DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202-5385	
Plaintiffs: JAMES LARUE, SUZANNE T. LARUE, INTERFAITH ALLIANCE OF COLORADO, RABBI JOEL R. SCHWARTZMAN, REV. MALCOLM HIMSCHOOT, KEVIN LEUNG, CHRISTIAN MOREAU, MARITZA CARRERA and SUSAN MCMAHON v. **Defendants:** COLORADO BOARD OF EDUCATION, COLORADO DEPARTMENT OF EDUCATION, DOUGLAS COUNTY BOARD OF EDUCATION and DOUGLAS COUNTY SCHOOL DISTRICT	**▲ COURT USE ONLY ▲** Case Number: 2011CV4424 Div./Ctrm.: 259
Attorneys for Plaintiff Matthew J. Douglas, #26017 Timothy R. Macdonald, #29180 Michelle K. Albert, #40665 Arnold & Porter LLP 370 Seventeenth Street, Suite 4500 Denver, CO 80202-1370 Phone Number: 303.863.1000 Fax: 303.832.0428 Email: Matthew.Douglas@aporter.com Timothy.Macdonald@aporter.com Michelle.Albert@aporter.com Paul Alexander, CA Bar #49997 Arnold & Porter LLP Suite 110, 1801 Page Mill Road Palo Alto, CA 94304-1216 Phone Number: 415.356.3000 Fax: 415.356.3099 Email: Paul.Alexander@aporter.com	

George Langendorf, CA Bar #255563
Arnold & Porter LLP
22nd Floor, One Embarcadero Center
San Francisco, CA 94111-3711
Phone Number: 415.356.3000
Fax: 415.356.3099
Email: George.Langendorf@aporter.com

Mark Silverstein, #26979
Rebecca T. Wallace, #39606
American Civil Liberties Union Foundation
of Colorado
400 Corona Street
Denver, CO 80218
Phone Number: 303.777.5482
Fax: 303.777.1773
Email: msilver2@att.net
rtwallace@aclu-co.org

Daniel Mach, DC Bar #461652
Heather L. Weaver, DC Bar #495582
ACLU Foundation Program on Freedom
of Religion and Belief
915 15th Street, NW, Suite 600
Washington, DC 20005
Phone Number: 202.675.2330
Fax: 202.546.0738
Email: dmach@aclu.org
hweaver@aclu.org

Ayesha N. Khan, DC Bar #426836
Gregory M. Lipper, DC Bar #494882
Americans United for Separation of Church and State
1301 K Street, NW
Suite 850, East Tower
Washington, DC 20005
Phone Number: 202.466.3234
Fax: 202.898.0955
Email: khan@au.org
lipper@au.org

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs James LaRue, Suzanne T. LaRue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Rev. Malcolm Himschoot, Kevin Leung, Christian Moreau, Maritza Carrera and Susan McMahon, (collectively, "Plaintiffs"), by and through their undersigned counsel, respectfully move for entry of a Preliminary Injunction preventing Defendants from funding or otherwise implementing the Choice Scholarship Pilot Program.

Certificate of Compliance

Pursuant to C.R.C.P. 121 1-15(8), counsel for Plaintiffs certify that they have conferred in good faith with counsel for Defendants prior to filing this Motion. Counsel for Defendants oppose the relief sought in this Motion.

INTRODUCTION

Plaintiffs seek to enjoin Defendants from diverting millions of dollars of public funds—generated from state and local tax revenues and specifically earmarked for public schools—to send 500 Douglas County students to private schools, most of them religious, through the Douglas County "Choice Scholarship Program" ("Voucher Program" or "Program"). Nearly 75% of the participating schools (14 of 19), will use these taxpayer funds for religious education and indoctrination. Specifically, in approving these schools as "partners," Defendants have expressly authorized them to use taxpayer funds to discriminate in both enrollment and hiring on the basis of religious beliefs, sexual orientation, and medical conditions, among other grounds. Defendants also have approved the use of taxpayer funds to require participating students to attend religious worship services and swear an oath to the particular faith favored by the schools.

For several independent reasons, this program violates the Colorado Constitution and laws. For one, the Colorado Constitution prevents the diversion of taxpayer dollars to fund religious entities, including religious schools; and, quite apart from concerns about funding religion, the Colorado Constitution requires that public funds support public schools and public

schools alone. The Program violates these provisions because, unless enjoined from doing so, the Defendants will soon begin funneling taxpayer dollars to these private, primarily religious schools.

As part of implementing its program, the School District has created a phantom charter school—with no building, classes, teachers, or books—in which the 500 voucher recipients will purportedly "enroll." But even if a public charter school that exists only on paper were legally permissible, this effort to end-run the Constitution hardly cures the problem. On the contrary, the District's public charter school mechanism merely compounds the constitutional violations by further entangling the District in the religious policies and practices of its Private School Partners. Not only will Defendants be unconstitutionally funding these religious practices and policies, but the discriminatory admissions criteria become a prerequisite to enrollment in a public school. Furthermore, a mandatory condition of the students' continued attendance in the Program includes their submission to proselytizing and inculcation of religious tenets, as well as compulsion to attend religious services.

With or without the phantom charter school, then, the Program runs afoul of the Colorado Constitution's most basic protections for religious liberty and public education, which aim to provide a free, uniform, and strong public school system open to all children regardless of their faith.

Accordingly, Plaintiffs seek a preliminary injunction declaring that the Voucher Program is likely to be found unconstitutional and otherwise unlawful, and enjoining the Defendants from taking any further steps to fund or implement the Program. Plaintiffs have a reasonable likelihood of success in showing that the Voucher Program violates Article IX, sections 2, 7, 8; Article II, section 4; and Article V, section 34 of the Colorado Constitution. The plain language

of these provisions, cases interpreting them, and the undisputed facts about the private religious schools that will participate in the Program, demonstrate Plaintiffs' likelihood of success on the merits of their claims for relief—and Plaintiffs need only demonstrate a reasonable probability of success on one of their claims in order to meet the preliminary injunction standard. Without an injunction, Plaintiffs' constitutional rights will be irreparably harmed, the taxes they have paid to Douglas County and the State will be illegally spent to support religious education and indoctrination, and will reach the coffers of churches and other religious organizations and private schools.

STATEMENT OF FACTS

The Voucher Program

In the upcoming 2011-12 school year, Defendants will divert millions of dollars in public funds intended to support public education, and will use these funds to send 500 students currently enrolled in Douglas County public schools to private schools, deemed "Private School Partners" by Douglas County. Ex. 1 at 1.

To be eligible to participate in the Voucher Program, a student must reside in Douglas County and must have attended a Douglas County public school for the prior school year. Ex. 2 at 2. There are no income limitations and no requirements of financial need. *Id.* To participate in the Program, a student must be granted admission to an approved private school, of which 14 of 19 are religious in nature and are controlled by a church or sectarian denomination. Exs. 1 at 1-3, 2 at 2.

If a student is selected to participate in the Program and is accepted at a Private School Partner, Douglas County School District will pay the private school 75% of the "Per Pupil Revenue" that it receives from the State of Colorado ($4,575 for 2011-12), or the private school's actual tuition fee, whichever is less. Ex. 2 at 2. The District will pay the private school

by check in four equal installments throughout the school year. The checks are made out to the parent of the participating student but are mailed directly to the private school. Parents must endorse the check for the sole use of the private school. *Id.* The amount of the voucher is the same for each student, irrespective of income or financial need.

