No. 07-1247

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO CHRISTIAN UNIVERSITY,
Plaintiff-Appellant,

v.

RAYMOND T. BAKER, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
Hon. Marcia S. Krieger, U.S. District Judge

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, COLORADO EDUCATION ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, and NATIONAL PARENT TEACHER ASSOCIATION IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

ROBERT H. CHANIN
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

JOHN M. WEST
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W., Suite 1000
Washington, DC 20005
(202) 842-2600

MARTHA R. HOUSER
Colorado Education Association
1500 Grant Street
Denver, CO 80203
(303) 837-1500

FRANCISCO M. NEGRON, JR.
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

All of the *amici* are organized as nonprofit corporations. None has any parent corporation, nor does any publicly held corporation own stock in them.

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is filed pursuant to Fed. R. App. P. 29(a) with the consent of all parties.

Amicus National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA operates through a network of affiliated state organizations, and *amicus* Colorado Education Association ("CEA") is NEA's Colorado state affiliate. CEA's membership consists of some 38,000 employees of public school districts, colleges, and universities in the State of Colorado.

Amicus National School Boards Association ("NSBA") was founded in 1940 as a not-for-profit federation of state school board associations from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the over 95,000 school board members who govern some 14,000 public school districts.

Amicus National Parent Teacher Association ("National PTA") is a non-profit organization comprised of parent, teacher, and student members of 26,000 local PTAs from every state. The mission of the National PTA has remained consistent over 110 years: to support and speak on behalf of children and youth in the schools, in the community, and before governmental bodies and other

organizations that make decisions affecting children; to assist parents in developing skills necessary to raise children; and to encourage parent and public involvement in the public schools of our nation.

Amici are committed to providing all of our nation's children with a high quality education through a system of public elementary/secondary schools. They are, concomitantly, opposed to "voucher" programs and other arrangements pursuant to which public funds are used to pay for children to attend private elementary/secondary schools – which, in Colorado and elsewhere, are for the most part operated by churches and other sectarian organizations.

Amici support Colorado's determination that public funds should not be used to pay for students to attend "pervasively sectarian" institutions of higher education, but their interest lies primarily in the implications of this case for the public funding of private elementary/secondary schools. As we explain below, although education in a pervasively sectarian setting is the exception in higher education, it is the norm in private education at the elementary/secondary level. Accordingly, whether and under what circumstances Colorado may constitutionally decline to provide public funding for the religious education of college students – which is the specific issue now before this Court – could well have a much greater impact at the elementary/secondary level, and the Court's decision is therefore of great significance to *amici*.

ARGUMENT

Plaintiff Colorado Christian University ("CCU") and its supporting *amici* contend that Colorado's statutory provisions excluding "pervasively sectarian" colleges and universities such as CCU from participating in the state's various college-level scholarship and grant programs violate the Free Exercise Clause and other provisions of the United States Constitution.[1] As defendants demonstrate in their brief, this contention is effectively disposed of by the recent decision of the United States Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004). Except for a few supplemental comments, our purpose in this *amicus* brief is not to retrace defendants' legal analysis on this dispositive point, but rather to place that analysis in a broader context by focusing on the provisions of the Colorado Constitution that form the constitutional background for the statutory provisions that are at issue.

CCU characterizes the statutory exclusion of pervasively sectarian schools from the scholarship and grant programs as the product of a "thirty year-old *mistake*" in the state's understanding of the federal Establishment Clause, Appellant's Opening Brief ("CCU Br.") at 26 (emphasis in original), and asserts that including CCU in these programs would not in any event violate Article IX,

[1] As the district court noted, Opinion at 26, the term "pervasively sectarian" is used in this context not as a federal constitutional term of art, but rather as a statutory shorthand for the criteria enumerated in Colo. Rev. Stat. § 23-3.5-105 and similar statutes.

§ 7, of Colorado's constitution. *Id.* at 68-69. CCU is wrong on both counts. In Part I, we explain that the statutory exclusions are mandated not only by Article IX, § 7, of the Colorado Constitution, but by a second constitutional provision as well – Article II, § 4. In Part II, we demonstrate that, far from manifesting religious discrimination, limiting the exclusions to those institutions of higher education that are deemed to be pervasively sectarian according to Colorado's statutory criteria is a reasonable and appropriate means of giving effect to the constitutional mandates in the least restrictive manner possible.

