COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 101 West Colfax, Suite 800 Denver, CO 80202	
Denver District Court - 2011CV4424 & Denver District Court - 2011CV4427	
Plaintiffs-Appellees: James Larue, Taxpayers for Public Education, Suzanne T. Larue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Rev. Malcolm Himschoot, Kevin Leung, Christian Moreau, Maritza Carrera, Susan McMahon, and Cindra S. and Marson S. Barnard, **Intervenors-Appellants:** Florence and Derrick Doyle, on their own behalf and as next friends of their children, Alexandra and Donovan; Diana and Mark Oakley, on their own behalf and as next friends of their child, Nathaniel; and Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, Max; **and** **Defendants-Appellants:** Douglas County School District, Douglas County Board of Education, Colorado State Board of Education, and Colorado Department of Education.	▲ COURT USE ONLY ▲
BRYAN CAVE HRO Stuart J. Lark, #27369 Counsel of Record 90 South Cascade Avenue, Suite 1300 Colorado Springs, Colorado 80903-1615 Telephone: (719) 473-3800 Facsimile: (719) 633-1518 Email: stuart.lark@hro.com ALLIANCE DEFENSE FUND Gregory S. Baylor, Esq. 801 G Street, NW, Suite 509 Washington DC 20001 Telephone: (202) 393-8690 Facsimile: (202) 642-1075 **ATTORNEYS FOR AMICI CURIAE**	Case Number: 2011CA1856 & 2011CA1857

BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CATHOLIC DIOCESE OF COLORADO SPRINGS, SHEPHERD OF THE HILLS CHRISTIAN SCHOOL, SOUTHEAST CHRISTIAN SCHOOL, AND VALOR CHRISTIAN HIGH SCHOOL

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).

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. __, p. __), not to an entire document, where the issue was raised and ruled on.

☐ For the party responding the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

s/Stuart J. Lark
Stuart J. Lark

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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 the district court's ruling in this case discriminates 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.

Shepherd of the Hills Christian School is a ministry of Shepherd of the Hills Lutheran Church and is located in Centennial, Colorado. The school opened in September of 1985 and serves students from preschool through the eighth grade.

Southeast Christian School is located in Parker, Colorado. Southeast opened its doors originally as Christian Way School in August of 1977. Southeast currently serves over 500 students from preschool through the eighth grade. Southeast's mission is to provide a Christ-centered education, preparing God's

children and young adults for works of service so the body of Christ may be built up.

Valor Christian High School is an independent private co-educational secondary school serving grades 9-12th located in Douglas County, Colorado. Valor was founded in 2005 and began its first year of operations in 2007 with 155 students enrolled. Today, Valor has 800 students and offers a full academic, athletic, arts and community service program for its students. Valor's stated mission is to provide a rigorous and comprehensive college preparatory program, supporting students' unique gifts and abilities, in a vibrant, Christ-centered environment, enhanced by cutting-edge facilities, and led by highly-skilled, innovative faculty, in partnership with committed parents.

SUMMARY OF ARGUMENT

Amici adopt the Statement of the Facts set forth in the Opening Brief of Appellant Douglas County School District (the "District"). One critical issue in this case is whether the District must exclude otherwise qualifying private school partners (PSPs") from the Choice Scholarship Program ("CSP") if they are too religious. *Amici* argue that even if the State of Colorado (the "State") Constitution requires 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 religious discrimination,

and doing so requires governmental officials to make religious determinations for which they have neither the authority nor the competence.

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

Amici and other 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 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. The district court interprets the State Constitution to mandate religious discrimination and require a governmental search for religious meaning.

The district court interprets the State Constitution to mandate religious discrimination against the religious PSPs. The court reaches this result by interpreting Colo. Const. Art. IX, § 7 ("Art. IX, § 7") to prohibit any public funding for a school which accomplishes its religious mission by infusing religious content into its "secular education function." The district court's interpretation means that the CSP must exclude any otherwise qualifying school if its educational program expresses an ideology that is religious in nature. Put differently, the CSP may include PSPs which provide educational programs from any ideological perspective other than a religious one.

The district court's religious exclusion is presumptively unconstitutional under 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. This religious discrimination is not required to comply with the Establishment Clause, or any with other compelling governmental interest. Because the CSP defines the qualifying institutions without reference to religion, nothing in the Establishment Clause prohibits the District

from including religious schools in the program. Presumably for this reason, plaintiffs have asserted no federal constitutional claims in this case.