The Predominance of Religious Schools

As of the filing of this Motion, 14 of the 19 private schools that have been approved to participate in the Program are religious. Of the five non-religious schools, one is for gifted students only, another is for special needs students, and the remaining three schools run through eighth grade only. Exs. 1 at 1-3, 37 at 1-9 . Most of the approved religious schools are owned and controlled by private religious institutions. For example:

- The Rock Academy is a ministry of The Rock Church. "As such it is in every way operated and directed as part of [the] ministry through the leadership of the church." Ex. 3 at 8.
- The Evangelical Christian Academy is part of the Village Seven Presbyterian Church. The secondary school is located at the church, and the elementary school is located at Grace Presbyterian Church. Ex. 4 at 4.
- Cherry Hills Christian Elementary School is part of Cherry Hills Community Church. Ex.5 at 1.
- Our Lady of Lourdes Catholic School is part of Our Lady of Lourdes Catholic School and Church. The school and the church are an indivisible entity. Ex. 6 at 1-2.
- Southeast Christian School and Southeast Christian Church are an indivisible entity described on their web site as "Southeast Christian Church and School." Ex. 7 at 1.
- Shepherd of the Hills Lutheran School is part of Shepherd of the Hills Lutheran Church, whose congregation provides "ultimate oversight of the school." Ex. 8 at 2.
- Lutheran High School is governed by the Colorado Lutheran High School Association, a "ministry of the Lutheran Church Missouri Synod," the membership of which consists of Lutheran churches in Denver and the surrounding area. Ex. 10 at 1, 9.
- Trinity Lutheran School is controlled by a school board that is "elected by the congregation." Ex. 11 at 19.

Religious Education and Indoctrination

One of the primary missions of the religious Private School Partners is to provide students with a religious upbringing and to inculcate in them the particular religious beliefs and values of the school or sponsoring religious organization. For example:

- The Rock Academy uses the "Principle Approach," a method of Biblical reasoning that "places the Truths (or principles) of God's Word at the heart of education." At the Rock, "[e]ach subject is predicated upon God's Biblical principles." Ex. 3 at 4.
- Front Range Christian School's materials state that "our standard of truth is in Scripture, which we believe to be the inspired and infallible Word of God. If teaching materials or information are in conflict with that standard, the Bible will always take precedence." Ex. 12 at 1.
- Trinity Lutheran School's Application states: "First and foremost, the school curriculum shall consist of instruction in the Word of God and principles of the Christian faith." Ex. 11 at 20.
- Lutheran High School materials indicate that "high school students should be educated with Christ, or risk being educated against Him" and that "high school plays a pivotal role in the development of the brain." Ex. 13 at 1, 3.
- Valor Christian High School's Application states that the "Bible is the foundation for all our programs. We will not compromise our Christian values as found in the Bible and reflected in the life and teachings of Jesus Christ." Ex. 14 at 10.
- Southeast Christian School describes itself as "unashamedly creationist" and states that it seeks "to provide a place where the values of the Bible are given authority." Ex. 7 at 4.
- Shepherd of the Hills Lutheran School materials state that its students will "hear about Jesus Christ, their Savior, in personal ways throughout the school day and throughout the curriculum - *EVERY DAY*." Ex. 15 at 2. (emphasis in original).
- Denver Christian Schools' application states: "Our curriculum points to God in every subject and activity, not just in chapels and Bible classes." Ex. 16 at 7.
- At Cherry Hills Christian Elementary School, the curriculum includes Bible study in every year. Ex. 17 at 7. Moreover, "[c]lasses can be found praying at various times throughout the school day, both formally and informally." *Id.*

As the above descriptions confirm, students at these private religious schools experience religious teaching and indoctrination in and out of the classroom. Defendants have expressly authorized the participating schools to continue these practices using taxpayer funds. Indeed, after speaking with Douglas County Assistant Superintendent Dr. Cutter, one private school

superintendent observed that "the district wants *no control* over Cherry Hills Christian or any other partner school." (emphasis added). Ex. 28 at 1.

Moreover, all but two of the approved religious schools require attendance at worship services. The other two provide only the slimmest of exceptions: Hillel Academy of Denver states that parents may be permitted to exclude students from religious services "dependent on the individual circumstances of the child, although it is unusual and rarely requested"; and Front Range Christian School states that some part-time students do not attend chapel on Wednesdays if the students are not on campus during that time. Exs.18 at 5, 9 at 7.

The Program purports to afford participating students the right to "receive a waiver from any required religious services at the Private School Partner," but the waiver is virtually meaningless. As set forth in a "Frequently Asked Questions" document, the waiver "does not include instruction" and, though "[s]tudents may opt-out of participation" in a worship service, they may nevertheless "be required to respectfully attend, if that is the school's policy." Ex. 19 at 1.

Religious and Other Discrimination

Schools that wish to participate as a "partner" in the Voucher Program need not make any modifications to their admissions or hiring criteria, even if they discriminate on the basis of students' or teachers' religious views. In fact, the Program specifically authorizes participating private schools to "make enrollment decisions based upon religious beliefs." Ex. 2 at 1.

The applications submitted by religious private schools participating in the Program indicate that the schools intend to take advantage of this license. Indeed, many of the participating schools explicitly limit admissions on the basis of a student's religious beliefs, and in some cases on the basis of the parents' religious beliefs. By way of example:

- Evangelical Christian Academy Requires each parent and secondary student to sign a declaration of faith including "a written born-again believer's testimony"; at least one parent must be a professing Christian and "give expression of that profession through active membership in a local church." Ex. 20 at 8.
- Front Range Christian School requires that "at least one parent or guardian of a prospective student [must] profess a personal relationship with Christ." Ex. 9 at 8.
- Student applicants to Denver Christian Schools must describe their "personal relationship with Jesus Christ." Ex. 16 at 9.
- Our Lady of Lourdes Catholic School gives preference to Catholic students, and states that no person "shall be admitted" unless that person "and his/her parents subscribe to the school's philosophy." Non-Catholic students or students who are not parishioners at a parish within the archdiocese are charged higher tuition. Ex. 22 at 5.
- Cherry Hills Christian Elementary School requires student applications to include a signed "Family Commitment Statement" wherein the applicant must vow "to pray for CHC students, faculty, and administration." Ex. 5 at 8. Church member families get preferential treatment during enrollment. Ex. 17 at 6.
- The Rock Academy requires students to agree to "fully support the mission of the Rock Academy which is to develop students in the knowledge and love of Jesus Christ." Ex. 3 at 37.

In addition to permitting schools to discriminate on the basis of students' and parents' religious beliefs, the Program also permits the private schools to discriminate against students and staff on the basis of medical conditions, sexual orientation, and marital status. For example:

- Denver Christian Schools' Application for the Program sets forth the school's "AIDS policy," which permits a team appointed by the school superintendent to recommend whether to admit, deny, or withdraw an HIV-positive student. Ex. 16 at 7.
- Front Range Christian School considers homosexuality "a cause for termination." Ex. 9 at 11.
- Evangelical Christian Academy forbids teachers to engage in "homosexual behavior" and "other deviant acts" that "violate the bona fide occupational requirement to be a good Christian role model." Ex. 4 at 5.
- Southeast Christian School requires prospective teachers to sign a "Personal Sexual Purity Statement," which states that marriage is an act between one man and one woman, and that "God has expressly condemned . . . homosexual practice." Ex. 23 at 8-9.
- Lutheran High School reserves the right to expel students who decide to get married while at Lutheran High School, as well as pregnant students. Ex. 10 at 8.