Finally, in Part III, we briefly supplement defendants' arguments as to the dispositive legal issue in this case, by showing that Colorado's statutory implementation of its constitutional prohibition against funding religious education is fully consistent with the teaching of *Locke v. Davey.*

I. THE STATUTORY EXCLUSIONS AT ISSUE ARE GROUNDED IN COLORADO'S CONSTITUTIONAL PROVISIONS PROHIBITING THE PUBLIC FUNDING OF RELIGIOUS EDUCATION, AND ARE NECESSARY TO COMPLY WITH THOSE PROVISIONS

Far from resting simply on a mistaken understanding of the federal Establishment Clause, CCU Br. at 26, the statutory exclusions at issue are firmly grounded in, and are necessary to comply with, Colorado's constitutional prohibition against public funding of religious education.

The federal Establishment Clause was, to be sure, interpreted differently in the 1970s – when the first of the statutory exclusions at issue was enacted – than it is today, *compare Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), *with Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and the historical record shows that the legislators who enacted that exclusion were indeed concerned about compliance with the Establishment Clause. *See* Appellees' Answer Brief at 4-5. But whatever changes the United States Supreme Court may have made in the interim in its interpretation of the Establishment Clause, the fact remains that Colorado was in the 1970s and is today also bound by the provisions of its own constitution. It is these latter provisions that form the constitutional basis underlying – indeed, requiring – the General Assembly to act as it did in limiting the college scholarship and grant programs at issue to schools that are not pervasively sectarian.[2]

[2] CCU's suggestion that the religion clauses of the Colorado Constitution have no meaning independent of the federal Constitution, CCU Br. at 69-73, misreads the relevant precedent. Although the Colorado constitutional provisions governing the separation of church and state "embody the same values of free exercise and governmental non-involvement secured by the religious clauses of the First Amendment" to the federal Constitution, *Americans United v. State*, 648 P.2d 1072, 1081-82 (Colo. 1982), the Colorado Supreme Court has made clear that the state constitution is "considerably more specific," *id.* at 1081, and that federal First Amendment jurisprudence therefore "will not necessarily be dispositive of the state constitutional question." *Conrad v. City & County of Denver*, 656 P.2d 662, 667 (Colo. 1982). While the Colorado Supreme Court has said that it interprets the Preference Clause of Article II, § 4, by looking to the analogous federal Establishment Clause, *State v. Freedom from Religion Foundation, Inc.*, 898 P.2d

Although the district court focused on Article IX, § 7, there are in fact two provisions in the Colorado Constitution that prohibit public funding of religious education. The provision that we consider first is Article II, § 4, which deals with a citizen's right not to be compelled to support religious ministries or places of worship without his or her consent. We then turn to Article IX, § 7, which specifically prohibits public funding of sectarian schools. These two provisions are differently worded and have different historical origins, but both lead inexorably to the same conclusion.

A. Article II, Section 4, Prohibits The State From Compelling Taxpayers To Fund Religious Education

Article II, § 4, of the Colorado Constitution guarantees generally the free exercise of religion, and provides specifically that "[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." This type of provision – which we refer to as a "Compelled

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1013, 1019 (Colo. 1995), that clause is *not* at issue here, and the court has not adopted that view for the other provisions of Article II, § 4 (many of which, like the Compelled Support Clause, have no precise analogue in the First Amendment), or for Article IX, § 7. Rather, the court has held generally that resolution of issues raised under the state constitution's religion clauses "ultimately requires analysis of the text and purpose" of the Colorado constitutional provisions. *Conrad*, 656 P.2d at 667. Precisely for that reason, in its most closely relevant precedent – the *Americans United* case – the court did not treat its analysis under the federal Establishment Clause, 648 P.2d at 1078-81, as dispositive of the plaintiffs' state constitutional claims, but rather devoted extended, separate analyses to Article II, § 4 and to Article IX, § 7 of the Colorado Constitution. *See id.* at 1081-85.

Support" clause – appears in the constitutions of nearly half the states.[3] The clause was adopted by Colorado's 1876 constitutional convention, but it has roots that far antedate that period.

The 1876 constitutional convention drew largely from the then-recently adopted constitutions of Illinois, Pennsylvania, and Missouri, *see* Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution* 1 (2002), all of which contained clauses prohibiting the compelled support of religious ministries or places of worship.[4] But it was Pennsylvania's 1776 constitution that was the original source of this language, and indeed its origins date back to the Pennsylvania colony's 1682 Frame of Government. *See Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539, 556 (Vt. 1999) (tracing the origins of the language adopted by Vermont in 1777).

Article II, § 4, by its terms, prohibits the state from requiring citizens to "support" ministries, places of worship, and religious sects or denominations. That obviously includes "support" through the compelled payment of taxes – as is clear from the use of "compelled support" language in Thomas Jefferson's "Virginia Bill for Religious Liberty" of 1785, which was enacted in order to counter a proposal to

[3] While some state constitutions, like Colorado's, use the term "required" rather than "compelled," such provisions are generally known as "Compelled Support" clauses.

