Nos. 15-556, 15-557, and 15-558

IN THE

Supreme Court of the United States

FLORENCE DOYLE, et al.,
Petitioners,
v.
TAXPAYERS FOR PUBLIC EDUCATION, et al.,
Respondents.

DOUGLAS COUNTY SCHOOL DISTRICT, et al.,
Petitioners,
v.
TAXPAYERS FOR PUBLIC EDUCATION, et al.,
Respondents.

COLORADO STATE BOARD OF EDUCATION, et al.,
Petitioners,
v.
TAXPAYERS FOR PUBLIC EDUCATION, et al.,
Respondents.

On Petitions for a Writ of Certiorari to the Supreme Court of Colorado

BRIEF IN OPPOSITION

MICHAEL S. MCCARTHY
FAEGRE BAKER DANIELS LLP
1700 Lincoln Street
Suite 3200
Denver, CO 80203
(303) 607-3670

Counsel for Taxpayers for Public Education, et al.

TIMOTHY R. MACDONALD
Counsel of Record
MATTHEW J. DOUGLAS
ARNOLD & PORTER LLP
370 Seventeenth Street
Suite 4400
Denver, CO 80202
(303) 863-1000
timothy.macdonald@aporter.com

Counsel for James LaRue and Suzanne LaRue, et al.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

A 140-year-old provision of Colorado's Constitution prohibits the payment of public funds to religious schools. Colo. Const. art. IX, § 7. The Colorado Supreme Court gave effect to this constitutional provision by enjoining a school voucher program that provided public subsidies to 23 private schools, almost all of which are religious schools.

The question presented is whether the federal Free Exercise Clause compels a State to subsidize private religious education, even when the State does not subsidize private secular schools, and notwithstanding a state constitutional provision prohibiting such religious expenditures.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The decision below does not warrant this Court's review. When Colorado joined the United States 140 years ago, its citizens chose to ensure that taxpayer dollars would not be used to subsidize religious instruction of their children. The citizens codified that prohibition in their state constitution, and the meaning of that state law is what this case is principally about. The people of Colorado could have made a different choice and permitted their government to provide vouchers to religious schools. Unable to convince the people of Colorado to make that choice voluntarily, Petitioners now ask this Court to impose that outcome on Colorado and every other state through an expansive and intrusive reading of the federal Free Exercise Clause.

Unsurprisingly, no case holds that a state that chooses to provide vouchers to students attending non-religious schools is required to provide vouchers to religious schools. In *Locke v. Davey*, 540 U.S. 712 (2004), this Court held that there is permissible "play in the joints" between the Establishment Clause and the Free Exercise Clause, meaning that subsidizing religious instruction is neither prohibited by the former nor mandated by the latter. *Id*. at 718. Applying *Locke* in straightforward fashion, a plurality of the Colorado Supreme Court correctly concluded that the federal Constitution does not compel states to subsidize religious education. That decision exemplifies the spirit of federalism. Not a single judge below dissented on that question; there is no confusion in the lower courts; and there is no need for this Court to grant review.

That is especially so because the decision below does not even present the question the three petitioners

ask, which is some variation of whether a state may "discriminate" against religious schools by excluding them from a "generally available" government benefit. County i; State i; Doyle i. The plurality concluded that the Colorado Constitution prohibited the voucher program in its entirety, with respect to religious and non-religious schools alike. No vouchers are currently available to any school in Douglas County. Religious schools thus are not subject to any discrimination under the decision below; that fact is an insurmountable vehicle problem.

Two petitioners contend that Colorado's no-funding provision separately is unconstitutional on the theory that it reflects animus toward Catholics. That heavily disputed, fact-bound question is not worthy of this Court's attention, either. The plurality below agreed that the state law would be unconstitutional *if* it discriminated against Catholics (or any other religion), but concluded that it did not. Not only does the history of Colorado's no-funding provision overwhelmingly confirm its neutrality, but the plurality interpreted the constitutional text to apply equally to all religions—an interpretation of state law that is binding on this Court. There is no dispute that the Colorado Constitution has never been used to discriminate against Catholics and is being applied neutrally today.

At bottom, these petitions are simply a vehicle to advance petitioners' local policy preference—for public funding of religious schools—cloaked as a federal constitutional right. This Court's intervention in that policy debate is unwarranted and unnecessary.

STATEMENT

A. Colorado's No-Funding Provision

From the moment Colorado joined the Union in 1875, its citizens agreed that all children in the state would receive a free public education, a right that the state's founders enshrined in Article IX of the state's constitution. Those early Coloradans also valued a strong separation between religion and government, in part to guarantee that public education would be available to all. At Colorado's Constitutional Convention, "almost all seemed to be in agreement" that a "rigid separation of church and state" should be included in the state's constitutional structure. Tom I. Romero, II, *"Of Greater Value Than the Gold of Our Mountains": The Right to Education in Colorado's Nineteenth Century Constitution*, 83 U. Colo. L. Rev. 781, 830 (2012). This objective reflected popular sentiment. *See, e.g.*, Editorial, *Schools and the Church*, Denver Daily Times, Jan. 25, 1876, at 2 ("the people of Colorado seem to be very positive against all interference by churches, of whatever name, creed or denomination, in State affairs"); Proceedings of the Constitutional Convention Held in Denver, December 20, 1875, to Frame a Constitution for the State of Colorado 83 (1907) (citizen petition to the Convention urging the foundation and administration of "our entire political system . . . on a purely secular basis").