Moreover, the Program as a whole discriminates against students with disabilities. The Douglas County form Application for partner schools expressly states that the "[d]istrict-provided services to parentally placed students with disabilities are limited." Ex. 2 at 2.

The Phantom Charter School

From the outset, certain proponents of the Program recognized that it raised significant constitutional concerns. At a meeting held on January 5, 2011, members of the Douglas County Board of Education ("Douglas County Board") and the state Department of Education ("DOE") discussed the constitutional and legal obstacles to the Program, including the "no-aid" provisions of Article IX section 7, and also the problem of how to count the private school students in the Program as public school students for the purpose of obtaining state funds. *See* Ex. 24 at 2. In an attempt to sidestep the legal problems with using taxpayer dollars to fund private, religious schools, the final design of the Program incorporated a charter school discussed at the January 5th, 2011 meeting. *Id.*; Ex. 27.

On June 21, 2011, the Douglas County Board established a new charter school, the Choice Scholarship School to "administer" the Voucher Program. Ex. 26 at 1-17. Although the supposed school is organized as a public charter school under Colorado's Charter Schools Act, no student will attend this school. Unlike the other eight charter schools that already operate in Douglas County, see Ex. 31, the supposed Choice Scholarship "school" provides no educational instruction, has no curriculum, and "does not require its own classroom facilities." Ex. 27 at 9. In fact, it has no physical presence beyond "administrative offices as assigned by the DCSD Superintendent." *Id.* And unlike the other Douglas County charter schools, which do not discriminate on religious or other grounds, Ex. 32 at 1, in order to "enroll" in the phantom charter school, students must first meet the discriminatory admissions criteria of the Private

School Partners. Ex. 27 at 2. Students also must be able to make up the difference in costs between the Program "scholarship" amount and the private school tuition fee—in stark contrast to the District's other public charter schools, which, as required by state law, are free. Ex. 2 at 2. Further, to remain enrolled in the public charter school throughout the entire school year and in future years, students must comply with all policies and practices of the private religious schools, including mandatory submission to proselytizing and inculcation of religious tenets, as well as attendance at worship services and other religious services. Ex. 27 at 9.

In sum, the Voucher Program, if implemented, will soon take millions of dollars of public funds that are intended to support public education, and will use those funds to instead support religious education, indoctrination, mandatory worship, and discrimination, all through the vehicle of a supposed "public" charter school.

ARGUMENT

The Court should grant a preliminary injunction to stop further funding or implementation of the Voucher Program. As detailed below, Plaintiffs can and will demonstrate: (1) a reasonable probability of success on the merits of a claim for relief; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) the absence of a plain, speedy, and adequate legal remedy; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of the equities favors the injunction; and (6) that the injunction will preserve the status quo pending trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982).

I. Plaintiffs Are Likely To Succeed On The Merits.

Plaintiffs satisfy the first requirement for obtaining a preliminary injunction—a reasonable probability of success on the merits of one of their claims for relief—because the Voucher Program is unlawful under the following provisions of the Colorado Constitution:

(1) Article IX, section 7, by taking public funds intended to support public schools and using them instead to help support or sustain private schools controlled by churches or religious denominations;

(2) Article II, section 4, by compelling taxpayers to support the churches and religious organizations that own, operate, and control many of the private religious schools that are participating in the Program;

(3) Article IX, section 8, by subjecting students to religious admission criteria and teaching them religious tenets and doctrines;

(4) Article IX, section 2, because it undermines the constitutional requirement to maintain a "thorough and uniform system of free public schools;"

(5) Article V, section 34, by appropriating public educational funds to schools not under the absolute control of the state; and

(6) Article IX, section 15, by transferring control of education provided by public funds to private individuals not elected as required by section 15.

While Plaintiffs need only establish a reasonable likelihood of success on the merits of one of these claims in order to obtain preliminary relief, as explained below, Plaintiffs are likely to prevail on all of them. Accordingly, this Court should find that Plaintiffs meet the first prong of the preliminary injunction standard.

A. The Program Violates Article IX, Section 7 Of The Colorado Constitution Because It Constitutes An Appropriation Or Payment Of Public Funds To Support Schools Controlled By Churches Or Sectarian Denominations.

The Program violates Article IX, section 7 of the Colorado Constitution (often referred to as a "no-aid" provision), entitled "Aid to private schools, churches, sectarian purpose, forbidden." Article IX, section 7 proscribes any appropriation or use of public funds to support

any school controlled by a church or sectarian denomination. In relevant part, it states that the government shall not:

> [M]ake 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.

Section 7 codifies the constitutional founders' overriding interest in establishing a system of "free non-sectarian common schools" and ensuring that the funds set aside to support these schools would not be diverted for sectarian purposes. *See* Colo. Const. Convention Proceedings at 277-78. As the Colorado Supreme Court explained in *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927), "the purpose of said section 7 was to forestall public support of institutions controlled by [religious] sects." The Voucher Program violates the plain language of section 7 and aims to do precisely what that section intends to prohibit—taking public funds and using them to support or sustain private schools controlled by churches or sectarian denominations.

1. The Program Aids Private Religious Schools

Unless enjoined, Defendants will use appropriations or payments from "public fund[s] or moneys" to aid private schools controlled by churches or sectarian denominations, contrary to section 7. Specifically, the District plans to send 75% of its "per-pupil revenue" for the 500 students participating in the Program—that is, $2.25 million dollars—to private schools, of which 14 of 19 are religious schools. The District will accomplish this transfer of public funds to predominantly religious schools by sending checks directly to the schools. Although the checks will be made out to the parents of the participating students, the parents are required, under the

terms of the Program, to restrictively endorse the checks to the private school for the sole use of that school.

The facts as described above establish that a number of the private schools participating in the Program are in fact controlled by churches or sectarian groups. Some of them are expressly governed, operated or controlled by churches and congregations, while others are part of an indivisible entities that are a combined school and church. *See* Statement of Facts, above at p. 6.

Second, this violation of Article IX section 7 is not cured by making out the millions of dollars in checks to the parents of participating students. Section 7 prohibits "*any appropriation*" or any payment "*from any public fund or moneys whatever*," in aid of "any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school . . . controlled by any church or sectarian denomination whatsoever . . ." (emphasis added). The plain language of section 7 indicates that it applies to *any* appropriation or payment from a public fund "*in aid of*," *i.e.* which has the effect of aiding, a church or religious group, or which helps support a religious school. Whether made out to the religious schools, the parents, or some other party, the checks travel from the District to the religious schools, can be cashed only by the schools (after being restrictively endorsed by the parents). Thus, the funds have the effect of aiding and supporting religious schools and the churches or religious groups that control them.