[4] *See* Ill. Const. of 1870, art. I, § 3; Pa. Const. (adopted 1873), art. I, § 3; Mo. Const. of 1875, art. II, § 6.

create a tax to pay teachers of the Christian religion, *see Locke*, 540 U.S. at 722 n.6 – and courts in other states that have considered the issue under their Compelled Support clauses have so held. *See, e.g.*, *Almond v. Day*, 89 S.E.2d 851, 858 (Va. 1955) (state payment of tuition for attendance at sectarian schools "compels taxpayers to contribute money for the propagation of religious opinions which they may not believe"); *Chittenden*, 738 A.2d at 550 ("No party disputes that 'support' includes financial support through the payment of taxes."); *Knowlton v. Baumhover*, 166 N.W. 202, 207 (Iowa 1918) (constitution forbids "all taxation for ecclesiastical support," including support of sectarian schools); *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (Compelled Support Clause offended by "unrestricted application of public money to sectarian schools").

Article II, § 4, thus prohibits Colorado from requiring its citizens, through their tax payments, to support the religious education provided by "ministries" and "places of worship"[5] of any church, sect, or denomination – whether (as is more common) in elementary/secondary schools, or (as in this case) in institutions of higher education. By excluding pervasively sectarian colleges and universities such as CCU from participating in Colorado's scholarship and grant programs, the

[5] As the Vermont Supreme Court explained in the *Chittenden* case, where religious education is central to a school's educational program, "we see no way to separate religious instruction from religious worship." 738 A.2d at 562. Given the centrality of religious education and exercise at CCU, the university readily qualifies as a "place of worship" under this definition. *See also infra* p. 26 (noting CCU's role in preparing students for a religious ministry).

statutes at issue give effect to the mandate of Article II, § 4, by ensuring that Colorado taxpayers will not be compelled involuntarily to support such religious ministries and places of worship.

B. Article IX, Section 7, Prohibits Public Funding Of Religious Education

One would be hard pressed to draft a more categorical prohibition on public funding of religious education than is contained in Article IX, § 7, of the Colorado Constitution:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

This provision articulates the prohibition on public funding of religious education in various ways – referring to the use of public funds "in aid of any church or sectarian society," "to help support or sustain any school . . . , college, [or] university . . . controlled by any church or sectarian denomination," and "for any sectarian purpose."

There is no need here to explore the full reach of these overlapping articulations: suffice it to say that they at the very least make plain the framers'

determination to preclude the use of public funds to pay for education in pervasively sectarian schools. The use of public funds to pay for education at a pervasively sectarian college or university such as CCU under a scholarship or grant program like the ones at issue here undoubtedly would violate all of the articulations of the foregoing prohibition; we demonstrate the point by focusing on the first of those articulations – *i.e.*, the use of public funds "in aid of any church or sectarian society."[6]

Although it is sometimes asserted that tuition payments benefit only the student and do not constitute "aid" to the private school that he or she attends, that argument has no merit, and it has repeatedly been rejected by the courts. As the South Carolina Supreme Court explained in applying a South Carolina constitutional provision that contains "in aid of" language similar to that in Article IX, § 7:

> We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend [these schools] and the institutions depend upon the payment of such fees to aid in financing their operations. *While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid*.

[6] CCU contends that it cannot be deemed a sectarian institution because it is not the emanation of a single denomination. CCU Br. at 78. But the fact that the faith to which CCU subscribes is that of an association of like-minded Evangelical Christians, *see* Aplt. App. at 88-89 (¶ 21) (statement of faith of National Association of Evangelicals), rather than of a single denomination, hardly distinguishes the institution in any constitutionally meaningful way.

Hartness v. Patterson, 179 S.E.2d 907, 909 (S.C. 1971) (emphasis added); *see also, e.g., Weiss v. Bruno*, 509 P.2d 973, 978 (Wash. 1973) (striking program of tuition grants for private schools; rejecting argument that such grants benefit only students and not the schools they attend); *Almond v. Day*, 89 S.E.2d at 857 (same).[7]

Nor is the aid provided purely financial. By paying the cost for CCU to "serve God by providing Christ-centered higher education," Aplt. App. at 88 (¶ 19), to additional students who otherwise might have been unable to afford CCU's tuition, the scholarship and grant programs would be directly "in aid of" CCU's religious mission and purpose, an integral part of which is to provide its students with a religious education that reflects the doctrine and beliefs of the National Association of Evangelicals. *See* Aplt. App. at 88-90 (¶¶ 21-25). In short, even if the scholarships or grants yielded no financial benefit at all to CCU, they would still aid the university's religious mission and purpose in the most fundamental way possible – by paying the cost of this religious education.[8]

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[7] Notwithstanding CCU's contention, CCU Br. at 73-75, *Americans United* is not to the contrary. There, the court's description of the scholarship program as "designed to assist the student, not the institution" was premised on its determination that there was "nothing in the statutory design which suggests" that "aid in grant form may seep over into the non-secular functions" of participating church-affiliated colleges. 648 P.2d at 1083. That determination rested, in turn, on the fact that the participating colleges and universities were not pervasively sectarian. *Id.* at 1084.