Convention delegates took additional steps to promote religious freedom and tolerance. The 1875 Enabling Act authorizing Colorado to pursue statehood mandated that the drafters "provide an ordinance . . . [t]hat perfect toleration of religious sentiment shall be secured, and no inhabitant of [the state] shall ever be molested in person or property, on

account of his or her mode of religious worship." Proceedings at 10. The governor likewise encouraged delegates to "maintain the enjoyment of civil and religious liberty." House Journal of the Legislative Assembly of the Territory of Colorado 11 (1861).

These values manifested in discussions of public education at the Convention, with "delegates signal[ing] their strong preference for a rigid separation of public as opposed to private, religious schools." Romero at 830. This sentiment was codified, among other constitutional provisions, in Article IX, Section 7:

> Neither the general assembly, nor any county, . . . 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 . . . .

Colo. Const. art. IX, § 7.

A key purpose of no-funding provisions like Section 7 was "to secure the financial stability of the nascent common schools." Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 310 (2008). In an address to the Colorado Teachers' Association, Judge James Belford noted that schools of "three sects"—Catholic, Jewish, and Episcopalian—had already received public funding in other states, and wondered "[w]hat will become of [Colorado public schools] when [religious groups] all sit down at the public table?" Hon. James B. Belford, "Address Before

the Colorado Teachers' Association," The Writings and Speeches of Hon. James B. Belford 233 (William B. McClelland, ed., 1897). Petitions submitted during the Convention expressed similar views. *See* Proceedings at 113 (one petition stated, "[w]e believe that . . . funds raised for [the support of public schools] should not be diverted to other uses"). Public funding of private schools would jeopardize the legislature's ability to "provide for the establishment and maintenance of a thorough and efficient system of free schools." Romero at 828. Indeed, "there was near-unanimous consensus that the proposed constitution retain its ban on granting public funds—in any way, shape, or form—to private institutions." *Id*. at 831. As one delegate explained, the no-funding provision "was basic to maintaining a system of popular education." Donald Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History 349, 355 (1961).

Section 7 also was intended "[t]o strengthen the separation of church and state," not to discriminate against religion generally or any particular sect. *Id*. at 356. The prevailing sense was that state funding of religious schools would "violate[ ] rights of conscience [by] forc[ing] one person to pay for another's religious instruction; . . . would bring about religious dissention over the competition for funds; and . . . would result in ecclesiastical control over public monies." Green at 310.

Delegates simultaneously enacted Article II, Section 4, which provides broad protection for religious exercise and equality. And Section 8 of Article IX ensures that "[n]o religious test or qualification" could be required for public-school admission, and that no student would be "required to attend or participate in any religious service whatsoever." The neutral balance

between the no-funding clause and the no-religious-test provision reflected the view that "wrong w[ould] be done to no one and equal rights secured to all by the adoption of [Sections 7 and 8]." Proceedings at 278. Collectively, the provisions of Article IX reflect "the pillars" of Colorado's school system: a "thorough and uniform" "public system of education that was both non-sectarian and nondiscriminatory." Romero at 828, 833.

While some citizens of the era may have harbored anti-Catholic sentiments, there is no basis to attribute Section 7 to anti-Catholic animus and no evidence in the record that any delegate held such beliefs. In fact, the delegates simultaneously took steps to protect the rights of Catholics. For example, delegates rejected a proposal to tax church property, which would have substantially harmed the Catholic Church in Colorado. Hensel at 352; Colo. Const. art. X, § 5.

There is strong evidence that the Catholic delegates at the Convention did not understand Section 7 to be anti-Catholic. Indeed, of the approximately eight Catholic delegates, only three voted against Section 7. Dale A. Oesterle & Richard B. Collins, The Colorado State Constitution: A Reference Guide 11, 222 n.985 (2002); Proceedings at 357–58. There is no evidence that the three dissenting delegates opposed Section 7 on the ground that it was anti-Catholic.

In the 140 years since Section 7 was enacted, it has never been applied in Colorado to discriminate against Catholics or any other particular religious sect.

B. The School Voucher Program

The Douglas County School Board adopted the Choice Scholarship Program in 2011. All students

participating in the Program were required to enroll in a nominally public charter school. App. 167–68.[1] The charter school, however, had no buildings, classrooms, teachers, books, or curriculum. App. 169–70. The school's sole purpose was to administer the Voucher Program and contract with private partner schools. App. 169. The charter school was "simply a mechanism to count . . . private school students as public school students for purposes of state funding." Tr. Vol. I, 217:19–24.[2]

To participate in the voucher program, students were required to gain admission to an approved private school and meet the private school's requirements for admission, including religious requirements. App. 167–71, 177–82. The Voucher Program specifically authorized participating private schools to "make enrollment decisions based upon religious beliefs." App. 70, 171. As a result, most students had to meet religious admission tests; faculty also had to satisfy religious employment requirements. App. 178–80; Tr. Vol. II, 320:4–9, 399:1–7. Several participating schools required students, parents, or faculty to sign pledges that they would adhere to church doctrine. App. 180. Almost all the participating religious schools required students to attend worship services. App. 178.

For most students, and for all high-school students without special needs, the only way to participate in the Program was to attend a religious school. Of the 23 private schools participating in the Program in

---

[1] "App. __" citations refer to the appendix filed with Petition No. 15-558.

[2] "Tr. __" citations refer to the evidentiary hearing transcript before the district court.

2011–12, 18 were operated by churches or religious organizations. App. 175.[3] Of the five non-religious schools, the only high-school option was limited to students with special needs. App. 175. All but one of the 120 high-school students participating in the Program were enrolled in religious schools, and 93% of all Program participants had signed up with religious schools. App. 176.