Courts interpreting similar provisions from other states have agreed. The Arizona Supreme Court recently held that a similar voucher program violated Arizona's no-aid provision. *See Cain v. Horne*, 202 P.3d 1178, 1184 (Ariz. 2009). Under the Arizona programs at issue in *Cain*, parents or guardians of "disabled" or "displaced" students would receive vouchers to be used at private religious schools. Like the Douglas County Program, under the relevant Arizona

statutes, the parent (or guardian) would receive a check and was required to restrictively endorse the check to the selected private school. *See id.* at 1180-81. The court held that the program violated Arizona's "no-aid clause," which prohibits the "appropriation of public money . . . in aid of any . . . sectarian school," because the program did "precisely what the Aid Clause prohibits. These programs transfer state funds directly from the state treasury to private schools. *That the checks or warrants first pass through the hands of parents is immaterial*; once a pupil has been accepted into a qualified school under either program, the parents or guardians have no choice; they must endorse the check or warrant to the qualified school." *Cain*, 202 P.3d at 1184 (emphasis added) (discussing Ariz. Const. art. 9, § 10). The Arizona Supreme Court rejected the defendant's argument that the program did not violate the "aid provision" because it actually aided the students, not the schools, because to rule otherwise would "nullify the Aid Clause's clear prohibition against the use of public funds to aid . . . sectarian education." *Id.*

The Florida Court of Appeals reached the same result. *See Bush v. Holmes*, 886 So.2d 340, 352 (Fla. App. 2004) ("*Bush I*") (voucher program violates Florida's no-aid provision: "Even though the [voucher program] gives parents and guardians a choice as to which school to apply a tuition voucher, under the [voucher program] statute the parents must restrictively endorse the voucher to the school, and the voucher funds are then paid by the state to the school.") *aff'd on other grounds*, 919 So. 2d 392, 412-13 (Fla. 2006). (The Florida Supreme Court affirmed *Bush I* on other grounds, holding that the voucher program violated the constitutional requirement to provide a uniform system of free public education, which is discussed below in section III(C) of this Motion. *See Bush v. Holmes*, 919 So.2d 392, 412-13 (Fla. 2006) ("*Bush II*")).

The Attorney General of Hawaii has also opined that a publicly-funded school voucher program would be deemed unconstitutional under that state's no-aid provision. *See* Ex. 29 at 1 (opining that a publicly funded school voucher program would be unconstitutional under Article IX, section 1 of the Hawaii Constitution, which states, "nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution").[1]

2. The *Americans United* Decision Provides Additional Support for Plaintiffs' No-Aid Claim.

The Colorado Supreme Court's decision in *Americans United for Separation of Church and State v. Colorado*, 648 P.2d 1072 (Colo. 1982), offers strong support for Plaintiffs' claim that the private school financing Program unconstitutionally "aids" religious schools in violation of Article IX section 7. In *American's United,* the Court upheld a state-sponsored college grant program that excluded schools that were "pervasively sectarian." *Id.* at 1074-75. Because pervasively sectarian schools were excluded, taxpayer funds did not go to schools if (1) the faculty and students were exclusively of one religious persuasion, (2) students were required to attend religious convocations or services, (3) there was no strong commitment to principles of academic freedom, (4) there were required courses in religion or theology that tend to indoctrinate or proselytize, (5) the school's governing board was filled by members of only one religion, or (6) the schools' funds came primarily or predominantly from sources advocating a particular religion. *See id.* at 1075. Because of these extensive restrictions, and "[b]ecause as a

[1] The Wisconsin Supreme Court's decision in *Jackson v. Benson*, 578 N.W. 2d 602 (Wisc. 1998), which upheld a voucher program challenge based on that state's no-aid provision, is inapplicable here. Wisconsin's "no-aid" provision is substantially narrower than Art. IX, section 7 of the Colorado Constitution and does not prohibit appropriations to any school controlled by a church or religious organization. *See* Wisc. Const. art. 1, § 18 (stating in relevant part, "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries"). Moreover, the program there let parents decide whether to have their children participate in religious activities. *See Jackson,* 578 N.W.2d at 883.

general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, *there [was] less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education*." *Id.* at 1084 (emphasis added).

Unlike in *Americans United*, it is undisputed that the Voucher Program includes elementary and secondary schools that will use government funds to teach religion, indoctrinate students, and hold religious services.[2] Indeed, indoctrination is a primary purpose of nearly all of the approved religious Private School Partners. Religious teachings are a central part of their curricula, and almost all of the schools compel attendance at worship services. Whereas the sectarian restrictions in *Americans United* led the Colorado Supreme Court to conclude that the benefit to religious entities would be "incidental and remote," the Program here will directly fund the nonsecular functions of the participating religious institutions. *Id.* at 1082. In fact, for many of the participating religious schools, there are no purely "secular" functions, given the pervasive and predominant position of religious tenets in the school curricula and required worship services. Unlike the program challenged in *Americans United*, then, Voucher Program does not just aid students; it will directly aid religious schools by providing them with money to indoctrinate elementary and secondary students in particular religious beliefs and world-views.

Finally, the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) does not control or conflict with this case. *Zelman* was decided under the federal Establishment Clause, which precludes laws "respecting the establishment of religion." The "no-aid" provision

[2] In *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008), the Tenth Circuit held that the grant program's exclusion of "pervasively sectarian" schools represented an excessive entanglement with religion in violation of the First Amendment in the federal Constitution. No Colorado court has evaluated whether the grant program as modified by the Tenth Circuit complies with Article IX, section 7 of the Colorado constitution, a question on which the Tenth Circuit did not rule.

of Article IX, section 7 of the Colorado Constitution is far more specific than the Establishment Clause: it prohibits aid to churches, sectarian societies, and schools controlled by religious denominations. *See Americans United, 648 P.2d at 1081-82* (the Colorado Constitution is "considerably more specific" than the First Amendment); *see also Cain*, 202 P.3d at 1182 (explaining that "both the text and purpose of [Arizona's No] Aid Clause support the conclusion that the clause requires a construction independent from" the federal Establishment Clause); *Bush I*, 886 So.2d at 344 (explaining that a conclusion that the state no-aid provision is the same as the federal Establishment Clause "would have to ignore both the clear meaning and intent of the text and the unambiguous history of the no aid provision.").

As a result, Plaintiffs have a reasonable likelihood of success on the merits of their claim that the Voucher Program violates Article IX, section 7 of the Colorado Constitution by providing public funds to private religious schools, and by aiding and supporting private religious schools, churches, and religious societies.

B. The Program Violates The Mandate In Article II, Section 4 Of The Colorado Constitution, That No Person Shall Be Compelled To Support Any Ministry, Place Of Worship, Or Religious Denomination.

The Program violates Article II, section 4 of the Colorado Constitution, which guarantees that no person be required to support any ministry, religious sect, or denomination against his consent. It provides in relevant part that:

> [N]o person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion . . . . No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

Commonly referred to as a "compelled support" provision—and shared by nearly half the states—the principles undergirding this provision are nearly as old as this country. Thomas

Jefferson's 1785 "Virginia Bill for Religious Liberty" advocated against compelled support, through taxation, of religious teaching, explaining that compelling "a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." 2 Thomas Jefferson, The Writings of Thomas Jefferson, 238 (Paul Leicester Ford eds., 1893). And Article II, section 4 provides even greater protection than the federal Establishment Clause. While both section 4 and the First Amendment "embody the same values of free-exercise and governmental non-involvement," the prohibitions of section 4 are "considerably more specific." *See Americans United*, 648 P.2d at 1081-82.