In addition, to implement the religious exclusion, the District would have to monitor all PSPs for compliance. Such monitoring 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. Because these are determinations for which government officials have neither competence nor authority, the district court's religious exclusion could not be implemented in a constitutional manner.

ARGUMENT

I. 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 Opening 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 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.[1] 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).

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[1] *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.G. 43 (1997) (discussing the history of Protestant values in public education).

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 want to give our children opportunities to see the world through their own experiences and through the eyes of others. We want our children to learn about those who have come before them and discover ways each of them can contribute to the human story in their lifetime. We value cultural diversity, global studies, and we acknowledge interdependence as an essential aspect of the global community in which our children live, and will one day contribute their gifts in profound, passionate, and meaningful ways to create a better, more peaceful world.

http://www.mackintoshacademy.com/infopage.php?menu=aboutus, last visited April 11, 2012. 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 [sic] for personal excellence, and achieve educational excellence.

http://www.beaconcountrydayschool.com/values.php, last visited April 11, 2012.

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 "interdependence as an essential aspect of the global community," focusing on one's relationship to "those who have come before them" and how one can "contribute to the human story."

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, a nonreligious PSP may seek to help students "see the world through their own experiences and through the eyes of others;" a religious PSP may seek to help students also see the world through the eyes of God. Further, 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.[2]

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:

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[2] 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 April 11, 2012.

> 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.
>
> 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.

Id. at 1264. To distinguish among PSPs based on certain criteria is to discriminate on that criteria. To exclude the religious PSPs solely because of the religious nature of their ideologies is to engage in religious discrimination.

II. The district court interprets the State Constitution to mandate religious discrimination in violation of the First Amendment of the U.S. Constitution.

According to the district court, Art. IX, § 7 (and other State constitutional provisions) requires exclusion of religious PSPs solely because of the religious character of their educational programs. This religious exclusion turns not on whether the educational programs provide sufficient "secular" educational value - indeed the District has determined that they do - but rather on whether they include religious content that reflects the PSP's religious ideology. Such religious discrimination is presumptively unconstitutional and cannot be justified by reference to any compelling governmental interest.

A. The district court interprets Art. IX, § 7 to require exclusion from the CSP of otherwise qualifying PSPs based solely on religious criteria.

Based on a Colorado Supreme Court case, the district court asserts that Art. IX, §7 prevents government from providing public funds to a private school where there is a material "risk of religion intruding into the secular educational function of the institution." District Court Order at 38 (Addendum 1 to the District's Opening 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"). Accordingly, the district court held that the CSP improperly included religious PSPs, noting that:

> because of the interplay between the participating Private School Partner's curriculum and religious teachings, any funding of the private schools, even for the sole purpose of providing education, would further the sectarian purpose of religious indoctrination within the schools [sic] educational teachings *and not the secular educational needs of the students*.

Order at 40 (emphasis added).

As an initial matter, the court's analysis does not in fact turn on whether the PSP program fails to meet the "secular educational needs of students." The district court offers no basis for its apparent assertion that a school cannot further both a "sectarian purpose of religious indoctrination" and "the secular educational needs

of the students." *Id.* Indeed, the district court quotes Mr. Gehrke that the mission of his school "is to 'nurture academic excellence and encourage growth in Christ.'" *Id.* at 41. Nowhere does the district court suggest that these two prongs of the school's mission are at odds with each other. Nor does the district court ever suggest that any participating school failed to satisfy the District's academic standards because its program indoctrinated a particular ideology (religious or otherwise).

To the contrary, the district court's interpretation of Art. IX, §7 excludes any PSP with a mission to inculcate a religious ideology, even if it's educational program fully meets "the secular educational needs of students." *Id.* at 40. Applying this rule, the district 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).

The district court had already concluded that the District's purpose for the CSP is "to aid students and parents, not sectarian institutions." *Id.* at 39. Therefore, the district court's rule turns on the PSP's purposes and activities, not the District's purpose. Further, the distinguishing and disqualifying characteristic

in the rule is religion. The district court does not read Art. IX, § 7 to exclude any type of tenet or indoctrination other than religious tenets and indoctrination (nor does the Colorado Supreme Court). Therefore, pursuant to Art. IX, § 7 as interpreted by the district court, a PSP's educational program may, in addition to meeting the District's secular educational objectives, indoctrinate any ideology except a religious one.