Through the Voucher Program, the District offered up to 500 "scholarships" in 2011–12 to District students for tuition at designated private schools. App. 165–66. For each admitted pupil, the District would send the private school a check worth 75% of the state's calculated per-pupil funding ($4,575 for 2011–12) or the private school's actual tuition fee, whichever was less. The nominal charter school would retain the remaining 25% to cover "administrative costs." App. 164–65; Tr. Vol. I, 155:3–12. The checks were mailed directly to the private schools, and the students' parents were required to restrictively endorse the checks for the sole use of the private schools. App. 165. The private schools were free to use the tax funds for any purpose, including religious instruction, services, and facilities, as well as clergy salaries. App. 184.

C. Proceedings Below

1. In 2011, two plaintiff groups composed of Douglas County students and parents, taxpayers, and non-profit organizations sued the School District and others to enjoin the Voucher Program. App. 68. After conducting a three-day evidentiary hearing, the trial

[3] The trial court counted three campuses of a single school—Denver Christian Schools (App. 172–73)—to reach a total of 23 participating schools. Of this total, only "five participating schools . . . are non-religious." App. 175.

court permanently enjoined the Program, finding that it violated five different provisions of the Colorado Constitution, including Article IX, Section 7, as well as Colorado's Public School Finance Act, C.R.S. § 22-54-101 et seq.

The trial court examined the participating schools' websites and materials that the schools voluntarily submitted to the District, as well as in-court testimony from school representatives, to ascertain whether the schools were controlled by churches or other religious organizations. App. 176–83. It found that most of the schools were owned or controlled by private religious institutions, and that many had governing entities that are limited to adherents to a particular faith. App. 176–78. Some participating schools are physically attached to a church. Tr. Vol. II, 315:11–19, 395:17–396:8. Most of the participating schools have a mission of inculcating their students with their particular religious doctrines. App. 181–82.

2. The Colorado Court of Appeals reversed in a 2-1 decision. As relevant here, the majority concluded that the Voucher Program did not violate the religion or education clauses of the Colorado Constitution. App. 69. The majority interpreted Section 7 in a manner effectively coextensive with the federal Establishment Clause, despite material differences in the texts. The majority did not decide whether the federal Free Exercise Clause compels the state to provide equal public funding to religious and non-religious private schools and expressly declined to address petitioners' argument that the court "should disregard" Section 7 on the theory that some citizens who voted for the Colorado Constitution in 1875 may have been "motivated by anti-Catholic bigotry." App. 95.

Judge Bernard dissented. He concluded that the Program violates the plain command of Article IX, Section 7 of the Colorado Constitution and that "section 7 fits comfortably into the space created by the 'play in the joints'" that this Court articulated in *Locke v. Davey*, 540 U.S. 712 (2004). App. 126. The dissent meticulously canvassed the history of Colorado's no-funding provision and concluded that the historical record did not show that anti-Catholic bias was a "primary driving force[ ] behind the drafting and ratifying of section 7." App. 154.

3. The Colorado Supreme Court reinstated the injunction of the Voucher Program "in its entirety," meaning that no private school, religious or non-religious, is receiving voucher funding right now or may in the future under the Program. App. 29 n.18.

A three-judge plurality led by Chief Justice Rice concluded that the Voucher Program was "unconstitutional beyond a reasonable doubt" under Article IX, Section 7 of the Colorado Constitution, which "features broad, unequivocal language forbidding the State from using public money to fund religious schools." App. 23–24. The plurality explained that Section 7 is "more restrictive than the [federal] Establishment Clause regarding governmental aid to religion, and the Supreme Court has recognized that state constitutions may draw a tighter net around the conferral of such aid." App. 33. While noting that a federal constitutional challenge to Section 7 on the basis of alleged anti-Catholic animus "is not before us," App. 27 n.17, the plurality nevertheless rejected an interpretation of Section 7 that would bar funding only to Catholic schools. App. 27. The plurality did not reach the plaintiffs' remaining state constitutional claims.

The plurality rejected the contention that the trial court conducted an impermissible "invasive inquiry" into religious doctrine, concluding that the trial court simply "took notice of the Private School Partners' basic characteristics" by "cit[ing] various schools' ownership structures . . ., their admissions policies . . ., and their formal mission statements." App. 35. "In conducting this cursory examination, the trial court reached the self-evident and undisputed conclusion that certain Private School Partners are in fact religious." *Id*.

Justice Marquez provided the decisive fourth vote and concurred in the judgment only. She concluded that the Voucher Program violated Colorado's Public School Finance Act. Because Justice Marquez resolved the case on statutory grounds, she did not address the state constitutional claims. App. 48.

Three justices dissented on the ground that the plurality "misinterpret[ed] the language of section 7," which the dissent would have applied in a manner that would permit the Voucher Program. App. 50. The dissent acknowledged but did not attempt to resolve the defendants' contention that Section 7 was motivated by "possible anti-Catholic bias," noting however that the "trial court found the [State's] evidence and argument [on this issue] 'unpersuasive.'" App. 50, 63. The dissent did not address the question whether the application of Section 7 would violate the Free Exercise Clause if the provision was not motivated by anti-Catholic bias.

As a result of the decision below, the District is currently enjoined from providing vouchers to religious and non-religious private schools alike.

REASONS FOR DENYING THE PETITIONS

I. The decision below presents no federal question worthy of review.

A. There is no basis for reviewing the Colorado Supreme Court's decision that Colorado law prohibits a religious voucher program.

