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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, Taxpayers for Public Education, and Cindra S. and Marson S. Barnard,

Respondents:

Douglas County School District, Douglas County Board of Education, Colorado State Board of Education, and Colorado Department of Education;

and

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.

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Case Number: 13SC233

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BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CATHOLIC DIOCESE OF COLORADO SPRINGS, COLORADO CHRISTIAN UNIVERSITY, AND COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES

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 this Brief complies with C.A.R. 28(g) as it contains 7,433 words.

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/Stuart J. Lark
Stuart J. Lark

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

MISCELLANEOUS

STATEMENT OF INTEREST OF *AMICI CURIAE*

Because *amici* provide religiously-based educational programs in Colorado (either directly or through their members), they are concerned that Petitioners' interpretation of the Colorado Constitution would discriminate against them on the basis of religion.

Association of Christian Schools International ("ACSI") is the largest association of Protestant schools in the world, having more than 24,000 member Christian schools representing five million children in more than 105 nations. ACSI is based in Colorado Springs. Its mission is to enable Christian educators and schools worldwide to effectively prepare students for life.

Catholic Diocese of Colorado Springs covers ten counties and approximately 15,500 square miles in central Colorado. It includes 41 Roman Catholic parishes and missions, and contains five parochial elementary schools and one independent Catholic high school.

Colorado Christian University is an evangelical Christian university with a main campus located near Denver and several satellite campuses throughout Colorado. CCU has over 4,500 students in more than 35 undergraduate and graduate programs. CCU cultivates knowledge and love of God in a Christ-centered community of learners and scholars, with an enduring commitment to the

integration of exemplary academics, spiritual formation and engagement with the world.

The **Council for Christian Colleges & Universities** ("CCCU" or the "Council") is an international higher education association of Christian colleges and universities. Founded in 1976 with 38 members, the Council has grown to 120 members in North America, including Colorado Christian University ("CCU"), which together comprise over 400,000 students, 20,000 faculty and almost 2,000,000 alumni. In addition, the Council has 55 affiliate institutions in 20 countries. The Council's mission is: "[t]o advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth."

SUMMARY OF ARGUMENT

This case asks whether Douglas County School District (the "District") must exclude from the Choice Scholarship Program ("CSP") otherwise qualifying private school partners ("PSPs") if they are too religious. *Amici* argue that even if Article IX, § 7 of the Colorado Constitution ("Section 7")[1] may be interpreted to require such exclusion, the Free Exercise and Establishment Clauses of the First Amendment to the U.S. Constitution prohibit it. To exclude otherwise qualifying schools based solely on religious criteria is to engage in unconstitutional religious discrimination. It may also lead to unconstitutional religious inquiries. Therefore, the Court of Appeals correctly interpreted Section 7 to permit the CSP because PSPs qualify without regard to religion.

1. The educational programs of religious PSPs are fully qualifying.

Religious PSPs provide fully accredited educational programs consisting of all required "secular" subjects. Indeed, graduates from these schools are fully qualified to pursue additional education or work opportunities commensurate with their educational level.

Like all other private schools, and the District itself, the religious PSPs integrate a certain set of core values into their educational programs. The key

[1] Although this brief focuses on Section 7, the arguments set forth in this brief apply equally to the other sections of the Colorado Constitution cited by Petitioners.

distinction for religious PSPs is that their core values are expressed in terms of their religious beliefs. But the mere fact that the core values or ideology reflect religious (rather than secular) convictions does not affect the educational output that is properly the concern of the District. There is no dispute that the religious PSP educational programs otherwise satisfy applicable District and State standards.

Further, that the religious PSPs teach required subjects from particular religious (rather than secular) viewpoints does not make their programs any more ideological than the educational programs offered by the District or by nonreligious PSPs. The difference lies not in whether the programs are governed by an ideology – all programs are – but rather in the religious character of that ideology.

2. Petitioners and their *amici* interpret Section 7 to mandate religious discrimination and excessive religious inquiries.

Petitioners interpret Section 7 to prohibit any public funding from reaching a religious school. According to this interpretation, the CSP may include PSPs which provide educational programs from any ideological perspective other than a religious one. As such, Petitioners' interpretation mandates religious discrimination against the religious PSPs.

Petitioners' religious exclusion violates the Free Exercise Clause because it discriminates on the basis of religion. Again, the religious exclusion is not based on whether a program is ideological (versus nonideological), nor is it based on any

particular ideology (e.g., an ideology, however grounded, that promotes ethnic purity). Instead, the disqualifying characteristic is religion. Moreover, this religious discrimination is not required to comply with the Establishment Clause, or any with other compelling governmental interest.