B. The district court's religious exclusion is presumptively unconstitutional.

As applied to the CSP, the court's interpretation prohibits the state from funding an otherwise qualifying PSP solely based on the religious viewpoints integrated into the PSP's educational program, even when the state is funding other PSPs with educational programs in which nonreligious viewpoints are integrated. This viewpoint discrimination is presumptively unconstitutional.

1. Such exclusion constitutes religious viewpoint discrimination.

In those cases where the U.S. Supreme Court has specifically examined governmental restrictions on private religious viewpoints in otherwise qualifying programs, it has held that such restrictions constitute viewpoint 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. Rectors 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 viewpoint discrimination. This is precisely what occurs when the district court's 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 district court's religious exclusion, constitutes religious viewpoint discrimination.

2. Religious viewpoint discrimination is presumptively 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) (citing *Employment Div., Ore.*

Dept. of Human Res. v. Smith, 494 U.S. 872 (1990)). However, a law that is not neutral is subject to strict scrutiny and must be narrowly tailored to advance a compelling governmental interest. *Id.* at 531–32.

As discussed below the case law identifies several different ways to evaluate religious neutrality. Because the district court's religious exclusion fails to comply with each of these forms of neutrality, it is presumptively unconstitutional under the Free Exercise Clause.

The district court's 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, the district court's interpretation 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) (quotation omitted), 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."[3] The state law at issue in *Larson* contained an exemption for religious organizations, but only if they received more than half of their total contributions from members or affiliated organizations. *Id.* at 231–32.

In striking down the exemption, the Court held that the criteria "effectively distinguishe[d] between well-established churches that have achieved strong but

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[3] 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. Further, the Court in *Larson* expressly noted that the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245.

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 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 creates an unconstitutional preference.

The same unconstitutional preference results when a government-funded program excludes religious organizations that take a more distinctly religious approach to the delivery of education. Those religious PSPs that provide education from a distinctly religious perspective are excluded, while other PSPs whose approach is more objectively secular (but may in some sense be covertly religious) are included.

The district court incorrectly held that the U.S. Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004) applies to this case. The Court in *Locke* interpreted the Washington constitutional provision to apply only to the narrow

state interest asserted in not funding the religious training of clergy. *Locke*, 540 U.S. at 723 n.5. The district court's religious exclusion extends much further to include not only religious vocational training, but also secular topics taught from a religious perspective. Put differently, the religious exclusion does not apply merely to a distinct category of instruction such as religious vocational training, *Locke*, 540 U.S. at 713, but rather to all categories of instruction when presented from a particular religious viewpoint. The religious exclusion applies to a "prohibited perspective, not the general subject matter." *Rosenberger*, 515 U.S. at 831; *see also Colorado Christian University v. Weaver*, 534 F.3d 1245, 1255-57 (10th Cir. 2008).

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 the district court's religious exclusion, the survey is not difficult. By its express terms, its relationship to the CSP program objectives, and its intentional favoritism, the religious exclusion fails to comply with the neutrality principles required by the Free Exercise Clause.

C. Such exclusion is not required by the Establishment Clause.

Because the district court's 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 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. 793, 809 (2000) (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.*; *see 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").

Apart from 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. Wash. Dept. 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 governmental interest to justify the religious exclusion. To the extent the State has any interest in this regard, it can hardly be characterized as compelling since it is not protected by the Establishment Clause. Further, the religious exclusion is not narrowly tailored to any state interest in not funding the religious training of clergy, which was the only interest upheld in *Locke*. *See Locke*, 540 U.S. at 723 n5.

To summarize, private religious expression, even if it in some sense constitutes religious indoctrination, is not attributable to the government if it is conducted in furtherance of the objectives of a religiously neutral program. Further, to the extent the aid is indirect (such as the vouchers in the CSP), the

private choices of the families also preclude attribution. As a religiously neutral voucher program, the CSP satisfies this Establishment Clause requirement; any religious indoctrination by a PSP is not attributed to the District. By contrast, because the exclusion of private religious viewpoints on subject matter within the scope of a government aid program is not required by the Establishment Clause (or any other compelling governmental interest), the religious exclusion violates the Free Exercise Clause.[4]

III. The religious exclusion violates the Establishment Clause because it requires government officials to make independent religious determinations.