The Voucher Program, if implemented, would violate the text and purpose of section 4 in at least two independent ways: (1) by compelling Plaintiffs and other taxpayers to financially support the propagation of religious views that they do not share or wish to endorse; and (2) by compelling Douglas County students who want to participate in the Program to attend religious services and classes that include religious indoctrination.

1. The Voucher Program Compels Plaintiffs to Financially Support Religious Ministries and Places of Worship.

First, the Voucher Program violates section 4's prohibition on compelled support of religion by requiring state taxpayers to financially support ministries, places of worship, or religious denominations. Because the District plans to obtain public funding for the Program by creating a phantom charter school and counting Program participants as public school students, the Program will be funded through the Public School Finance Act, C.R.S. § 22-54-101 *et seq.* The funds are or have already been raised by collecting local property taxes, income tax, and other taxes paid by Plaintiffs to Douglas County and Colorado. Moreover, these funds will be used to support the "ministries," "places of worship," and "religious denominations" that own, operate, and control the private religious schools.

As set forth in the Statement of Facts, above at p. 6, many of the participating religious schools are indivisible from, or are controlled by, churches. Nothing in the Program restricts the ability of religious groups or ministries from expending the funds they receive through the Program to support religious education and indoctrination. Nor could it—when religious teaching, indoctrination and worship is an integral element of a school's curriculum, any support to the educational function of the church or religious group supports the ministries and religious denominations that control those schools.

In applying provisions similar to Colorado's compelled-support clause, the highest courts from other states have invalidated this type of program on the ground that it constitutes improper support to religious organizations. For instance, in *Chittenden Town School District v. Department of Education*, 738 A.2d 539 (Vt. 1999), the Vermont Supreme Court invalidated a tuition reimbursement policy implemented by a school district to provide tuition reimbursement to a private religious school owned and operated by the Roman Catholic Diocese of Burlington. The court held that the program violated Vermont's constitutional prohibition on compelled support of any "place of worship." 738 A.2d at 563. In that case, like the Program that Defendants seek to implement here, the religious school that would have received public funds was one in which "the secular and sectarian aspects of its educational program are intertwined," *i.e.*, the school required instruction in religious theology and quiet attendance at daily prayers; and the faculty was required to "adhere to Catholic doctrine in their teachings" and "exemplify the values of the Catholic faith." *Id.* at 542. Under these circumstances, the court found that the vouchers "can, and presumably will, directly pay for religious instruction." *Id.* at 562.

Similarly, in *Almond v. Day*, 89 S.E.2d 851 (Va. 1955), the Virginia Supreme Court invalidated a program through which the state paid tuition and fees for certain children to attend

private religious schools, because it "compell[ed] taxpayers to contribute money for the propagation of religious opinions which they may not believe." *Id.* at 858. *See also Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (holding that compelled support clause was offended by "unrestricted application of public money to sectarian schools"); *Knowlton v. Baumhover*, 166 N.W. 202, 207 (Iowa 1918) (holding that the Iowa Constitution forbids "all taxation" for ecclesiastical support, including support of religious schools).

These courts' reasoning applies equally here. Unless the Program is enjoined, taxpayers will be compelled to provide financial support to religious schools in which religious worship and instruction is an integral aspect of the schools' educational missions and curricula.

2. The Voucher Program Violates the Proscription on Compelled Attendance at Any Ministry or Place of Worship.

The Program also violates Article II, section 4's prohibition on compelled support for a second, independent reason: it will require children of elementary and secondary age who wish to participate in the Program to "attend" ministries or places of worship, even if they do not consent. Program information published by the Douglas County School Board states that while "[s]tudents may opt-out of *participation*" in a worship service, they may nevertheless "be required to respectfully *attend*, if that is the school's policy." Ex. 19 at 1. As explained by School District Assistant Superintendent Christian Cutter, so long as students are permitted to remain silent during worship services, the Program's waiver provision would not prohibit Partner Schools from compelling students to attend the services. *See* Email from Christian Cutter to Ken Palmreuter (Apr. 7, 2011), attached as Exhibit 30 at 1. Students who no longer wish to attend religious services will have no choice but to drop out of the school; section 4 does not permit the State or the District to compel this type of attendance at religious worship services.

The Colorado Supreme Court's analysis in *Americans United* confirms that the Voucher Program violates Article II, section 4. While the Court in *Americans United* held that the state-funded, college-scholarship program challenged in that case did not violate section 4, the Court reached that decision because that program excluded "pervasively sectarian" institutions, and thus did not pose any risk of "even incidental or remote institutional support" for institutions whose "religious mission predominates over its secular educational role." 648 P.2d at 1082. Further, the financial assistance to students was "distributed under statutory conditions calculated to significantly reduce any risk of fallout assistance to the participating [religious] institution." *Id.*

The facts are notably different here. For one, under the Program many if not most students will be compelled to receive religious instruction and attend religious services. As discussed above, many or all of the religious schools are ones for which the "religious mission predominates" over the school's secular educational role. And, unlike the program questioned in *Americans United*, nothing in the design of the Voucher Program here is calculated to reduce the risk of assistance to the participating religious institutions.

Moreover, unlike the program upheld in *Americans United*, the Voucher Program creates a high risk of "governmental control of churches" or "governmental entanglement to any constitutionally significant degree." *Id.* This concern is demonstrated most vividly by an email from the County's Mr. Cutter, who assures a religious-school superintendent that even the limited waiver from active participation in religious services might not apply to all Partners and religious services: "Most of this can be worked out between us one-on-one. Because services vary between faiths and institutions, the waiver will include unique specifics for each individual school. It's not a 'one waiver fits all.' you and I can work together to make sure it is

comprehensive after your application is submitted." Ex.30. The process that Mr. Cutter envisions will require the District to make judgment calls and decisions about specific religious services, in violation of section 4's requirements.

For these reasons, Plaintiffs have a reasonable likelihood of success on the merits of their claim that the Voucher Program violates Article II, section 4.

C. The Program Violates Article IX, Section 8 Of The Colorado Constitution By Subjecting Public School Students To Religious Tests and Services, and By Teaching Sectarian Tenets in Public School.

Under the Voucher program, Douglas County is treating the participating students as public school students and enrolling them in a newly-created public charter school. By doing so, the Voucher Program violates three separate components of Article IX, section 8. This section provides that:

> [1] No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and [2] no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. [3] No sectarian tenets or doctrines shall ever be taught in the public school . . ."

Colorado Constitution Article IX, section 8. The first provision guarantees "that any person of any religion or no religion may become a teacher or student." *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927), *overruled on other grounds*, *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982). The second and third provisions protect students attending public schools from forced participation in religious activities.

According to Defendants, all students participating in the Voucher Program are considered to be "enrolled" in the new public charter school, the Choice Scholarship School. Ex. 26 at 9-10. As described above in the Statement of Facts, pp. 9-10 this charter school exists only in name and on paper: the school itself does not even have a building, classes, curriculum or

teachers. But if the Program students are actually to be enrolled in this charter school, as intended by Defendants, they must be treated like students in public schools.