Finally, to the extent Petitioners (or their *amici*) assert that Section 7 requires exclusion of schools or programs infused with religion, such exclusion could not be implemented in a constitutional manner. A religious infusion exclusion would require the District to search for and make independent determinations regarding the religious meaning or significance of the programs and activities of private schools, and to measure the religious indoctrination quotient of such activities. These are determinations which government officials have neither the constitutional competence nor authority to make.

3. This Court should interpret Section 7 to permit religiously neutral programs such as the CSP.

Section 7 cannot be read to mandate either religious discrimination or intrusive religious inquiries. Although Section 7 may prohibit the government from favoring religious institutions *because* they are religious (*i.e.*, creating a program for the purpose of funding churches), it cannot be read to prohibit government aid programs for which institutions qualify *without regard to* religion. Therefore, Section 7 can and should be read to permit the CSP because it is a religiously neutral program.

ARGUMENT

I. Petitioners' interpretation of Section 7 mandates religious discrimination in violation of the First Amendment of the U.S. Constitution.

According to Petitioners, Section 7 requires exclusion of religious PSPs solely because they are religious. This religious exclusion turns not on whether their educational programs provide sufficient "secular" educational value - indeed the District has determined that they do - but rather on the religious character of the PSP. This religious discrimination cannot be justified by reference to any compelling governmental interest.

A. The educational programs of religious PSPs are no less qualifying nor any more ideological than the educational programs of other PSPs.

As a condition of participation in the CSP, a private school must demonstrate to the District:

> that its educational program produces student achievement and growth results for Choice Scholarship students at least as strong as what District neighborhood and charter schools produce. One component of a school's educational program shall include how the school intervenes to improve a student's performance to ensure that all students are making satisfactory progress towards achieving the District's End Statements.

District Board Policy JCB, Section E.3.a (Addendum 2 to the District's Answer Brief). All of the religious PSPs have satisfied this requirement. Further, there is no evidence that any religious aspect of a PSP's educational program has caused such program to fail to meet this standard.

Instead, the religious viewpoints integrated into the educational programs offered by religious PSPs expand upon the "secular educational functions" of these programs; they provide a philosophical basis for understanding these subjects. As stated in *Amici* Catholic Diocese's contract with the District:

> Private School is a Catholic school community in which the Catholic faith is a part of all that is learned and of all activities. Private School designs and conducts its educational program (including its curriculum and all supplemental activities) specifically in accordance with its Catholic educational philosophy and as an exercise and expression of the school's Catholic mission. Accordingly, Private School considers all of its activities to be religious activities in furtherance of the school's religious mission.

Defendants' Exhibit EE, p. 19, admitted at the Preliminary Injunction Hearing.

As an example, one Christian understanding of the material world is as follows:

> Only God is truly independent; all created things, including the chemical elements chemists study, are utterly contingent upon him. They depend for their existence and their properties upon him in every instance, at all points and at every moment. Thus the very chemicals we study are Christ's handiwork and, if we allow them, they will declare to us his glory (Psalm 19:1).

Duane Litfin, Conceiving the Christian College 160 (Wm. B. Eerdmans Publg. Co. 2004). The teacher of a "Christian-based" chemistry course might seek to integrate this understanding in the following manner:

> Chemicals . . . obviously behave the same for Christians as they do for non-Christians. At that level . . . there should be no difference at all [between a religious course and a nonreligious course]. But I want more for our students. . . . I want them not only to be fascinated and

> delighted by the intricacies of chemical behavior, but also to realize that what they're exploring is the handiwork of the Lord Jesus Christ. . . .I want them to delight in what they're learning about chemistry, but as Christians I also want them to see at every moment what these things are telling them about the One they know as their Savior, so that in the end they are lifted up to him, even in a chemistry course.

Id. at 76-77.

As this example demonstrates, a religiously-based education ". . . is marked by courses and curricula which are rooted in and are permeated by a [religious] worldview, rather than a secular worldview (often disguised as a supposedly neutral worldview)." *Id*. at 83 (quoting Stephen V. Monsma, "Christian Worldview in Academia," Faculty Dialogue 21 (Spring-Summer 1994): 146). But the fact that religiously-based educational programs teach from a distinctly religious viewpoint does not make such programs more "ideological" than secular educational programs. All schools, including all public schools in the District, at least implicitly teach from some set of defining values or ideological viewpoint. As the Tenth Circuit Court of Appeals has observed, "[n]o comprehensive school curriculum worthy of public support can be developed without broaching subjects and questions concerning morality and the origin, meaning and destiny of humanity." *Lanner v. Wimmer*, 662 F.2d 1349, 1352 (10th Cir. 1981).

