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

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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

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

§ 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.

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*

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 yrcc-0.007e gen s t i t

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.

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*,

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

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).

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 4( )]TJT*lay aTD8467 0 TD0.0001 Tc-0.0002 Tw[education roadlly

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

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 innot

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 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,

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.*

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,

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CERTIFICATE OF COMPLIANCE

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