Indeed, charter schools are "public school[s]" "for any purposes under Colorado law." Colo. Rev. Stat. Ann. § 22-30.5-104(4). To ensure the public status of charter schools, the Colorado legislature has forbade the creation of a charter school from a preexisting private school. Colo. Rev. Stat. Ann. § 22-30.5-106(2). They are public entities for purposes of constitutional and statutory liability. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010) (municipal liability applies to charter school as public school, or "local governmental entity"); *King v. United States*, 53 F. Supp. 2d 1056, 1066 (D. Colo. 1999) (charter school is a "public entity" entitled to sovereign immunity because they are delegated "the power to conduct the business of educating public school pupils"), *rev'd in part on other grounds*, 301 F.3d 1270 (10th Cir. 2002). They may not discriminate on the basis of "disability, race, creed, color, sex, sexual orientation, national origin, religion, ancestry, or need for special education services," Colo. Rev. Stat. Ann. § 22-30.5-104(b)(3); and they must provide for retirement benefits for all teachers, the same as for other public school teachers. Colo. Rev. Stat. Ann. § 22-30.5-111(3).

Moreover, and of particular relevance here, charter schools must "[o]perate . . . pursuant to . . . article IX of the state constitution." Colo. Rev. Stat. Ann. § 22-30.5-204(2)(a). Yet any *actual* education of the students "enrolled" in the Choice Scholarship School will be outsourced to the private schools participating in the Voucher Program. By admitting only students who have met certain religious qualifications necessary to obtain entrance into participating private religious schools, the Choice Scholarship School impermissibly imposes a "religious test or qualification . . . . as a condition of admission" into a public school. *See* Statement of Facts,

above at pp. 6-9. By requiring that its enrolled students comply with all the religious practices and policies of a particular private school, including mandatory worship services, the charter school also unlawfully requires public school students "to attend or participate in a[] religious service." *Id*. Further, by delegating the education of its enrolled students to religious private schools that integrate religious beliefs into nearly every aspect of their curricula, the charter school teaches "sectarian tenets or doctrines" in contravention to Article IX. *Id.*

Lest there be any remaining doubt that the Choice Scholarship School will deny its enrolled students the same legal protections afforded to all other public school students in the district, including those enrolled at other charter schools, Douglas County has stated that it will not require any change in the participating private schools' admission criteria, nor prevent the schools from requiring students to take religious tests or participate in religious services, or teaching sectarian tenets. *See* Ex. 2 at 9. ("[E]ligible schools need not modify their admission criteria or education programs to participate."); Ex. 19 at 1. ("The required opt-out does not include instruction. [The District] recognize[s] that many schools embed religious studies in all areas of the curriculum.").

Douglas County is using the newly created charter school in an attempt to obtain public money for a Program that subjects students to religious tests, compels participation in religious services, and teaches sectarian tenets. For these reasons, Plaintiffs have a reasonable probability of success on the merits of their claim that the Program violates Article IX, section 8.

D. The Voucher Program Violates the Requirement, Under Article IX, Section 2 Of The Colorado Constitution, That Public Funds Be Used "For The Establishment And Maintenance Of A Thorough And Uniform System Of Free Public Schools Throughout The State."

In diverting taxpayer dollars to private schools, the Program violates Article IX, section 2's fundamental command that taxpayer dollars support free, public education: the legislature

must "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state." When, as here, the State raises public funds for public education pursuant to this constitutional mandate, neither the State nor any state or local agency may reallocate those funds to private, fee-based schools. The Voucher Program, however, would divert publicly-raised funds to private schools that exclude many if not most Colorado youth, pursue a private, often religious educational program, and charge substantial fees for admittance. While private individuals are free to pursue that private educational alternative on their own, they may not do so with public funds raised for free, public schools.

1. The "Choice" Voucher Program Violates Article IX, Section 2 because it Takes Taxpayer Monies Intended for a Uniform System of Public Education and Diverts Them to Private Schools.

The funds at issue in this case are public and were raised for a clearly identified public purpose—providing for free public schools throughout Colorado. As required by Article IX, section 2, the State raises funds for public schools which are distributed to those public schools pursuant to Public School Finance Act. That Act does so for the purpose of providing "a thorough and uniform system of public education" as required by the Colorado Constitution. Colo. Rev. Stat. § 22-54-102(1). And under Article IX, section 2, it does not matter whether one views these private schools as "good" or "bad" or "better" than public schools. These public funds must be used exclusively for that public purpose set forth by Article IX, section 2.

The Voucher Program would do the opposite. Even at its "pilot" stage, the Program would take roughly $2.25 million intended for public schools and divert that sum to private schools. And if, as proponents intend, the Program grows, then the amount of diverted funds will grow dramatically.

The Florida Supreme Court invalidated a private school voucher program in *Bush v. Holmes*, 919 So.2d 392, 412-13 (Fla. 2006), holding that the Florida program violated a similar

provision of the Florida Constitution because private schools would receive funds that would otherwise be provided to free public schools. Indeed, "because voucher payments reduce funding for the public education system, the [voucher program] by its very nature undermines the system of 'high quality' free public schools that are the sole means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida." *Id.* at 409. Moreover, because the taxpayer money that would otherwise go to public schools was redirected instead to private schools, the Florida Supreme Court held that the voucher program could not be viewed as a "supplement" to the public education system but, rather, was a detraction from it. *Id.* at 408.

The reasoning of the Florida Supreme Court applies equally in this case. The constitutional mandate of a "thorough and uniform" system of "free public schools" is found in the language of the Constitutions of both states. The basis for raising the funds at issue is essentially the same in both states—to meet this constitutional mandate. And both programs operate in the same way—they take money raised for those public schools and divert it to private schools instead. The basic principle that arises from *Bush v. Holmes* is directly applicable here: vital public funds raised for the purpose of providing free public schools cannot lawfully be diverted to private schools.

2. The Voucher Program Violates Article IX, Section 2 because it Diverts Public Education Funds to Private Schools That are Neither Free Nor Open to the Public.

The Voucher Program also violates Article IX, Section 2 for the reason that public funds are paid to private schools that charge substantial tuitions for admission and that are not open to all Colorado students, even if they can afford that tuition. In *Lujan v. Colorado State Board Of Education*, 649 P.2d 1005 (Colo. 1982), the Supreme Court of Colorado held that one of the requirements of Article IX, section 2 was that each child of school age had the opportunity to

"receive a free education." 649 P.2d, at 1019. In that case, parents of school children in Colorado and various school districts alleged that Colorado's system of financing public elementary and secondary education was unconstitutional. *Id.* at 1010. Although the Colorado Supreme Court ultimately held that "thorough and uniform" under the state constitution did not require exact equality from county to county in "educational services or expenditures," the Court did hold that Article IX, section 2 mandates that each child receive an education free of charge. *Id.*

Yet the Voucher Program would fund schools that are far from free and that exclude many Colorado youth. Each of the private schools participating in the Voucher Program charges substantial tuition, which is the reason why the Voucher Program exists in the first place. The participating private schools seek these funds in order to support the operation of their schools.

Moreover, the private schools are able to, and in fact do, restrict admission based on a variety of criteria, including religious belief, disability, sexual orientation, and pregnancy. *See* Statement of Facts, above at pp. 6-8. The Voucher Program Executive Summary provides that "[p]rivate school partners will not be required to change their admission criteria to accept Choice Scholarship students." Ex. 2 at 1. Thus, recipients of the Voucher Program funds remain free to exclude students they deem unacceptable, whether for religious faith or other reasons. Article IX section 2 does not permit Defendants to take funds raised to provide "free public schools throughout Colorado" and instead use those funds to support private schools that charge significant tuition and impose restrictive and discriminatory admissions criteria.