The view that chemicals are created by God is, of course, a religious viewpoint, and it stands in sharp contrast to the view that chemicals are derived from purely natural causes. But these different viewpoints or ideologies simply

reflect philosophical differences about the nature of reality; they differ not based on whether they are ideological or not, but rather on the religious character of their respective ideologies. Indeed, the Tenth Circuit concluded that "[s]o long as the state engages in the widespread business of molding the belief structure of children, the often recited metaphor of a 'wall of separation' between church and statue is unavoidably illusory." *Id.* (citation omitted).

This country's earliest institutions of education were founded to teach from expressly Christian viewpoints.[2] However, the predominant defining values today are more likely to be ". . . egalitarianism, environmentalism, self-esteem, and other products of modern secular liberal thought." Michael W. McConnell, *Why is Religious Liberty the "First Freedom?*" 21 Cardozo L. Rev. 1243, 1264 (2000), ("*First Freedom*").

These values can be seen in the mission or values statements of nonreligous PSPs. In this regard, the PSP Mackintosh Academy describes its "school philosophy" in part as follows:

> We believe that traits such as being empathic and compassionate towards others, listening with understanding, hearing different points

[2] *See The Christian College: A History of Protestant Higher Education in America* 40 (Baker Academic 2nd ed. 2006) (describing the religious affiliations of the initial higher educational institutions in this country, including Harvard, Yale and Princeton). *See generally*, Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43 (1997) (discussing the history of Protestant values in public education).

> of view, negotiating, communicating, resolving conflicts and taking responsibility for behavior are critical in the development of our children's social and leadership skills.
>
> Learning does not occur in isolation but in a community of learners who are accepting of one another's feelings, opinions, and beliefs and understand that other people, with their differences, can also be right.

http://www.mackintoshacademy.com/growing-learners/compassionate-hearts, last visited July 21, 2014. Similarly, the PSP Beacon Country Day School sets forth as part of its mission statement:

> BCDS provides opportunities to develop self-esteem, creativity, and the joy of learning which will maximize each child's potential, encourage life long learning, strive for personal excellence, and achieve educational excellence.

http://www.beaconcountrydayschool.com/values.php, last visited July 21, 2014.

Just like religious PSPs, each of these nonreligious PSPs seeks to inculcate (or indoctrinate) in its students a distinct ideology. In contrast to the ideologies of religious PSPs, these nonreligious PSPs inculcate "secular" ideologies. The ideology of Mackintosh Academy emphasizes "traits such as… hearing different points of view… and taking responsibility for behavior as well as being accepting of one another's… opinions and beliefs." Similarly, Beacon Country Day School's particular approach to inculcating self-esteem, personal creativity and excellence reflects that school's ideology regarding the basis for individual self-worth and the measure of personal excellence.

Put differently, whereas a nonreligious PSP may seek to help students "understand that other people, with their differences, can also be right," a religious PSP may seek to help students also see the world through the eyes of God. Similarly, whereas a nonreligious PSP may seek to develop students with a high self-esteem and/or a passion to serve global causes, a religious PSP may seek to develop students with a high regard for God and a passion to help others see God's glory revealed in themselves as individuals created in God's image.[3]

Considering the range of ideological distinctives which define different schools, even different PSPs, it is important to note that there is no "neutral" reference point from which to evaluate them. With respect to the change in the predominant value system in education from Christianity to secularism, Professor McConnell has noted:

> It is not evident, however, that education has become any less one-sided – any less sectarian[] – than it used to be. The dominant ideology has changed, but the use of the schools to inculcate that dominant ideology is essentially the same.

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[3] As another example of a distinctly religious viewpoint on character development in education, Catholic theology teaches that "[t]he education of conscience is a lifelong task. . . . Prudent education teaches virtue; it prevents or cures fear, selfishness, and pride, resentment arising from guilt, and feelings of complacency, born of human weakness and faults. The education of the conscience guarantees freedom and engenders peace of heart." Catechism of the Catholic Church, Part Three, Section One, Chapter One, Article 6, II ¶ 1784; http://www.vatican.va/archive/ENG0015/__P60.HTM; last visited July 21, 2014.