A plurality of the Colorado Supreme Court concluded that the Colorado Constitution prohibits the funding of religious schools through voucher programs, and that the federal Free Exercise Clause does not require states to spend their citizens' tax dollars on religious schools. This unremarkable result embraces the state-by-state diversity regarding the funding of religious schools that our federal Constitution permits and that this Court has endorsed. Petitioners attempt to turn a quintessential state-law question into a federal one by distorting this Court's precedents, the decision below, and the decisions of other federal and state courts.

1. There is no conflict with any decision of this Court. The plurality's opinion below is consistent with this Court's decisions in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Locke v. Davey*, 540 U.S. 712 (2004). *Zelman* held that the federal Establishment Clause generally does not prohibit states from establishing private-school voucher programs that include religious schools. 536 U.S. at 662–63. *Locke* held that the federal Free Exercise Clause and other constitutional provisions permit states to provide financial assistance to students pursuing degrees in secular studies, but to refuse to provide such assistance to students pursuing religious degrees. 540 U.S. at 724. Such exclusions reflect legitimate policy

choices that states may make on a state-by-state basis, and are "not evidence of hostility toward religion." *Id.* at 721. Indeed, the Court in *Locke* could "think of few areas in which a State's antiestablishment interests come more into play" than the context of declining to fund religious instruction. *Id.* at 722 nn.5–6.

The decision below is a straightforward application of *Locke*'s holding that "there is room for play in the joints" between the Establishment Clause and the Free Exercise Clause. *Id.* at 718 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). "In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718–19. The plurality below appropriately concluded that school vouchers are among these permissible but *optional* state actions. As the plurality acknowledged, this Court "has recognized that state constitutions may draw a tighter net around the conferral of [governmental] aid" to religion. App. 33.

Not even petitioners contend that the decision below *conflicts* with *Locke*. Instead, they argue that *Locke* left open the question whether states must fund religious schools if they fund secular ones. Petitioners seek to recast *Locke* as narrowly tailored toward state constitutional provisions that exclude the funding of devotional degrees, as opposed to excluding religious instruction in general. State 17; County 30; Doyle 32. But that is not what the Court said. The Court explained that "religious instruction is of a different ilk" for purposes of public funding. *Locke*, 540 U.S. at 723. In describing the historical "antiestablishment interests" justifying no-funding provisions, *id.* at 722, the Court highlighted as "[p]erhaps the most famous example" the "public outcry" against a Virginia bill

that sought to subsidize religious instruction generally. *Id.* at 722 n.6 (describing "A Bill Establishing A Provision for Teachers of the Christian Religion").

While *Locke* focused on the facts presented by the case, County 30–31, that was for the unremarkable reason that those were the facts presented by the case. The Court was not implicitly suggesting that devotional degrees were the *only* kind of religious instruction that the state could decline to fund. Nor did the Court distinguish a program declining to fund religious instruction from a program declining to fund devotional degrees on the ground that the former would evince "hostility toward religion." County 31; Doyle 33. On the contrary, the Court doubted that declining to fund religious studies could even "be called" "disfavor of religion" and noted that failure to fund religious education "imposes neither criminal nor civil sanctions" and "does not require students to choose between their religious beliefs and receiving a government benefit." *Locke*, 540 U.S. at 720–21. That analysis applies equally to the Voucher Program here.

Locke also rejected an Equal Protection Clause challenge, explaining that rational-basis review applied because the scholarship program did not violate the Free Exercise Clause. *Id*. at 720 n.3. This holding is fatal to certain petitioners' half-hearted efforts to argue that "heightened scrutiny" applies here. *See* County 33–35.

But even if there were some question whether the federal Constitution requires a state to provide vouchers for religious schools whenever it provides vouchers for similarly situated secular schools, the decision below simply does not present that question. The Colorado Supreme Court struck down the Voucher Program in its entirety, and the County is

currently providing vouchers to nobody. App. 29 n.18; *see supra* at 10.

2. Certiorari is not warranted to "clarify" *Locke*. State 15; County 26; Doyle 39. Every federal circuit and state high court to consider the constitutionality of religious subsidies post-*Locke* has held that states that choose to give aid to secular programs are not *required* by the federal constitution to provide such aid to religious programs. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 783–85 (8th Cir. 2015), *cert. petition pending* (No. 15-577); *Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 355–57 (1st Cir. 2004); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 673, 679–81 (Ky. 2010); *Anderson v. Town of Durham*, 895 A.2d 944, 958–61 (Me. 2006). The three petitions and nine amicus briefs do not identify a single contrary decision by any federal circuit or state high court.

a. Petitioners argue that the Seventh and Tenth Circuits split with the plurality. State 18–20; County 27–29; Doyle 28–30. That is incorrect.

In *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the Tenth Circuit held that a Colorado law that gave scholarships to students attending some but not all religious colleges violated the Religion Clauses. The law discriminated on the basis of religiosity by excluding only colleges that were deemed "pervasively sectarian," and required an "intrusive inquiry" to determine whether a college was "pervasively sectarian" rather than permissibly religious. *Id*. at 1256–57; *see* App. 34–35. Discrimination among religions was decisive in *Colorado Christian*. As the plurality below recognized, that holding is irrelevant here, because the Voucher Program "does not distinguish among religious schools" or

require any intrusive inquiry into religiosity. App. 34–35.