[8] Several of the *amicus* briefs supporting CCU endeavor to dismiss Article IX, § 7, as a "Blaine amendment" that apparently should be disregarded because of

C. *Americans United* Makes Clear That Including Pervasively Sectarian Colleges And Universities In The Scholarship And Grant Programs At Issue Would Violate Article II, Section 4, And Article IX, Section 7

In its principal statement on the religion clauses in the Colorado Constitution, the Colorado Supreme Court in *Americans United v. State*, 648 P.2d 1072 (Colo. 1982), rejected a challenge to the inclusion of church-affiliated – but

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the anti-Catholic animus that allegedly led to its adoption. Apart from the fact that these attacks have no relevance to Article II, § 4 – which, as noted above, has its roots in early American efforts to protect religious liberty and freedom of conscience and cannot by any stretch of the imagination be characterized as a "Blaine amendment" – *amici*'s characterization of the state constitutional provisions barring public funding of sectarian schools that were widely adopted in the late nineteenth century as nothing more than the product of anti-Catholic bigotry and nativism is, in fact, a vastly over-simplified and highly controversial rendering of history. No one denies that it was principally Catholic schools that were affected by efforts to ban the diversion of public funds to sectarian institutions in the latter half of the nineteenth century, or that religious bigotry motivated some who championed the federal Blaine amendment and its state offspring. But contrary to the single-factor motivation *amici* selectively extract from the historical record of the so-called Blaine amendments, the no-aid movement was far more complex and controversial than *amici* portray it. *See, e.g.*, Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 92-117 (2002) (demonstrating that the "nonsectarian ideal" that motivated the no-aid movement was far broader than simple anti-Catholicism, and that as it succeeded it lost its anti-Catholic coloring); Laura S. Underkuffler, *The "Blaine" Debate: Must States Fund Religious Schools*, 2 First Amend. L. Rev. 179, 195 (2003) ("[L]egal prohibitions against public funding of religious schools were the products of far more diverse political, religious, and educational concerns than simple anti-Catholic animus, or any other particularly identifiable view."); Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 First Amend. L. Rev. 107 (2003) (same); Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 First Amend. L. Rev. 153, 166-76 (2003) (nineteenth century opposition to the political objectives of the Catholic church was not simply the product of bigotry or nativism).

not pervasively sectarian – colleges in one of the scholarship programs at issue here. The court's reasoning in that decision makes abundantly clear that providing publicly funded scholarships for attendance at pervasively sectarian colleges would be incompatible with both Article II, § 4, and Article IX, § 7.

In *Americans United*, the court focused on the use of public funds to pay for education at colleges or universities whose "religious character . . . bears no significant relationship to [their] educational function." *Id.* at 1082. Emphasizing the distinction in this regard between elementary/secondary education and higher education, the court stated that because "as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is 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. And, the court took particular note of the statutory exclusion from participation in the grant program of institutions deemed "pervasively sectarian." This exclusion, the court explained, "militate[s] against the type of ideological control over the secular educational function which Article IX, Section 7, at least in part, addresses." 648 P.2d at 1084; *see also id.* at 1082 (same conclusion in context of Article II, § 4).

The court's analysis thus makes clear that where religion is not peripheral but central to a school's educational program – whether in the case of an elementary/secondary sectarian school, or as here in the case of a college or

university in which the role of religion is similarly pervasive – Colorado's constitution prohibits the public funding of the school's educational program.

D. Directing The Scholarship Or Grant Payments To Students Does Not Avoid The Problem Under Article IX, Section 7, Or Article II, Section 4

Plaintiff and its *amici* endeavor to avoid the constitutional restrictions on the use of public funds for religious purposes by characterizing the programs at issue here as simply providing scholarships or grants to individual students. But the constitutional prohibition on public funding of religious education cannot be evaded so easily – as numerous courts have held, in interpreting similar provisions in their state constitutions.

The Supreme Court of Virginia, for example, has explained that "[t]he fact that . . . the funds may be paid to the parents or guardians of the children and not directly to the institutions does not alter their underlying purpose and effect." *Almond v. Day*, 89 S.E.2d at 856. Similarly, the Alaska Supreme Court held that a college tuition grant program was not saved by the mere fact that the grants were made to students, who were required to pay the funds over to the private colleges of their choice. *Sheldon Jackson Coll. v. State*, 599 P.2d 127, 132 (Alaska 1979). To the same effect are numerous other decisions that we cite in the margin.[9] In *all*

[9] *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (en banc), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539, 563 (Vt. 1999); *Doolittle v. Meridian Joint*

of these cases – decided under state constitutional provisions similar to Colorado's – the programs at issue allowed students or parents to determine the school at which their scholarship, voucher, or other benefit would be used; in none of them did the courts deem the element of student or parental choice sufficient to avoid invalidation of the program as in aid of sectarian institutions and purposes.