> It is essential to recognize that secularism is not a neutral stance. It is a partisan stance, no less "sectarian," in its way, than religion. In a country of many diverse traditions and perspectives – some religious, some secular – neutrality cannot be achieved by assuming that one set of beliefs is more publicly acceptable than another.

McConnell, *First Freedom* at 1264. To distinguish among PSPs based on certain criteria is to discriminate on those criteria. To exclude the religious PSPs solely because of the religious nature of their ideologies is to engage in religious discrimination.

B. Petitioners' interpretation of Section 7 to require exclusion of religious PSPs violates the Free Exercise Clause.

1. Petitioners' religious exclusion constitutes religious discrimination.

Petitioners (and the Court of Appeals' dissent) argue that Section 7 prohibits the District from providing public funds to help support any school controlled by a church or religious organization. It is important to note that Petitioners' interpretation does not turn on whether the PSP program fails to meet the "secular educational needs of students." Indeed, Petitioners never even suggest that any participating school failed to satisfy the District's academic standards because its program indoctrinated a particular ideology (religious or otherwise). Nor do Petitioners challenge the trial court's conclusion that the District's purpose for the CSP is "to aid students and parents, not sectarian institutions." Trial Court Order at 39 (Addendum 3 to the District's Answer Brief).

Instead, Petitioners' interpretation turns on the PSPs' purposes and activities, not those of the District. Further, the distinguishing and disqualifying characteristic in the interpretation is religion. As applied to the CSP, Petitioners' interpretation of Section 7 prohibits the District from directing funds to an otherwise qualifying PSP solely based on the religious character of the PSP, even when the District is funding other PSPs with educational programs in which nonreligious viewpoints are integrated.

In those cases where the U.S. Supreme Court has specifically examined restrictions on private religious viewpoints of otherwise qualifying participants in governmental programs, it has held that such restrictions constitute religious discrimination. In *Good News Club v. Milford Central School*, 533 U.S. 98, 103 (2001), the Court struck down a provision in an elementary school's community use policy that prohibited use "by any individual or organization for religious purposes." The Court noted that the policy permitted use for "a variety of purposes, including events pertaining to the welfare of the community." *Id*. at 108 (internal quotation omitted). Pursuant to the policy, "any group that promotes the moral and character development of children was eligible to use the school building." *Id*. (internal quotation omitted).

The school argued that the activities of a Bible club, which consisted of singing religious songs, praying, memorizing Bible verses, and discussing a Bible

lesson and its life application, were "religious in nature" and "different in kind" from other activities permitted by the school. *Id*. at 110-111. Further, the school argued that the club engaged in an "additional layer" of "quintessentially religious" activities that are "focused on teaching children how to cultivate their relationship with God through Jesus Christ." *Id.* The school sought to distinguish these activities from "pure moral and character development." *Id.*

The Court rejected these arguments, concluding that "the [club] seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint." *Id.* at 109. The Court held that the exclusion of the club based on its religious nature "constitutes unconstitutional viewpoint discrimination." *Id.* The Court expressly disagreed with the proposition "that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." *Id*. at 111. The Court noted that there is "no logical difference in kind between the invocation of Christianity by the [club] and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Id.*

Similarly, in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 387 (1993), the Court held that a policy permitting community use of school facilities for "social, civic, or recreational uses," but not for "religious

purposes," constitutes viewpoint discrimination as applied to "a film series dealing with family and child-rearing issues faced by parents today." The Court concluded that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id*. at 393.

In *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995), the Court struck down a restriction in a public university student club funding policy pursuant to which the university denied funding to a religious student publication. The restriction excluded activities that "primarily promote[] or manifest[] a particular belie[f] in or about a deity or an ultimate reality." *Id*. at 825. The Court noted that the policy:

> Does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make . . . payments, for the subjects discussed were otherwise within the approved category of publications.

Id. at 831.

Taken together, these cases establish that when the government excludes private religious viewpoints on matters that are otherwise within the scope of a government program (*e.g.*, by denying government resources for such programs), it

engages in religious discrimination. This is precisely what occurs when the Petitioners' religious exclusion is applied to the CSP. Just as nonreligious PSPs extend their viewpoints grounded in self-esteem and egalitarianism (for instance) into their educational programs, so religious PSPs extend their viewpoints grounded in religious tenets into their educational programs. But these differing viewpoints do not distinguish religious PSPs in terms of the purpose of the CSP. Denying funding to a religious PSP solely because its viewpoints are religious, as required under the Petitioners' religious exclusion, constitutes religious discrimination.