Nor can Defendants avoid compliance with Article IX, section 2 merely by asserting that the private schools would provide an educational "alternative" and "competition" that somehow benefits all Colorado youth, as opposed to the select few who would benefit from the diversion

of public money. Colorado has already provided a variety of educational alternatives through an extensive system of charter schools, and Douglas County itself is already home to eight "charter schools." *See* Ex. 31 at 1. Unlike the Voucher Program's private schools, each of these charter schools is open to all Colorado youth, and none of them discriminates on religious or other private grounds or charges tuition. *See* Ex. 32 at 1.

Thus, it is the bona fide charter schools—not the Voucher Program—that create parental choice while providing an education that is free and open to all. The existence of and need for this important component of Colorado public education belies any argument that diverting funds to selective private schools would somehow serve a valid public purpose. It would not. Instead, it would detract from the ability of the State to provide a much needed "thorough and uniform" system of free public schools open to all Colorado youth.

Unlike the system of charter schools that already serve Douglas County, the phantom charter school created by the Voucher Program is not a bona fide charter school. It is merely a strategic creation designed to secure public funding for the Program and is intended to sidestep the constitutional and statutory proscriptions on using public funds to support private schools, religious education, and religious institutions.

3. The Private Schools Funded by the Voucher Program Violate Article IX, Section 2 for the Additional Reason that They Serve a Private, Not a Public, Educational Agenda and Implement Private Standards With No Public Input.

The Program violates Article IX, Section 2 for yet a third independent reason: it furthers a private, not public, agenda, and participating schools need not comply with public educational standards. The "uniform standard" for public education in Colorado is set forth in the criteria created by the state legislature and is implemented by and under the continued supervision of the local school boards. *Lujan,* 649 P.2d at 1019. Douglas County School District has adopted

Colorado State Standards, as promulgated by the Colorado Department of Education, to create learning targets for the District. Ex. 33 at 1-2. These standards describe the learning goals in each substantive area of instruction for each academic grade level. Ex. 34 at 1. Douglas County School District also issues its own learning goals for each academic school year outlining the key academic objectives to be achieved for that year. Ex. 35 at 1. Furthermore, teachers in Douglas County School District are subject to specially delineated licensing criteria, including the requirement of an "initial license" for new teachers, as set forth by the Colorado State Board of Education.

The Voucher Program's private schools, however, are not subject to these requirements. To the contrary, while the Program vaguely requires that the private schools produce "student achievement and growth for Choice Scholarship students at least as strong as what DCSD neighborhood and charter schools produce," the private schools receive little or no supervision by the local school district, are free to pursue their own, private educational agenda and to set their own criteria for teacher eligibility. Ex. 36 at 1. This lack of oversight has real consequences. For example, Christian Schools International describes its science and social studies programs as follows:

> Science is taught to give students a solid foundation, anchored firmly in Biblical truth. Special attention is given to interesting scientific facts that reveal God as the Master Designer of the universe and confirm the accuracy of the Bible. The curriculum promotes an excitement for the acquisition of critical learning skills. . . .
>
> Social Studies teaches how man has carried out God's command to rule over creation and how man has developed cultures. It reveals the Christian's responsibility to his neighbor, his community, his country and the world. It emphasizes God's plan throughout history.

Ex. 20 at 4.

The issue is not whether one agrees or disagrees with this educational choice, but rather that it is a private educational agenda developed by private school. Neither the Douglas County School District nor any other state agency has any input, much less any influence or control, over this or virtually any aspect of the private school educational process. Likewise, the Voucher Program provides no standards for teacher certification, but rather requires only that "qualifications of teaching staff" be provided to the School District. As a result, the Voucher Program leaves participating private schools free to spend millions of taxpayer dollars however they want to pursue their respective private goals and agenda. While parents and private schools are perfectly free to do this on their own, a program that does so with public education funds violates Article IX, section 2.

Plaintiffs therefore have a reasonable probability of showing that the Voucher Program violates Article IX, section 2.

E. The Voucher Program Violates Article V, Section 34 Of The Colorado Constitution Because It Provides Taxpayer Funds To Institutions Not Under Absolute Control Of The State For Nonpublic Purposes, And To Sectarian Institutions.

In providing taxpayer money to unregulated private schools, and to religious schools, the Voucher Program violates Colorado Constitution Article V, section 34 in two ways. First, the Program impermissibly appropriates money "for charitable, industrial, educational or benevolent purposes" to private persons or institutions "not under the absolute control of the state." Colorado Constitution Article V, section 34. Second, the Program impermissibly provides state funds, regardless of control, to "denominational or sectarian institution[s]."

First, the Program appropriates taxpayer funds for private schools that are not under State control. Far from exercising "absolute control," the Program provides virtually no control. There

are no requirements related to curricula, textbooks, or teacher qualifications, and "eligible schools need not modify their admission criteria or education programs to participate . . ." Ex.2 at 3.

Nor does the Program fall within the exception to the "absolute control" requirement that applies when "the purpose sought to be obtained is a public one and contains the elements of public benefit." *Americans United,* 648 P.2d at 1085 (quoting *Bedford v. White*, 106 P.2d 469, 476 (Colo. 1940)). This exception applies only if the asserted public purpose is "discrete and particularized" and clearly outweighs "any individual interests incidentally served by the statutory program" when measured against the proscription of Article V, section 34. *Id.* at 1086.

Here, and as explained in more detail above in Section I(A), pp. 12-18, the State sends money directly to the private schools (nominally made out to parents but required to be endorsed to private schools), and the Program takes no steps to avoid subjecting students to compulsory religious services and instruction, which in fact is the primary mission of many of the schools. Thus, the Program contains none of the features that led to the Colorado Supreme Court in *Americans United* to conclude that a program providing grants to college students fell within the "public purpose" exception.

Furthermore, the *Americans United* program contained several features that limited its religious nature—and thus amplified its public purpose: (1) the program did not apply to "parochial elementary and secondary education" and thus there was little risk of religion "intruding into *the secular educational function*." *Id.* at 1084 (citations omitted) (emphasis added); and (2) the legislation specifically provided that there could be "no required attendance at religious convocations or services," no required courses in religion "that tend to indoctrinate or proselytize," and that participating schools have "strong commitment to principles of

academic freedom." *Id.* at 1087 (citing § 23-3.5-105(1), C.R.S.1973 (1981 Supp.)). None of those limitations is present in the Douglas County Voucher Program.

In contrast, the Voucher Program engages in full-fledged sponsorship of religious education, a fundamentally private purpose. *See Opinion of the Justices*, 258 A.2d 343, 347 (N.H. 1969) ("the support of parochial schools . . . is not a public purpose"); *cf. Lenstrom v. Thone*, 311 N.W.2d 884, 889 (1981) (grant program to college students serves public purpose only because of restriction on "pursuing courses of study which are pervasively sectarian"). Moreover, by not requiring participating private schools to modify their hiring or admissions criteria, the Program runs counter to the important public purpose, as codified in state and federal law, to prohibit discrimination on the basis of religion, sexual orientation, medical conditions, disability, and even marital status.