Colorado Christian held nothing about the reach of *Locke*. The Tenth Circuit did "not decide" even "whether" a difference between funding devotional degrees and religious education generally mattered under *Locke*, much less "how" a court should analyze such a difference. 534 F.3d at 1256. The State (at 19) points to *Colorado Christian*'s musing that *Locke* "suggests," though it "does not hold," that states cannot engage in "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colorado Christian*, 534 F.3d at 1255. But the Tenth Circuit expressly stated: "We need not decide if we would have upheld" a program, like the one the First Circuit upheld in *Eulitt*, "providing tuition to private secular secondary schools but categorically excluding religious ones." *Id.* at 1256–57. Petitioners' suggestion that *Colorado Christian* "noted its disagreement with, and split from," the First Circuit's decision in *Eulitt*, State 21 n.4, or "expressly rejected" *Eulitt*, Doyle 28, is irreconcilable with *Colorado Christian*'s express disclaimer that it decided any such issue.[4]

Nor is *Colorado Christian*'s observation about "wholesale exclusion" inconsistent with the decision below. *Colorado Christian* may have been referring to the sorts of exclusions referenced in the dissent

---

[4] The Tenth Circuit did not expand *Colorado Christian* via a sentence in *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1201 (10th Cir. 2015), *cert. granted on unrelated issue*, 136 S. Ct. 446 (2015). Doyle 31 n.13. *Little Sisters* reaffirmed that *Colorado Christian* was about *degrees* of religiosity and barred "intrusive scrutiny of religious belief." 794 F.3d at 1201.

below—like exclusions from police protection, which the plurality below plainly did not endorse. App. 58. We do not know, because *Colorado Christian* did not reach any holding on the subject. The case concerned university scholarships, not vouchers for elementary and secondary schools; and the Tenth Circuit was not purporting to consider whether states that provide voucher programs are required to provide religious vouchers.

The Seventh Circuit's decision in *Badger Catholic Inc. v. Walsh*, 620 F.3d 755 (7th Cir. 2010), aligns with the decision below. *Badger Catholic* held that a university violated the Free Speech Clause—and only that clause—by excluding religious counseling from a "public forum where the students, not the University, decide what is to be said." 620 F.3d at 780. The decision relied on the doctrine banning viewpoint discrimination in public forums, not the Free Exercise Clause. *Id.* at 779–80. Indeed, the Seventh Circuit noted *Locke*'s holding that "public-forum analysis was 'simply inapplicable'" to decisions to fund educational scholarships, and explained that withholding "funds over which [the state] had retained plenary control" from religious programs was constitutional. *Id.* at 780 (quoting *Locke*, 540 U.S. at 720 n.3). Outside the context of a public forum, *Badger Catholic* explained, "selective funding [is a] permissible public choice." *Id.* No petitioner here raises a free-speech or public-forum question.

Badger Catholic offered the unremarkable observation that *Locke* itself involved a ban only on using state funds to support ministry degrees. 620 F.3d at 780. It did not adopt a "narrower view" of the implications of *Locke*, County 28, much less hold that a broader program of selective funding would be

unconstitutional. On the contrary, *Badger Catholic* explained that the "more important[ ]" and dispositive point was that *Locke* involved selective funding outside a public forum. *Id.* The *Badger* dissent did not suggest, as one Petitioner claims, that the majority adopted a narrow view of *Locke*. *See* Doyle 30 (taking statement from the dissent out of context).

The Doyle petitioners alone argue that decisions from the Sixth and Eighth Circuits conflict with the plurality's opinion. Doyle 20. But *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), and *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), pre-dated *Locke* and obviously do not contribute to a split about the meaning of *Locke*. Indeed, as the State and County acknowledge (State 20; County 27), the Eighth Circuit's post-*Locke* jurisprudence is consistent with the decision below. *See Trinity Lutheran*, 788 F.3d at 783–85. The same is true of the Sixth Circuit's post-*Locke* jurisprudence. *Bowman v. United States*, 564 F.3d 765, 773–74 (6th Cir. 2008).

b. The plurality's opinion also does not conflict with any decision from any other state high court. The cases identified in the State's petition (at 21–23) either did not reach any federal question because they held that their state constitutions permitted selective funding, or are *dissents* from decisions *agreeing* with the opinion below, *e.g.*, *Anderson*, 895 A.2d 944 (Clifford, J., dissenting); *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (en banc) (Polston, J., dissenting). Dissenting opinions from intermediate state court decisions do not establish a conflict worthy of this Court's attention. And the fact that Colorado's intermediate state appellate court disagreed with Colorado's Supreme Court on state-law grounds is certainly not a reason to grant the petition. State 24.

The County and Doyle petitioners do not argue that any state high court decision conflicts with the decision below on any federal issue. The only "conflict" petitioners identify is that different state courts construe their no-funding clauses differently. Doyle 37–38. Of course that presents no federal issue.

B. There is no basis for reviewing the Colorado Supreme Court plurality's conclusion that Section 7 is neutral as between religious sects.

Certain petitioners argue that Section 7 is inconsistent with the First Amendment and the Equal Protection Clause because it purportedly reflects animus toward and disfavors Catholics. County 20–25; Doyle 34–36. But the plurality interpreted Section 7 to require the neutrality petitioners seek, and certiorari is not warranted to insert this Court into a factual dispute about the origin of a Colorado constitutional provision. In any event, Section 7 does not disfavor Catholics. Not a single judge below concluded otherwise.

1. The plurality below recognized that Section 7 "would patently violate the First Amendment if it discriminated against a particular religion." App. 27 n.17. Petitioners thus present no disputed legal issue worthy of this Court's attention.