Nor, with respect particularly to the protection against "compelled support" of religion found in Article II, § 4, would taxpayer funding of education in pervasively sectarian institutions be any less problematic by virtue of the fact that the amount of such funding that would flow to the institution would be a function of students' decisions as to where to attend school. Any suggestion to the contrary misses the critical point that it is *taxpayers*, not students, who are protected by Article II, § 4, from being compelled to support religion against their consciences. The fact that the "Christ-centered . . . education," Aplt. App. at 88 (¶ 19), offered by CCU may be freely chosen does not obviate the fact that, absent the statutory exclusions at issue, taxpayers would be compelled in violation of the constitutional prohibition to support the religious education of students who do make that choice.

Sch. Dist. No. 2, 919 P.2d 334, 342 (Idaho 1996); *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992); *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989); *Opinion of the Justices to the Senate*, 514 N.E.2d 353, 356 (Mass. 1987); *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726 (Neb. 1974); *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129 (Ill. 1973); *Hartness v. Patterson*, 179 S.E.2d 907 (S.C. 1971); *Otken v. Lamkin*, 56 Miss. 758 (1879).

The foregoing analysis indicates why the parental-choice argument that proved successful under the federal Establishment Clause in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), does not provide a safe harbor under a Compelled Support clause. As the Vermont Supreme Court explained with regard to the Compelled Support clause in that state's constitution:

> [T]he United States Supreme Court may well decide that the intervention of unfettered parental choice between the public funding source and the educational provider will eliminate any First Amendment objection to the flow of public money to sectarian education. We cannot conclude, however, that parental choice has the same effect with respect to Article 3. If choice is involved in the Article 3 equation, it is the choice of those who are being required to support the religious education, not the choice of the beneficiaries of the funding.

Chittenden, 738 A.2d at 563. "[T]hose who are being required to support the religious education" – the state's taxpayers – of course have no choice in the matter.

II. THE STATUTORY EXCLUSION OF PERVASIVELY SECTARIAN COLLEGES AND UNIVERSITIES IS AN APPROPRIATELY NARROW APPLICATION OF THE CONSTITUTIONAL PROHIBITION AGAINST PUBLIC FUNDING OF RELIGIOUS EDUCATION IN THE HIGHER EDUCATION CONTEXT

The application of Article II, § 4, and Article IX, § 7, to elementary/secondary education is relatively straightforward: the overriding purpose of almost all church-affiliated elementary/secondary schools (and in turn of the

overwhelming majority of all private elementary/secondary schools)[10] is to provide their students with an education based on and grounded in religious training and worship. Such schools are, accordingly, characterized by educational programs in which religious training and worship play a central role, inextricably intertwined with the education in secular subjects that the schools provide. As the United States Supreme Court explained over 30 years ago, sectarian elementary/secondary schools typically

> (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.

Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 767-68 (1973). *See also*, *e.g.*, *Chittenden*, 738 A.2d at 542-43 (describing characteristics of sectarian high school).

That being the case, Colorado's constitutional prohibitions on the use of taxpayer monies to pay for religious education broadly bar public funding of education at all or virtually all religiously affiliated elementary/secondary

[10] In Colorado, as in most other states, 70% or more of all private elementary/secondary schools are sectarian. Relevant data from Colorado can be obtained from the state Department of Education's nonpublic school directory, http://www.cde.state.co.us/choice/download/2006NONPUBLICSCHOOLSDIRECTORY.pdf.

schools.[11] The factual situation in higher education is, however, quite different, and it results in a very different application of the Colorado Constitution – an application that prompts CCU and its *amici* to argue that the statutory exclusions at issue discriminate against institutions that are supposedly "too religious." There is no merit to this argument.