2. Religious discrimination is unconstitutional under the Free Exercise Clause.

The Free Exercise Clause generally requires government action to be neutral with respect to religion and of general applicability. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("[O]ur decisions… have prohibited governments from discriminating in the distribution of public benefits based on religious status or sincerity"). A law that is not religiously neutral is subject to strict scrutiny and must be narrowly tailored to advance a compelling governmental interest. *Lukumi*, 508 U.S. at 531–32.

As discussed below the case law identifies several different ways to evaluate religious neutrality. Because Petitioners' religious exclusion fails to comply with

each of these forms of neutrality, it is presumptively unconstitutional under the Free Exercise Clause.

Petitioners' religious exclusion is not facially neutral with respect to religion because it necessarily uses religious criteria to determine whether or not a particular educational activity may be funded. The Court in *Lukumi* stated that "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. The Court noted that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* In this case, Petitioners' interpretation of Section 7 requires the exclusion of religious viewpoints in secular education programs. Because the religious character of the program is the basis upon which the exclusion turns, there is no secular meaning for the exclusionary criteria. Therefore, the interpretation does not satisfy the minimum requirement of facial neutrality.

The lack of neutrality is also evident in the fact that excluding religious viewpoints from an otherwise qualifying educational program is unrelated to the interests furthered by the CSP. In other words, the religious exclusion does not serve to protect or promote the interests of the CSP, but rather merely to distinguish between favored and disfavored expression. As noted by the Court, "a law which visits gratuitous restrictions on religious conduct . . . seeks not to

effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538.

A law also lacks neutrality if it intentionally favors certain types of religious organizations over others. In *Larson v. Valente*, 456 U.S. 228, 246 (1982) , the Court stated that "the fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."[4] The state law at issue in *Larson* distinguished among religious organizations based on whether they received more than half of their total contributions from members or affiliated organizations. *Id*. at 231–32. The Court held that this criteria was unconstitutional because it "effectively distinguishe[d] between well-established churches that have achieved strong but not total financial support from their members . . . and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members. . . ." *Id*. at 245 n.23 (internal citation and quotation omitted).

The favoritism prohibited in *Larson* applies with even greater force when the distinctions turn upon expressly religious criteria. In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the court struck down a "substantial

[4] Even though *Larson* was decided under the Establishment Clause, the Court applied the same strict scrutiny test once it determined that the law at issue did not treat all religious denominations equally. *Id.* at 247.

religious character" test used by the NLRB to determine whether a religious employer is exempt from NLRB jurisdiction. The court in *Great Falls* concluded that failing to exempt religious institutions that take a less religious approach to the delivery of educational services created an unconstitutional preference. The same unconstitutional preference results when a government program excludes religious organizations that take a more distinctly religious approach to the delivery of education.

In applying the neutrality requirement of the Free Exercise Clause, the Court has stated that it must "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (internal quotation marks and citation omitted). With respect to Petitioners' religious exclusion, the survey is not difficult. By its express terms, its lack of any relationship to the CSP program objectives, and its intentional favoritism of nonreligious schools, the religious exclusion fails to comply with the neutrality principles required by the Free Exercise Clause.[5]

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[5] Petitioners' religious exclusion may also violate the Establishment Clause. In *Good News Club*, 533 U.S. at 118, the Court discussed the danger that school students would perceive governmental hostility toward the religious viewpoints of a Bible club if it were excluded from using the school building after school hours. In addition, the Court noted that "[a]ny bystander could conceivably be aware of the school's use policy and its exclusion of the [club], and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement." *Id.*

3. Such exclusion is not justified by the Establishment Clause or any other compelling governmental interest.

Because Petitioners' religious exclusion is presumptively unconstitutional, it must be narrowly tailored to further a compelling governmental interest. *Lukumi*, 508 U.S. at 531-32. In this regard, and most importantly, the Establishment Clause does not provide the necessary compelling interest because it does not require the exclusion of religious viewpoints on "secular" subjects from a state program that funds all other viewpoints on these same subjects. The Court's cases firmly establish religious neutrality as the primary Establishment Clause requirement in this context. Further, the Court has consistently upheld indirect aid programs such as the CSP against Establishment Clause challenges.

The Establishment Clause analysis in this context turns on whether the student aid results in governmental indoctrination. *Agostini v. Felton*, 521 U.S. 203, 234 (1997). In its most recent case involving direct aid to religious schools, a four-justice plurality of the Court held that:

> the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.

Mitchell v. Helms, 530 U.S. at 809 (plurality). The plurality further stated that "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of

neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Id.*; s*ee also id*. at 838 (O'Connor, J., concurring) ("[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges").