Petitioners nevertheless argue that Section 7 discriminates against Catholics because, in their view, the word "sectarian" is coded language for "Catholic." County 22–23; Doyle 34. Applying state-law principles of state constitutional interpretation, the plurality below concluded otherwise. The plurality explained that Section 7's use of the word "sectarian" is "synonymous" with "religious." App. 24. The plurality

emphasized "[t]hat section 7 twice equates the term 'sectarian' with the word 'church'": Section 7 bars aid to "any *church* or sectarian society," or aid for any "school . . . controlled by any *church* or sectarian denomination whatsoever." *Id*. (quoting Colo. Const. art. IX, § 7) (emphasis added). The plurality accordingly concluded that Section 7 "plain[ly]" applies to all religions, not just Catholicism, and Section 7 must be "enforce[d] . . . as it is written." App. 27. A state court's interpretation of its own constitution is binding on this Court. "[I]t is not [this Court's] function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974).

The County petitioners argue that the "original public meaning" of Section 7 reflected bias against Catholics 140 years ago, and that an "original public meaning" should inform the provision's interpretation today. County 24. But the manner in which Colorado courts interpret the Colorado Constitution is a matter of Colorado law. Federal tools of constitutional interpretation like the "original public meaning" canon have no application here. In any event, the County's argument hangs entirely on the assumption that the word "sectarian" is synonymous with "Catholic," while ignoring that Section 7 bans public funding to "any *church or* sectarian denomination." Colo. Const. art. IX, § 7 (emphasis added).

The factual dispute about whether the adoption of Section 7 over a century ago involved any anti-Catholic bias is especially unworthy of this Court's review because it is undisputed that the provision is being applied *today* in a way that is neutral between religions. Participants in the Voucher Program included Catholic, Presbyterian, Lutheran, and Jewish

schools, App. 176, and under the decision below, none will receive public funding. Catholics have not been disfavored. Indeed, only three of the 18 religious schools approved to take part in the Voucher Program were Catholic. *See* App. 172–78.

Nor was there any error: Section 7 isn't an anti-Catholic provision. Not a single judge who participated in the three proceedings below concluded that Section 7 is a so-called "Blaine amendment" that discriminates against Catholics. The notion that expert testimony relating to Section 7's origins was "unrebutted" is pure fiction. Doyle 35. Petitioners' expert came undone on cross-examination, and the district court found the defendants' evidence "unpersuasive." App. 213; *id*. at 63 (Eid, J., dissenting). The district court further observed that "Colorado's 'no aid' provision is nearly identical to a provision in the Illinois Constitution [that] was enacted prior to the proposal of the Blaine amendments," and that Colorado Catholics "conducted a 'pro-constitution' rally in Denver just days before ratification." App. 213–14. Moreover, only three of the eight Catholic delegates to the Colorado Constitutional Convention voted against Section 7. *Supra* at 6.

The majority opinion in the Colorado Court of Appeals did not address the issue of Catholic animus. The dissent, however, undertook a lengthy analysis of why the amendment was *not* anti-Catholic. App. 136–50. And the dissenting judges in the Colorado Supreme Court merely charged that the plurality's investigation of the subject was not as searching as the dissenters would have liked. They thought the plurality had given insufficient attention to "*allegations* of anti-Catholic animus" and the "*possibility* of anti-Catholic bigotry." App. 50, 59 (emphasis added).

Thus, while members of this Court have appropriately condemned laws that target Catholics, County 22 (citing *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.)), Section 7 does not target Catholics. Indeed, Section 7 does not include the phrase—"*pervasively* sectarian"—that the *Mitchell* plurality described as a hallmark of animus toward Catholics. *Mitchell*, 530 U.S. at 828 (emphasis added).

2. This case is worlds apart from the animus cases on which petitioners rely, including *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Hunter v. Underwood*, 471 U.S. 222 (1985); and *Romer v. Evans*, 517 U.S. 620 (1996). County 20–24; Doyle 35–36. None are funding cases. All involved a state's use of its criminal or regulatory authority to discriminate against individuals based on their particular religion, race, or sexual orientation. All involved provisions that had the *effect* of discriminating against a protected class at the time of the decision. And if that were not enough, all the provisions either: (a) *facially* discriminated based on sect, race, or sexual orientation, or (b) were *concededly* borne of unlawful prejudice.

Lukumi involved ordinances barring animal sacrifices that clearly "target[ed] Santeria"; the statute contained exceptions for essentially any animal killing other than Santeria sacrifices. 508 U.S. at 528, 535. In practice, and based on "the interpretation given to the ordinance" by the city and state, the *Lukumi* statute applied only to Santeria. 508 U.S. at 536–57. In contrast, here there is no dispute that Section 7 is neutral between religions in operation. That the ordinances in *Lukumi* imposed criminal penalties is the final dispositive difference: *Locke* held that the

Lukumi analysis is simply not applicable to provisions conferring or denying funding. *Locke*, 540 U.S. at 720.

Hunter v. Underwood, 471 U.S. 222 (1985), involved a law that all parties conceded was enacted to deprive African Americans of the right to vote, *id.* at 230, 232, and that "continue[d] to this day to have that effect," *id.* at 233. African Americans were "at least 1.7 times as likely as whites to suffer disenfranchisement" under the law. *Id.* at 227. Colorado's no-funding clause, by contrast, has never been used to discriminate against Catholics and applies equally today to all religious groups.