Although our nation has a rich tradition of church-supported higher education, it is today the exception rather than the rule for religiously affiliated colleges and universities to be pervasively sectarian.[12] Whether, at such

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[11] The Colorado courts have not had occasion to address this specific question; in striking down a 2003 voucher plan for private elementary/secondary schools on other grounds, the Colorado Supreme Court did not reach the objection that the program also violated Article II, § 4, and Article IX, § 7. *See Owens v. Colorado Cong. of Parents*, 92 P.3d 933 (Colo. 2004). The courts of nearly a score of other states, however, have overturned under state constitutional religion clauses similar to one or both of those found in Colorado's constitution a variety of voucher and scholarship programs, *see supra* pp. 14-15 & n.9 (citing cases), as well as, in many cases, more modest programs supplying textbooks or bus transportation for children attending sectarian elementary/secondary schools, *see In re Certification of Question*, 372 N.W.2d 113 (S.D. 1985) (textbooks); *California Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981) (textbooks); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (textbooks); *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971) (bus transportation); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968) (bus transportation); *Dickman v. School Dist. No. 62C*, 366 P.2d 533 (Or. 1961) (textbooks). *But see Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (sustaining voucher program upon holding that state constitution's religion clause was equivalent of federal Establishment Clause).

[12] As *amicus* Council for Christian Colleges and Universities points out in materials published on its web site, of some 900 colleges and universities nationwide that describe themselves as "religiously affiliated," "only 102 are

institutions, religious influence is largely undetectable – doubtless a fair description of the University of Denver, notwithstanding its ties to the Methodist Church – or somewhat more visible, as is likely true of Jesuit-affiliated Regis University, it is nonetheless the case that a student attending such institutions is neither subject to religious indoctrination, required to engage in religious worship, nor expected to profess a particular religious faith.

In consequence, the use of taxpayer monies to pay for the education of students at such colleges and universities cannot fairly be said to support religious education. As the Colorado Supreme Court put it, "[b]ecause as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is 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." *Americans United*, 648 P.2d at 1084 (citing *Tilton v. Richardson*, 403 U.S. 672 (1971)). By way of analogy, a religiously affiliated hospital may trace its origins to the religious values of its sponsoring church, but the medical treatment provided to patients – or, in this case, the education provided to students – does not differ substantially from that offered at a purely secular institution. Most religiously affiliated colleges and universities are thus unlike the plaintiff university in this case, whose teachers "consistently strive to integrate all

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intentionally Christ-centered institutions that have qualified for membership in the CCCU." *See* http://www.cccu.org/about/members.asp.

academic disciplines with a Christian worldview as reflected in CCU's statement of faith." Aplt. App. at 89-90 (¶ 24).

Accordingly, the Colorado Supreme Court in *Americans United* and a number of other state courts have upheld scholarship or grant programs in higher education as consistent with the religion clauses of their state constitutions. In every such case, the decisions have recognized that, under the challenged programs, funds would not flow to pervasively sectarian institutions – either because the court determined that, unlike sectarian elementary/secondary schools, higher education institutions generally are not pervasively sectarian institutions devoted to religious indoctrination, or because the programs at issue (like Colorado's) specifically excluded such institutions.[13]

[13] In addition to the Colorado Supreme Court's *Americans United* decision, *see Americans United v. Rogers*, 538 S.W.2d 711, 722 (Mo. 1976) ("the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved"); *Alabama Educ. Ass'n v. James*, 373 So. 2d 1076 (Ala. 1979) (upholding postsecondary grant program based on finding that none of the recipient colleges were "pervasively sectarian" and that no state funds would be used for sectarian purposes); *Lenstrom v. Thone*, 311 N.W.2d 884, 889 (Neb. 1981) (upholding program that excluded use of grants "for pursuing courses of study which are pervasively sectarian"); *Minnesota Fed'n of Teachers v. Mammenga*, 485 N.W.2d 305 (Minn. Ct. App. 1992) (upholding program on finding that most participating colleges were not pervasively sectarian); *State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 284-87 (Wash. 2002) (upholding postsecondary grant program that barred "enroll[ment] in any program that includes any religious worship, exercise, or instruction").

Although a few state courts have interpreted similar constitutional provisions to prohibit the use of public funds at *any* religiously affiliated college or university,[14] the Colorado Supreme Court has not done so. It has held that the religion clauses in the Colorado Constitution do not prohibit public funds from flowing to educational institutions merely because of a religious affiliation without more. *Americans United*, 648 P.2d at 1081-85. Consistent with this holding, Colorado's General Assembly, in enacting the scholarship and grant programs at issue, has appropriately chosen to implement the state's constitutional prohibition on public funding of religious education in a manner that does not exclude from participation a religiously affiliated college or university, "the religious character of which bears no significant relationship to its educational function." *Id.* at 1082.

Limiting the constitutional exclusion to those colleges and universities that fall within the statutory definition of "pervasively sectarian" gives effect to the constitutional mandate without cutting more broadly than is necessary to accomplish that end. As the district court put it: "In limiting the exclusion to pervasively sectarian institutions, Colorado ensures that the exclusion only affects situations where its antiestablishment interests are most pronounced – that is, those whose purportedly 'secular' instruction is predominated over and inextricably

[14] *Almond v. Day*, 89 S.E. 2d 851, 857-58 (Va. 1955); *Hartness v. Patterson*, 179 S.E.2d 907 (S.C. 1971); *Sheldon Jackson Coll. v. State*, 599 P.2d 127 (Alaska 1979); *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726 (Neb. 1974).

entwined with religious indoctrination." Opinion at 30. Far from evidencing impermissible discrimination, this implementation of the state's constitutional values in the least restrictive manner possible is fully in accord with the mandate of the federal Constitution.