In applying the neutrality principle to the question of attribution, the plurality explained that:

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.

Id. at 809-810. On this basis, the plurality concluded that if "eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern." *Id*. at 820 (plurality).

The Court has required neutrality to avoid attribution in other cases involving aid to private organizations. For instance, in *University of Wisconsin v. Southworth*, 529 U.S. 217 (2000), the Court held that viewpoint neutrality is required in the allocation of funding support to recognized student organizations at a public university. *Id.* at 233. The Court noted that this requirement is consistent with its holding in *Rosenberger* that a public university's "adherence to a rule of

viewpoint neutrality in administering its student fee program would prevent 'any mistaken impression that the student newspapers speak for the University.'" *Id*. (citing *Rosenberger*, 515 U.S. at 841). *See also Agostini*, 521 U.S. at 230 ("the criteria by which an aid program identifies its beneficiaries [is relevant to assessing] whether any use of that aid to indoctrinate religion could be attributed to the State"). As a religiously neutral voucher program, the CSP satisfies this Establishment Clause requirement; any religious indoctrination by a PSP is not attributable to the District.

In addition to the neutrality analysis, the Court has consistently held that there is no attribution in indirect aid programs such as the CSP. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Witters v. Washington Department of Servs.*, 474 U.S. 481 (1986). On this basis alone, the Establishment Clause does not require the religious exclusion for the CSP.

Finally, there is no other compelling or substantial governmental interest to justify the religious exclusion. To the extent the State has such an interest, it can hardly be characterized as compelling. State funds flow to religious schools in Colorado and in many other states through programs similar to the CSP. *See, e.g.*, *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (noting that Section 7 does not require religious discrimination); *Locke v. Davey*, 540 U.S.

712, 724-25 (2004) (upholding a state scholarship program that included pervasively sectarian schools and devotional theology courses).

Petitioners incorrectly assert that the U.S. Supreme Court's decision in *Locke* permits religious discrimination in school funding. Opening Brief at 64. The Court in *Locke* upheld a Washington state scholarship program that excluded degrees for professional clergy based on a narrow state interest in not funding the vocational religious training of clergy. *Locke*, 540 U.S. at 723 n.5. Petitioners' religious exclusion extends well beyond religious vocational training and encompasses all secular topics taught at religious schools. More generally, Petitioners' religious exclusion does not apply merely to a distinct category of instruction such as religious vocational training, *id*. at 713, but rather to all categories of instruction presented from the perspectives of religious schools. The religious exclusion applies to a "prohibited perspective, not the general subject matter." *Rosenberger*, 515 U.S. at 831; *see also Colorado Christian University*, 534 F.3d at 1255-57 (noting that *Locke* suggests that "the state's latitude to discriminate against religion… does not extend to wholesale exclusion of religious institutions from otherwise neutral and generally available government programs").

In short, Petitioners' religious exclusion has no relationship to any alleged state interest in not funding the religious training of clergy, nor do Petitioners assert that the applicable state interest is so focused. To the contrary, Petitioners

assert a much broader interest in denying all aid that may end up going to religious schools, even when the government has a secular purpose. But such a broad interest has never been recognized. Indeed, Petitioners' religious exclusion contradicts this Court's holding (discussed below) that aid to certain religious schools is permissible. It would also preclude other programs that benefit religious schools. *See, e.g.*, C.R.S. § 23-3.5-105 (2011) (authorizing a governmental body to issue tax-exempt bonds for religious schools). Because the scope of discrimination imposed by Petitioners' religious exclusion is substantially broader than that imposed by the program at issue in *Locke*, and because the State has no compelling interest in such a broad exclusion, *Locke* simply provides no support for Petitioners' religious exclusion.

II. A "religious infusion" interpretation of Section 7 violates the Establishment Clause.

The trial court held that no governmental funds may flow to a private school if there is a material "risk of religion intruding into the secular educational function of the institution." Trial Court Order at 38 (Addendum 3 to the Defendants' Answer Brief) (citing *Americans United for Separation of Church and State Fund, Inc. v. State of Colo.*, 648 P.2d 1072, 1084 (Colo. 1982) (holding that public funds may go to a sectarian institution if there is not "the type of ideological control over the secular educational function which Art. IX, § 7, at least in part, addresses").