Romer v. Evans, 517 U.S. 620 (1996), struck down a law that barred public entities in the state of Colorado from affording "homosexual, lesbian or bisexual" individuals any "protected status" and prohibited those individuals from bringing any "claim of discrimination." *Id*. at 624; *see* Doyle 33–34. *Romer* did not suggest that the Equal Protection Clause requires state governments to provide religious school vouchers. Meanwhile, *Locke* itself rejected petitioners' notion that the Equal Protection Clause requires "heightened scrutiny" of laws purportedly discriminating on the basis of religion. County 34; *see also id*. 20, 30, 33; Doyle 35. *Locke* expressly held that standard rational-basis review applied because the scholarship program at issue did not violate the Free Exercise Clause. 540 U.S. at 720 n.3.

3. Finally, petitioners' "animus" argument does not implicate a split with any federal court of appeals or state high court, and petitioners do not argue otherwise. In the absence of a split, this Court should not review the fact-bound question whether a Colorado constitutional provision that is unquestionably being

applied neutrally today might have been motivated by anti-Catholic animus 140 years ago.

C. Petitioners vastly overstate the decision's significance.

The three petitions persistently mischaracterize the impact of the decision below. The decision does not create an "intractable bind" or "Catch-22" for any state. State 15, 24. Colorado is not put to the choice of "abandon[ing] longstanding public benefits programs" or "discriminat[ing] against religion." State 15; County 35. Colorado could enact a voucher program tomorrow that includes religious schools if its citizens so choose; the Colorado Constitution has been amended more than 150 times and amendments may be raised by citizen initiatives. Thus, this decision hardly "effectively nullif[ies]" *Zelman*. County 35. Indeed, as petitioners recognize, many states have chosen to interpret their own Constitutions as coterminous with *Zelman* to permit religious school voucher programs. County 35; Doyle 37. Not a single state or local policymaker is "directed" to "discriminat[e] against religion" by any federal aspect of the decision below. State 28. Rather the decision whether to provide vouchers is left entirely to the states. It is petitioners who wish to eliminate state choice by enshrining a new one-size-fits-all federal rule.

Thus the Doyle petitioners are wrong to warn of a "perverse state of affairs" in which different states apply different rules related to funding of religious schools. Doyle 37–38. The cited "conflicts" are simply the product of differences in state law. The diversity of state approaches is a benefit of federalism, not a defect for this Court to correct.

Petitioners and their amici also raise hypothetical horribles that are not presented by the decision below. *See* County 36. To the extent Petitioners are concerned with the potential implications of the plurality's conclusion in other contexts, that is a question for another day.

Nor did the plurality suggest that it would uphold a program that distinguished between certain religious schools and "pervasively sectarian" ones. State 25. Quite the contrary; the plurality explained that *Colorado Christian* was irrelevant because it involved such a distinction. App. 36. And the plurality recognized a "categorical difference between inquiring into the *extent* of an institution's religiosity and determining its *existence*." App. 35–36. Not even the dissent thought that the plurality's opinion engaged in or called for any analysis of whether any school is "pervasively sectarian."

The charge that the plurality below would "endorse eligibility determinations based on the kind of searching, intrusive inquiry into religious belief and practice that the *Mitchell* plurality said was 'offensive,'" State 26, is simply irreconcilable with the plurality below's express "recogni[tion] that a court may not trespass into the depths [of] an institution's religious beliefs," App. 37.[5] Various petitioners assert that applying Section 7 requires impermissible "trolling through" or "second-guessing of their religious beliefs," County 33;

---

[5] Thus while the plurality below observed (correctly) that the plurality opinion in *Mitchell* was not binding, App. 32 n.20; *see Marks v. United States*, 430 U.S. 188, 193 (1977), it did not reach any conclusion that is inconsistent with any conclusion of the *Mitchell* plurality. *Mitchell* concerned whether giving aid to religious schools violated the Establishment Clause, not whether declining to give aid violated the Free Exercise Clause.

see State 25, but they are notably vague about what sort of intrusion occurred here. The dissenting opinion below identified no such intrusion. In fact, the schools that participated in the Voucher Program self-identified as religious. App. 35.

Like the citizens of Washington in *Locke*, the citizens of Colorado have "merely chosen not to fund a distinct category of instruction." *Locke*, 540 U.S. at 721. Declining to provide vouchers to attend religious schools "does not require students to choose between their religious beliefs and receiving a government benefit," *id*. at 720–21, any more than refusing to provide college scholarships did in *Locke*.

II. There are significant vehicle problems.

This case is a particularly poor candidate for plenary review. Principally, the question posed in the petitions—whether a state may "discriminate" against religious education—is not actually presented on these facts. The Colorado Supreme Court struck down the Voucher Program "in its entirety" and thereby treated secular and religious private schools equally. App. 29 n.18. No religious school was "discriminated against" in relation to its secular counterparts, *see* County i, and no Free Exercise violation flows from that outcome.

Petitioners' entire theory of this case—that the "Colorado Supreme Court has required petitioners to exclude religious schools in order to save a program that is neutral and constitutional under the federal Constitution," County 3—is thus fundamentally flawed. Petitioners ask this Court to address the hypothetical question whether, if Colorado *were* proceeding with a voucher program that excluded religious schools alone, such a program would run

afoul of the Free Exercise Clause. No Petitioner contends that there is anything unconstitutional about a state's choice to eliminate a voucher program entirely. On the contrary, "of course, a public/private . . . distinction would be constitutional." Doyle 2 n.10.