As the foregoing analysis makes clear, the contention that the statutes at issue discriminate against "less traditional, non-mainstream religions, like evangelical Christian," and in favor of the "traditional, mainstream religions" with which institutions like the University of Denver and Regis University are affiliated, CCU Br. at 50, is far off the mark. The reason why the University of Denver and Regis University are treated differently under the statutes than is CCU has nothing whatever to do with the fact that CCU is not affiliated with a "mainstream" or "traditional" religion; it has to do, rather, with the fact that CCU's educational program is suffused and intertwined with religion, so that the state would be impermissibly funding religious education by using taxpayer monies to pay for the course of education that CCU provides to its students. The line drawn by the statutes between colleges and universities that are pervasively sectarian and those that are not is, in sum, an eminently reasonable and appropriate means of applying the state's constitutional prohibition on public funding of religious education in the higher education context.

III. COLORADO MAY CHOOSE TO PROTECT ITS CONSTITUTIONAL VALUES OF RELIGIOUS LIBERTY AND FREEDOM OF CONSCIENCE BY PROHIBITING THE PUBLIC FUNDING OF RELIGIOUS EDUCATION MORE RIGOROUSLY THAN DOES THE FEDERAL ESTABLISHMENT CLAUSE

The foregoing discussion demonstrates that the statutory exclusions at issue reflect the state's determination of whether and to what extent it can, under the Colorado Constitution, publicly fund religious education. As defendants have shown in their brief, CCU's contention that the state is "penalizing certain of its citizens because of religious activities" in violation of the Free Exercise Clause, CCU Br. at 29, cannot be maintained in the face of the Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004). We make only two points to supplement that showing – the first dealing with the obligation *vel non* of government to fund protected activity, and the second with the fact that the specific scholarship program at issue in *Locke* involved the narrow exclusion of students who are training for the ministry.

A. The Free Exercise Clause prevents government from "plac[ing] a substantial burden on the observation of a central religious belief or practice," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), but government's mere refusal to pay the cost of a pervasively sectarian college or university education – even if it pays for a secular college or university education – does not impose any such burden.

The Supreme Court consistently has applied a different analysis to government *funding* of protected activity than is applicable to government regulation or prohibition of the same activity: "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). And, that is so even if the government funds some alternative activity – as the Court explained in holding that the constitutional right to abortion was not burdened by the provision of Medicaid funding for childbirth but not for abortions:

> An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.

Maher v. Roe, 432 U.S. 464, 474 (1977); *see also, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). By the same token, Colorado's decision to subsidize education at colleges and universities that are not pervasively sectarian imposes no restriction "that was not already there" on any student's ability freely to exercise his or her religion by attending CCU.

Indeed, certain members of the Supreme Court have even suggested – in the context of the First Amendment's speech clauses – that the First Amendment has no application at all to government funding decisions:

> The nub of the difference between me and the Court is that I regard the distinction between "abridging" speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable. . . . The Government, I think, may allocate . . . funding *ad libitum*, insofar as the First Amendment is concerned.

National Endowment for the Arts v. Finley, 524 U.S. 569, 599 (1998) (Scalia, J., joined by Thomas, J., concurring).[15] But one need not go so far to resolve the issue presented by the instant case, inasmuch as *Locke* clearly stands for the proposition that government is *not* required to fund religious education and secular education equally. As *Locke* holds, 540 U.S. at 718-19, there is room for "play in the joints," between the commands of the Establishment and Free Exercise Clauses, for states to make their own determinations as to how best to protect religious liberty and freedom of conscience – even to the extent that the determination requires a more rigorous separation of church and state than does the First Amendment.

B. CCU and its *amici* argue that *Locke* should be limited to its specific facts, and thus should be read to permit the exclusion, from college scholarship and grant programs, only of students training for the ministry. It is difficult, however, to see what principled difference there might be between public funding for the

[15] Although the divide between "prohibiting the free exercise" of religion and funding it could hardly be any less "fundamental" than the divide between "'abridging' speech and funding it," Justice Scalia did not reprise his advocacy of the state's freedom to "allocate . . . funding *ad libitum*" in *Locke*, and his vigorous dissent from the Court's decision in that case made no reference to his previously expressed views. *See* 540 U.S. at 726-34 (Scalia, J., joined by Thomas, J., dissenting).

training of ministers and public funding for ministries of religious education – and that has been the holding of the courts that have considered this issue. *See Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) ("The appellants endeavor to cabin *Davey* and restrict its teachings to the context of funding instruction for those training to enter religious ministries. Their attempt is unpersuasive."); *Bush v. Holmes*, 886 So. 2d at 364 ("nothing in the *Locke* opinion . . . limits its application to [the specific] facts" of that case).