The trial court's interpretation of Section 7 excludes any PSP with a mission to inculcate a religious ideology, even if its educational program fully meets "the secular educational needs of students." *Id.* at 40. Applying this rule, the trial court concluded that:

> Because the scholarship aid is available to students attending elementary and secondary institutions, and because the religious Private School Partners *infuse religious tenets into their educational curriculum*, any funds provided to the schools, even if strictly limited to the cost of education, will result in the impermissible aid to Private School Partners *to further their missions of religious indoctrination* to purportedly "public" school students.

Id. at 42-43 (emphasis added).

In order to ensure compliance with such an interpretation of Section 7, the District would be required to determine the tenets (or ideology) of each PSP, whether such tenets are religious in nature, whether they are "infused" into the PSP's activities, and whether they are taught so as to indoctrinate. These inquiries immerse the District (and the courts in the event of litigation) in a sea of subjective religious determinations which they have no competence or constitutional authority to make.

In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), for example, the U.S. Supreme Court struck down a statute which required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for

sectarian activities." *Id.* at 132. The Court noted that the requirement would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id.* at 132-33 (emphasis added). The Court concluded that "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id.* at 133.[6]

This same principle applies to attempts to measure the religiosity of different types of religious activities. In *Widmar v. Vincent*, the Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." 454 U.S. 263, 269 n.6 (1981). The Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* The Court noted that "[m]erely to draw the distinction would require the [State] - and ultimately the Courts - to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by

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[6] *See also Hernandez v. Commissioner*, 490 U.S. 680, 694 (1989) (in income tax exemption context, pervasive governmental inquiry into "the subtle or overt presence of religious matter" is proscribed by the First Amendment Establishment Clause).

the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*; *see also id.* at 272 n.11 (noting the difficulty of determining which words and activities constitute religious worship due to the many and various beliefs that constitute religion).

Similarly, the Tenth Circuit recently rejected an inquiry into whether a school's religion courses tended to indoctrinate or proselytize. *Colorado Christian University*, 534 F.3d at 1262. The court noted that the line "between 'indoctrination' and mere education is highly subjective and susceptible to abuse." *Id.* Accordingly, the court concluded that "[t]he First Amendment does not permit government officials to sit as judges of the '*indoctrination' quotient* of theology classes." *Id.* at 1263 (emphasis added).

This same deference principle has been adopted by this Court. In *Maurer v. Young Life*, 774 P.2d 1317 (Colo. 1989), this Court upheld a determination by the Board of Assessment Appeals that camp property owned and operated by Young Life qualified for a religious worship exemption. This court cited the testimony of Young Life's president that:

> To us, skiing, horseback riding, swimming, opportunities to be with young people in a setting and in an activity that is wholesome is all a part of the expression of God in worship. There is no ["] we are now doing something secular, we are now doing something spiritual.["]

Id. at 1328. This Court concluded that "[a]voiding a narrow construction of property tax exemptions based upon religious use also serves the important

purpose of avoiding any detailed governmental inquiry into or resulting endorsement of religion that would be prohibited by the establishment clause . . ." *Id.* at 1333 n.21.

These cases all recognize that in practice discerning the religious significance of an activity (*i.e.*, whether it is not religious at all, religious but not indoctrinating, or religious and indoctrinating) requires doctrinal interpretation and an inquiry into religious motives. For example, Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993).

The religious infusion test advanced by Petitioners and employed by the trial court would require government officials to make distinctions for which they very likely have little competence and certainly have no constitutional authority. And for this reason the religious infusion test is unconstitutional.

III. This Court should interpret Section 7 to permit religiously neutral programs such as the CSP.

In light of the foregoing constitutional limitations, Section 7 should be interpreted to require only that government aid programs have a secular purpose and be neutral with respect to religion. This interpretation is consistent with prior case law interpreting Section 7 and with a plain reading of Section 7. It also fosters religious pluralism.

A. Religious neutrality preserves this Court's holding in *Americans United* and the Tenth Circuit's analysis in *Colorado Christian University*.

In *Americans United*, this Court held that a student aid program satisfied Section 7 because it was indirect aid and the statute excluded "pervasively sectarian" schools. *Americans United*, 648 P.2d at 1084. However, this Court did not hold that these components of the program were required by Section 7. In *Colorado Christian University*, the Tenth Circuit held that the "pervasively sectarian" exclusion violated the Free Exercise and Establishment Clauses and was not necessary to comply with Section 7. *Colorado Christian University*, 534 F.3d at 1268 n.10. Specifically, the Tenth Circuit held that this Court "would likely uphold the program even if CCU were admitted."[7] *Id.* at 1268. As a result, the Tenth Circuit concluded that the State had no interest to justify the religious

[7] Following *Colorado Christian University*, the Colorado General Assembly amended the program to remove the pervasively sectarian exclusion. *See* C.R.S. § 23-3.5-105 (2011).

discrimination. Therefore, if this Court were now to adopt Petitioners' religious exclusion interpretation, Section 7 would not only nullify the CSP, but it would also render the Tenth Circuit's analysis incomplete (since the analysis assumed that the religious exclusion interpretation was not correct).

