that it "can be truly said . . . that today, as in the beginning, our national life reflects a religious people." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 213 (1963).[3] The *Schempp* Court cited census data showing that 64 percent of Americans were members of a church. *See id.* (citing U.S. Census Bureau, *Statistical Abstract of the United States* (1962)). Today, religious identification has increased even more, to nearly 80 percent (U.S. Census Bureau, *Statistical Abstract of the United States*, tbl. 75 (2012), *available at* https://www.census.gov/compendia/statab/2012/tables/12s0075.pdf). The rates of belief are high. *See* Pew Forum on Religion & Public

[3] That observation is all the more powerful when viewed in light of Madison's reflections on the effects of the Virginia Bill for Establishing Religious Freedom after witnessing the first few decades of its operation: "Religion prevails with more zeal, and a more exemplary priesthood than it ever did when established and patronised by Public authority." Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 307 (Ralph Ketcham ed., 2006).

Life, *U.S. Religious Landscape Survey: Religious Beliefs and Practices* 9 (June 2008). And intensity of belief, as measured by regular attendance at worship services, has remained at least constant for the last fifty years. *See* Gallup Politics, *In U.S., Four in 10 Report Attending Church in Last Week* (Dec. 24, 2013), *available at* http://www.gallup.com/poll/166613/four-report-attending-church-last-week.aspx.

Religious pluralism has likewise flourished. In 1875, both this State and the Nation were overwhelmingly Christian and Protestant. Today the U.S. population "can be usefully grouped into more than a dozen major religious traditions that, in turn, can be divided into hundreds of distinct religious groups." Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey: Religious Affiliation* 10 (Feb. 2008).

It is no stretch to say that the success of religion in the United States is attributable to our steadfast adherence to the principle that individual congregations and worshippers are free to define for themselves the terms of belief and religious practice, without dependence on, or interference from, civil authority. *See, e.g.*, *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 882-83 (2005) (O'Connor, J., concurring) (Americans' commitment to keep religion "a matter for the individual conscience" has "allow[ed] private religious exercise to flourish."); *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring) (cautioning

"that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular").

Maintaining this commitment is all the more important today. In our highly pluralistic society, making denominations, houses of worship, or religious schools distort their practices in order to qualify for public money, or forcing them to compete for scarce public resources, is the surest recipe for the sectarian strife and distortion and degradation of religion that Williams, Madison, Jefferson and the people of this State worked so hard to prevent. *Cf. Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (warning that "divisiveness based upon religion . . . promotes social conflict, sapping the strength of government and religion alike"); *McCollum*, 333 U.S. at 217 (Frankfurter, J., joined by Jackson, Rutledge, and Burton, JJ., concurring) ("The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.").

The school-voucher program here threatens to bring about these very distortions. It creates incentives for religious schools to alter their curricula and practices in order to qualify to receive public money. It makes them compete with

each other for the limited number of voucher payments authorized by the program. And it bleeds the public-school fund and the School District's coffers to support private schools that discriminate on the basis of religion rather than being open equally to all comers regardless of faith or belief. The continued religious liberty of Coloradans will be best secured by steadfast adherence to the No-Aid Clause and the principles of freedom of conscience and civic virtue that it embodies. The school-voucher program here is as irreconcilable with those principles as it is with the plain language of the clause. It should not be allowed to stand.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2014, I electronically filed a true and correct copy of the foregoing *Brief of* Amici Curiae *Religious Organizations* with the Clerk of the Supreme Court and served an electronic copy upon the following via ICCES:

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APPENDIX

APPENDIX OF *AMICI CURIAE*

Anti-Defamation League

The Anti-Defamation League was organized in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment to all. It seeks to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state, a principle directly at issue in this litigation. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America and to the protection of minority religions and their adherents. ADL has previously opposed school-voucher programs, such as the program at issue here, on the grounds that directing government money to private religious institutions subverts the separation of church and state.

Baptist Joint Committee for Religious Liberty

The Baptist Joint Committee for Religious Liberty is a religious-liberty education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations

throughout the nation, including in Colorado. BJC deals exclusively with issues of religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. BJC also supports religious-liberty protections in state constitutions—such as the ones in the Colorado constitution—which provide additional safeguards against governmental sponsorship of and interference in religion.

Disciples Justice Action Network

Disciples Justice Action Network is a multi-racial, multi-ethnic, multi-generational, and multi-issue network of congregations and individuals within the Christian Church (Disciples of Christ), all working together to promote greater justice, peace, and the celebration of diversity in our church, our society, and our world. DJAN strongly supports the separation of church and state as the best way to guarantee equal freedom to all our churches, as well as the houses of worship of other communities of faith. This strong support, combined with our equally strong commitment to public education, leads us to oppose all efforts to drain our public schools of necessary funds and give that public money to private schools, including religious schools.

Equal Partners In Faith

Equal Partners in Faith is a multi-faith network committed to ending racism, sexism, homophobia, and religious intolerance. As part of its commitment to religious diversity, EPF opposes all efforts to diminish religious liberty, including government proposals that force all people of faith to support, through their tax dollars, the promotion of the doctrines and religious rituals of any one particular religion. For this reason, EPF is opposed to vouchers for private religious schools.

Hadassah, The Women's Zionist Organization of America

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates and supporters nationwide. While traditionally known for its role in funding health care and other initiatives in Israel, Hadassah also has a proud history of domestic and international advocacy, including protecting the rights of the Jewish community in the United States. Hadassah has long been committed to the protection of the strict separation of church and state that has served as a guarantee for religious freedom and diversity. Hadassah has participated in numerous *amicus* briefs upholding this fundamental principle.

Hindu American Foundation

The Hindu American Foundation is a 501(c)(3) national advocacy organization for the Hindu American community. HAF educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with the Foundation's objectives. HAF focuses on human and civil rights, public policy, media, academia, and interfaith relations. Since its inception, HAF has made legal advocacy one of its main pillars. From issues of religious accommodation and religious discrimination to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or as an *amicus curiae*. HAF has frequently joined other faith-based and civil-rights groups in cases involving school-voucher programs. In such cases, HAF has consistently taken the position that the use of public taxpayer funds to support religious schools through school-voucher programs undermines religious liberty and unnecessarily entangles government and religion. The issues before this Court, therefore, have profound implications for Hindu Americans, who strongly believe that the religious education of children is a purely private matter that should not be interfered with or supported by the government.

Jewish Social Policy Action Network

The Jewish Social Policy Action Network is an organization of American Jews who seek to protect the constitutional liberties and civil rights of all Americans. JSPAN's efforts frequently focus on the religion clauses of the federal and state constitutions because these are the bedrock of American freedom, without which neither religious freedom nor other basic freedoms can endure. JSPAN opposes the Choice Scholarship Program not only because public funding for sectarian religious education inevitably affects the amount of funding available for public schools, but also because it diminishes private religious schools in two different ways. First, it makes them dependent on continued governmental largess, which places them in conflict with other groups in the insatiable demand for a larger share of taxpayer resources that should be devoted to the general welfare of all. Second, because regulation inevitably follows from governmental support, private religious schools are subject to pressures that threaten their institutional autonomy since they necessarily have to conform to government mandates such as the Douglas County School District's "high standards for safety, fiscal soundness, and non-discrimination." See https://www.dcsdk12.org/choice-programming##. The No-Aid Clause contained in Article IX, Section 7, of the Colorado constitution serves as a bulwark to protect against such encroachment.

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of our long-standing commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights, and opportunities than have been known anywhere else throughout history.