That there is no principled difference between the statutory exclusions in this case and the exclusion at issue in *Locke* is readily apparent from what CCU itself says about the nature and purpose of the education it provides. One of the basic differences between CCU and the colleges and universities eligible to participate in Colorado's scholarship and grant programs is that CCU views the education it provides to *all* of its students as preparation for a religious ministry:

> CCU places a strong emphasis on personal discipleship and preparation for ministry. Students are encouraged to mature in their relationship with Christ and in their service for Him. The University urges from Scripture that all Christians are called to serve Christ and to minister to others . . . .

Aplt. App. at 88 (¶ 19).

Colorado's decision to prohibit public funding of such religious education is fully consistent with the values secured by the religion clauses of the First Amendment to the United States Constitution: "The object or purpose of a

government's refusal to fund religion is not the suppression of religious conduct – it is avoidance of the divisiveness, strife, and violations of conscience that forcing taxpayers to fund the religions of others involves."[16] As *Locke* makes clear, this decision – which reflects Colorado's choice about how best to protect the values of religious liberty and freedom of conscience embodied in its state constitution – is entitled to deference and respect.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ John M. West

ROBERT H. CHANIN
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035
rchanin@nea.org

JOHN M. WEST
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W., Suite 1000
Washington, DC 20005
(202) 842-2600
jwest@bredhoff.com

MARTHA R. HOUSER
Colorado Education Association
1500 Grant Street
Denver, CO 80203
(303) 837-1500
mhouser@nea.org

FRANCISCO M. NEGRON, JR.
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Counsel for Amici Curiae

[16] Underkuffler, 2 First Amend. L. Rev. at 185.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief *Amicus Curiae* of the National Education Association *et al.* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is in Times New Roman 14-point typeface. With the exception of those portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii), it contains 6,992 words.

/s/ John M. West
John M. West

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the foregoing Brief *Amicus Curiae* of the National Education Association *et al.* as submitted in digital form is an exact copy of the written document filed with the Clerk. The digital submission has been scanned for viruses with Symantec AntiVirus, version 9.0, updated on December 3, 2007, and according to the program is free of viruses.

/s/ John M. West
John M. West

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief *Amicus Curiae* of the National Education Association *et al.* was, this 5th day of December, 2007, dispatched to the Clerk and served on counsel for appellant and appellees by first-class mail, postage prepaid, at the addresses indicated below:

Daniel D. Domenico
John R. Sleeman, Jr.
Antony B. Dyl
Michelle M. Merz
Attorney General's Office
1525 Sherman Street, 7th Floor
Denver, CO 80203

Gregory S. Baylor
Timothy J. Tracey
Isaac Fong
Center for Law & Religious Freedom
8001 Braddock Road, Suite 300
Springfield, VA 22151

Eric V. Hall
L. Martin Nussbaum
Rothgerber Johnson & Lyons, LLP
90 S. Cascade Ave., Suite 1100
Colorado Springs, CO 80903

Benjamin W. Bull
Gary S. McCaleb
Alliance Defense Fund
15333 North Pima Road, Suite 165
Scottsdale, AZ 85260

Thomas N. Scheffel
3801 E. Florida Avenue, Suite 600
Denver, CO 80210

and was served by electronic mail on counsel for the parties and *amici curiae* at the following addresses:

daniel.domenico@state.co.us
john.sleeman@state.co.us
tony.dyl@state.co.us
michelle.merz@state.co.us
gbaylor@clsnet.org
tjtracey@clsnet.org
ifong@clsnet.org
laycockd@umich.edu
esbeckc@missouri.edu
mjnorton@bf2-law.com
erassbach@becketfund.org
rseverino@becketfund.org
stuart.lark@hro.com
rena.comisac@usdoj.gov

ehall@rothgerber.com
mnussbaum@rothgerber.com
tscheffel@tnslaw.com
bbull@telladf.org
gmccaleb@telladf.org
WDellinger@OMM.com
PHarris@OMM.com
katskee@au.org
mstern@ajcongress.org
dmach@dcaclu.org
jschaeffer@pfaw.org

mark.l.gross@usdoj.gov
dirk.phillips@usdoj.gov
kevin.traskos@usdoj.gov
greg.jones@morallaw.org
bdupre@morallaw.org
rarchuleta@aclj.org
fmanion@aol.com
gsurtees@aclj.org

/s/ John M. West
John M. West