This Court should follow the Tenth Circuit's analysis by interpreting Section 7 to require only religious neutrality. This interpretation – in stark contrast to Petitioners' religious exclusion - would also preserve this Court's holding in *Americans United* that Section 7 does not preclude government funds flowing to religious schools. The distinctions upon which Petitioners rely to square their religious exclusion with *Americans United* are all irrelevant. Nothing about Petitioners' religious exclusion would permit a religious school to participate in a government program if the school was not pervasively sectarian, or did not infuse religion into its curriculum, or did not require chapel, or limit its admission, or offered only higher educational programs.[8] Petitioners' religious exclusion applies because the school is religious; all other distinguishing factors are red herrings.

[8] Indeed, the Section 7 language itself makes no distinction between schools either based on the grade levels they serve or "the pervasiveness of their sectarianism." *Colorado Christian University,* 534 F.3d at 1268.

B. The plain language of Section 7 can be read as requiring only religious neutrality.

The actual language of Section 7 supports a religious neutrality interpretation. The language prohibits aid "to help support" a religious school or "for any sectarian purpose." The key issue is what the phrase "to help support" means. Petitioners construe the phrase to encompass any funds flowing to a religious school, even if the funds are being paid specifically for the tuition of a student enrolled in the program.[9]

But this is a strained construction. Under this construction, Petitioners would apparently argue that the Good Samaritan's payments to the innkeeper to cover the costs of caring for the wounded traveler were actually "to help support" the innkeeper.

A more natural reading is that payments made under a religiously neutral program "help support" the program's objectives. Any benefit that a religious institution may receive from such payments is incidental and does not constitute "support" within the meaning of Section 7. *Americans United*, 648 P.2d at 1082,

[9] While purporting to apply a "plain language" analysis, Petitioners in fact entirely ignore or change key phrases. For example, although Section 7 only prohibits aid to schools "controlled by any church or sectarian denomination," Petitioners interpret Section 7 to apply to schools controlled by any religious organization (and even to independent religious schools).

1083-84. As applied to the CSP, because the payments are made to help support the students and their parents, they comply with the plain language of Section 7.

C. Religious neutrality in the provision of government benefits fosters religious pluralism.

Petitioners' *amici* Anti-Defamation League, *et al*., have put forward the counter-intuitive and paternalistic argument that religious discrimination is necessary to foster religious diversity. These *amici* assert that religious schools must be protected from the temptation to surrender their religious convictions in order to obtain public funds. The notion inherent in this argument – that money may corrupt – is one that all persons, religious and otherwise, would undoubtedly do well to consider.

But Petitioners' *amici* cite no authority holding that this notion justifies religious discrimination from an otherwise neutral program. Moreover, Petitioners' *amici* fail to identify even one requirement of the CSP that is designed to incentivize religious schools to alter their curricula or violate their religious beliefs. Religious liberty is not so fragile that it requires the government to protect religious organizations from themselves. Nor is it the government's job, as Petitioners' *amici* quaintly suggest, to prevent religious organizations from competing among themselves. To the contrary, such competition is the essence of religious pluralism in the marketplace of ideas.

CONCLUSION

The First Amendment nurtures this country's distinctive heritage of religious pluralism by preventing the government from either promoting or inhibiting religious viewpoints in the marketplace of ideas. To ensure the continued vitality of this marketplace, to foster religious pluralism, and to protect the religious choices of citizens, the government may not exclude from a religiously-neutral program an otherwise qualifying institution solely because the institution's ideology is grounded in religious conviction.

Therefore, *amici* respectfully request this Court to affirm the Court of Appeals' interpretation of Section 7. Moreover, because the CSP is not only religiously neutral, but also a voucher program, this Court should affirm that the program is designed to help parents and not to further any religious purpose of the District. Accordingly, the CSP complies with Section 7.

Respectfully submitted this 4th day of August, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of August, 2014, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CATHOLIC DIOCESE OF COLORADO SPRINGS, COLORADO CHRISTIAN UNIVERSITY, AND COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES** was served by ICCES as follows:

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