If the CSP contained the religious exclusion required by the district court, many religious schools (including perhaps all *amici* PSPs) might choose not to participate in the CSP. But the District would still be required to ensure that PSPs comply with the exclusion. To do this, 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

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[4] It 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.*

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 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.[5]

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

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[5] *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).

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 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 prohibition on governmental searches for religious meaning applies not only to the questions of whether there is religious content in private secular

activities, or whether activities with religious content are indoctrinating, but also to the question of whether religious activities are too secular. In one case, the Court upheld against an Establishment Clause challenge, a religious exemption that applied to all activities of a religious organization, not just its *religious activities.* The Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987). Similarly, Judge (now Justice) Alito writing for the Third Circuit rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. Judge Alito wrote that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 230 (3rd Cir. 2007).

This same deference principle has been adopted by the Colorado Supreme Court. In *Maurer v. Young Life*, 774 P.2d 1317 (Colo. 1989), the Colorado Supreme 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. The 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. Further, the court noted 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 exclusion 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 as well the religious exclusion is unconstitutional.

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 hold that the district court's interpretation of Art. IX, §7 (and related State constitutional provisions) violates the First Amendment.

Respectfully submitted this 13th day of April, 2012.

s/Stuart J. Lark
Stuart J. Lark
Counsel of Record
BRYAN CAVE HRO

Gregory S. Baylor, Esq.
ALLIANCE DEFENSE FUND

CERTIFICATE OF SERVICE

The undersigned certifies that on this 13th day of April, 2012, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CATHOLIC DIOCESE OF COLORADO SPRINGS, SHEPHERD OF THE HILLS CHRISTIAN SCHOOL, SOUTHEAST CHRISTIAN SCHOOL, AND VALOR CHRISTIAN HIGH SCHOOL** was served by LexisNexis File and Serve as follows:

Matthew J. Douglas, Esq.
Matthew.Douglas@aporter.com
Timothy R. MacDonald, Esq.
Timothy.Macdonald@aporter.com
Michelle K. Albert, Esq.
Michelle.Albert@aporter.com
Arnold & Porter LLP
370 17th Street, Suite 4500
Denver, CO 80202

Mark Silverstein, Esq.
msilver2@att.net
Rebecca T. Wallace, Esq.
rtwallace@aclu-co.org
American Civil Liberties Union
Foundation of Colorado
400 Corona Street
Denver, CO 80218

Michael S. McCarthy, Esq.
mmccarthy@faegre.com
Colin C. Deihl, Esq.
cdeihl@faegre.com
Madia G. Malik, Esq.
nmalik@faegre.com
Sarah A. Kellner, Esq.
skellner@faegre.com
Caroline Lee, Esq.
clee@faegre.com
FAEGRE BAKER DANIELS, LLP
3200 Wells Fargo Center
1700 Lincoln
Denver, CO 80203-4532

Antony B. Dyl, Esq.
tony.dyl@state.co.us
Nicholas G. Stancil, Esq.
nick.stancil@state.co.us
Office of the Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

William H. Mellor, Esq.
wmellor@ij.org
Richard D. Komer, Esq.
dkomer@ij.org
Timothy D. Keller, Esq.
tkeller@ij.org
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203

Alexander Halpern, Esq.
ahalpern@halpernllc.com
Alexander Halpern LLC
1426 Pearl Street, #420
Boulder, CO 80302

Michael Bindas
mbindas@ij.org
Institute for Justice
101 Yesler Way, Suite 603
Seattle, WA 98104

Raymond L. Gifford, Esq.
rgifford@wkblaw.com
Phil Roselli, Esq.
proselli@wkblaw.com
Wilkinson Barker Knauer, LLP
1430 Wynkoop Street, Suite 201
Denver, CO 80202

Martin Nussbaum
mnussbaum@rothgerber.com
James M. Lyons
jlyons@rothgerber.com
Eric V. Hall
ehall@rothgerber.com
Renee Carmody
rcarmody@rothgerber.com
David Hyams
dhayams@rothgerber.com
Rothgerber Johnson & Lyons LLP
90 S. Cascade Avenue, Suite 1100
Colorado Springs, CO 80903

s/ Kimberley L. Hans
Kimberley L. Hans