For all of these reasons, the Program fails to qualify for the "public purpose" exception, and instead fails to comply with the "absolute control" requirement of Article V, section 34.

Second, the Program also violates the blanket prohibition against providing state funds to "any denominational or sectarian institution." Colorado Constitution Article V, section 34. That clause—which was not considered in *Americans United*, 648 P.2d at 1085—reflects an even broader conviction: sectarian interests are inherently private. As discussed above in section I(A), there can be no dispute that the Program provides state funds to sectarian institutions.

Plaintiffs therefore have a reasonable probability of showing that the Voucher Program violates Article V section 34.

F. The Voucher Program Violates Article IX, Section 15 Of The Colorado Constitution, The Public School Finance Act, and Other Statutes.

Finally, the Voucher Program violates Article IX, section 15 of the Colorado Constitution, by transferring control of education provided by public funds to private individuals

not elected as required by section 15, as set forth in the Motion For Preliminary Injunction filed by Plaintiffs in *Taxpayers for Public Education ("TFPE") v. Douglas County School District RE-1*, No. 2011-4427C (Martinez, J.). Plaintiffs incorporate the arguments and authorities cited in the *TFPE* Motion For A Preliminary Injunction filed in case no. 2011-4427C on July 5, 2011, which further support the issuance of an injunction. A Joint Motion to Consolidate these cases was filed in this case and *TFPE* on July 1, 2011.

II. The Voucher Program Threatens Plaintiffs With Real, Immediate, And Irreparable Injury That Will Be Prevented With Injunctive Relief.

The second and third factors for a preliminary injunction—danger of real, immediate, irreparable injury which may be prevented by injunctive relief; and the absence of a plain, speedy, and adequate legal remedy—are both met in this case. The injury to Plaintiffs' constitutional rights is irreparable and, once Plaintiffs are injured, cannot be undone. Similarly, the injury Plaintiffs suffer as taxpayers from the unconstitutional and unlawful use of their taxes cannot be repaired once the funds are distributed. Neither injury is one for which a legal remedy exists.

An injunction is warranted where, as here, "property rights or fundamental constitutional rights are being destroyed or threatened with destruction." *Rathke*, 648 P.2d at 652; *see Evans v. Romer*, 1993 WL 19678, at *8 (Dist. Colo. 1993) (enjoining defendants from declaring a constitutional amendment to be in effect, and explaining that "any denial of fundamental constitutional rights would be real, immediate, and irreparable harm"), *aff'd on other grounds*, *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993). In this case, Plaintiffs' constitutional rights, as set forth above, will be irreparably violated if the Voucher Program is implemented, because the constitutional injury cannot be undone or remedied by monetary or other compensation. *See also Kikimura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (holding that a violation of an

individual's religious rights is not adequately redressed by monetary compensation and is therefore irreparable, and explaining that "when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

Moreover, the harm that Plaintiffs would suffer as a result of the Defendants' misappropriation of public funds would be irreversible and also satisfies the "irreparable injury" and "no adequate remedy" standards. *See, e.g.*, *Rath v. City of Sutton*, 673 N.W.2d 869, 884-85 (Neb. 2004) (holding that a "taxpayer seeking to enjoin an alleged illegal expenditure of public funds needs to prove only that the funds are being spent contrary to law in order to establish an irreparable injury"); *Lien v. Nw. Eng'g Co.*, 54 N.W.2d 472, 479-484 (S.D. 1952) (holding that a court may grant injunctive relief to a taxpayer plaintiff without showing substantial detriment or damage to the plaintiff). Once taxpayer funds are disbursed to the Voucher Program, the funds cannot be returned to the public coffers, thus depriving Plaintiffs of their equitable ownership of those funds, and imposing a liability on Plaintiffs and other taxpayers to replenish the improperly appropriated funds.

III. The Public Interest, The Balance Of Equities, And The Need To Preserve The Status Quo All Favor An Injunction.

The remaining three factors are satisfied here as well. A preliminary injunction will serve the public interest in upholding the Colorado Constitution, which prohibits: funneling public funds to private schools or schools controlled by religious institutions; compelling individuals to support churches and religious groups; compromising the free and uniform system of public schools; authorizing the expenditure of public funds to support schools not under the absolute control of the state; and indoctrinating public school students in religious beliefs and tenets.

Likewise, the balance of equities and the importance of preserving the status quo both favor preliminary injunctive relief. The aforementioned constitutional violations, and the illegal transfer of public funds to support private schools, will cause Plaintiffs substantial and irreparable harm. Plaintiffs' injury will be amplified for every student enrolled in the Program, on each and every day the Program operates. In contrast, the students seeking to participate in this program would suffer no cognizable harm from continuing to attend Douglas County public schools, as they have done in the past. Parents would remain free to send their children to private schools should they choose to do so, at their own expense. Nor will the Defendants be harmed if the Voucher Program is enjoined. An injunction will merely preserve the status quo and allow all Douglas County students to continue receiving a quality public school education. Thus, the constitutional injury to the Plaintiffs far outweighs any harm to the Defendants or to the students currently enrolled in the Program.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge this Court to enjoin Defendants from taking any further steps to fund or implement the Douglas County Voucher Program.

Dated: July 5, 2011

Respectfully submitted,

ARNOLD & PORTER LLP

By s/ Matthew J. Douglas

Matthew J. Douglas (#26017)
Timothy R. Macdonald (#29180)
Michelle K. Albert (#40665)
370 Seventeenth Street, Suite 4500
Denver, CO 80202-1370
Telephone: 303.863.1000

Paul Alexander (CA Bar #49997)
Suite 110, 1801 Page Mill Road
Palo Alto, CA 94304-1216
Telephone: 415.356.3000

George Langendorf (CA Bar #255563)
22nd Floor, One Embarcadero Center
San Francisco, CA 94111-3711
Telephone: 415.356.3000

Mark Silverstein (#26979)
Rebecca T. Wallace (#39606)
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, CO 80218
Telephone: 303.777.5482

Daniel Mach (DC Bar #461652)
Heather L. Weaver (DC Bar #495582)
ACLU Foundation Program on Freedom of Religion and Belief
915 15th Street, NW, Suite 600
Washington, DC 20005
Telephone: 202.675.2330

Ayesha N. Khan (DC Bar #426836)
Gregory M. Lipper (DC Bar #494882)
Americans United for Separation of Church and State
1301 K Street, NW
Suite 850, East Tower
Washington, DC 20005
Telephone: 202.466.3234

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2011, a true and correct copy of the foregoing MOTION FOR PRELIMINARY INJUNCTION was served via LexisNexis File & Serve on the following:

Antony B. Dyl
tony.dyl@state.co.us
Senior Assistant Attorney General
Nick Stancil
nick.stancil@state.co.us
Assistant Attorney General
Office of the Colorado Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203
Attorneys for Defendants Colorado Board of Education and Colorado Department of Education

James M. Lyons
jlyons@rothgerber.com
Eric V. Hall
ehall@rothgerber.com
David M. Hyams
dhyams@rothgerber.com
Rothgerber Johnson & Lyons LLP
One Tabor Center, Suite 3000
1200 Seventeenth Street
Denver, CO 80202
Attorneys for Defendants Douglas County Board of Education and Douglas County School District

s/ Linda J. Teater

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