With respect to the County and Doyle petitioners' animus argument, the historical facts underlying Section 7 are vigorously contested. Petitioners' contrary representations are simply wrong; the trial court found that "there is a genuine dispute as to the historical relevance of the 'Blaine amendments' in the context of the Colorado Constitution," and found petitioners' evidence on this point "unpersuasive." App. 213. To reach the so-called Blaine amendment issue, this Court would have to reject the trial court's factual finding that evidence of anti-Catholic animus is "unpersuasive" and independently resolve contested facts about what motivated delegates to Colorado's Constitutional Convention and voters who adopted Section 7 in 1875. Even the dissenting justices below did not ascribe anti-Catholic bias to Section 7, at most conceding that such attribution was "possible." App. 50. Moreover, the plurality stated that petitioners' "attack on section 7's constitutionality" on the basis of supposed anti-Catholic animus was "not before" the court below, posing a "procedural obstacle." App. 27 n.17.

In any event, the history and application of Section 7 is unique to Colorado. Any factual determinations about the subjective intent of Colorado delegates and voters in 1875 has no general application to the experiences or the differently worded laws of other states. For example, Colorado was not required to include a no-funding clause in its state constitution by its federal enabling act, making Colorado's volitional

choice distinguishable from those of at least ten other states.[6]

This case also is a poor vehicle for resolving any issue relating to Section 7 because the three-judge plurality opinion below does not constitute a definitive and controlling interpretation of state law necessary to determine whether Section 7 is preempted by federal law. A plurality decision is a "point of reference for further discussion of the issue," "not binding precedent." *Texas v. Brown*, 460 U.S. 730, 737 (1983); *Colorado v. Schaufele*, 325 P.3d 1060, 1073–74 (Colo. 2014) (Eid, J., dissenting) (same). The question presented thus is not ripe because a future panel of the Colorado Supreme Court is free to adopt the interpretation of Section 7 offered by the plurality, the dissent, or neither. This Court should decline petitioners' invitation to strike down a state constitutional provision that has not been definitively interpreted on the assumption that state law cannot be constitutionally applied. No judge at any stage of this case resolved either federal constitutional argument in petitioners' favor.

Further, a ruling from this Court in petitioners' favor would not be outcome determinative. The state supreme court did not address three additional state constitutional claims raised by challengers below, including a provision relating exclusively to the funding of public education. None of those claims would necessarily be affected by resolution of the federal constitutional arguments presented in the petitions.

---

[6] The amicus briefs by Arizona (at 23) and Christian Legal Society (at 26–27) allege that ten states were required to include no-aid clauses in their state constitutions by federal enabling acts, while conceding that Colorado was not such a state.

Finally, a fundamental premise of the petitions—that the Voucher Program "is neutral and constitutional under the federal Constitution," County 3—is contested. In *Zelman*, the Court explained that constitutional school-voucher programs provide "genuine opportunities . . . to select secular educational options" for all students and do not create any "incentive for parents to choose a religious school." 536 U.S. at 654–55. The Voucher Program here does not meet these requirements because, for example, high-school students without special needs have no non-religious school options. App. 12 & n.6.

Aside from the merits, the Doyle petition must be denied because intervenor-petitioners lack a "legally cognizable interest in the outcome" of this case. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013). They no longer have children eligible to participate in the Voucher Program. *See* Doyle 9 n.2. Intervenors, like all litigants, must show the existence of an Article III case or controversy upon invoking federal jurisdiction. Because intervenors' alleged injury cannot be redressed by a favorable disposition, they no longer have an actionable interest in the litigation, and Petition No. 15-556 should be denied. *See Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 432–33 (1952) (denying review where "child had graduated from the public schools before this appeal was taken to this Court" and "no decision we could render now would protect any rights she may once have had").

III. The decision below is correct.

The Colorado Supreme Court plurality correctly concluded that states are not required by the federal Constitution to fund religious programs. That conclusion follows directly from *Locke*, *see supra* part I.A, and is consistent with decision after decision of this Court recognizing the "play in the joints" between the Establishment Clause and the Free Exercise Clause. *Locke*, 540 U.S. at 718; *Walz*, 397 U.S. at 669; *Norwood v. Harrison*, 413 U.S. 455, 469 (1973). States are simply not "constitutionally obligated to provide even 'neutral' services to sectarian schools." *Norwood*, 413 U.S. at 469.

Colorado's decision not to provide vouchers to religious schools—or any private school—does not prevent anybody from freely exercising his or her religion. The students of Colorado are free to attend any school they wish, of any religious denomination at all. The state and federal constitutions also guarantee all students the right to attend public school without having to participate in any religious activity contrary to their beliefs. It is not the decision below that places anyone in a "Catch-22." State 24. Rather it is the notion that if a state is unwilling to spend its tax dollars to subsidize religious instruction of its children, the federal Constitution prohibits that state from experimenting with alternative means of educating its children.

Petitioners' Free Exercise Clause argument creates absurd results. It would mean that every time a state elects to give any money to anyone, the state has to give that same funding to someone who wants to engage in a similar activity with a religious aspect to it. That is not what free exercise means, and this Court has never so held.

By contrast, none of petitioners' dire predictions will come true. States and local policymakers will not be "forced to discriminate against religious institutions or abandon their public benefits programs entirely." State 24. The decision below simply reflects the federalist principle that states may choose to provide vouchers for religious schools, or not, and both choices are permitted by the federal Constitution.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

MICHAEL S. MCCARTHY
FAEGRE BAKER DANIELS LLP
1700 Lincoln Street
Suite 3200
Denver, CO 80203
(303) 607-3670

Counsel for Taxpayers for Public Education, et al.

TIMOTHY R. MACDONALD
Counsel of Record
MATTHEW J. DOUGLAS
ARNOLD & PORTER LLP
370 Seventeenth Street
Suite 4400
Denver, CO 80202
(303) 863-1000
timothy.macdonald@aporter.com

Counsel for James LaRue and Suzanne LaRue, et al.