No. 15-558

IN THE

Supreme Court of the United States

COLORADO STATE BOARD OF EDUCATION, ET AL,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

STATE PETITIONER'S REPLY BRIEF

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January 13, 2016

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

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REPLY ARGUMENT

Respondents assert that this Court should be untroubled by the decision below because "no vouchers are currently available to *any* school in Douglas County" and "the County is currently providing vouchers to *nobody*." Br. Opp'n 2, 14–15 (emphases added). This, Respondents claim, proves that no discrimination has occurred. *Id.* at 1–2, 26.

Of course, Respondents are correct that no school district is constitutionally required to establish a voucher program and, if a district chooses not to establish one, it will not have discriminated against religion. But that is not the issue here. The issue here—of vital importance to the State of Colorado and state and local governments across the country—is whether the *reason* for the lack of a voucher program in Douglas County is constitutional. And here, the reason Douglas County has been prohibited from implementing its Choice Scholarship Program is that the Program allows parents to use public funds at religious schools.

When Douglas County designed the Program, it heeded the Tenth Circuit's guidance in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). That case interpreted *Locke v. Davey* to mean "that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* at 1255 (quoting *Locke*, 540 U.S. 712, 725 (2004)). Respondents, facing this unfavorable federal precedent from a court whose decisions are binding in Colorado, immediately challenged the Program under state law, leading to more

than four years of litigation and two appellate reversals, culminating in the decision below. That decision puts state law in direct conflict with the Tenth Circuit's understanding of the First Amendment by mandating the categorical exclusion of certain institutions from public benefits programs based on a single criterion: whether those institutions are religious. Other federal and state courts are similarly divided on the same issue. State and local governments across the country—including school districts in Colorado—need to know whether the First Amendment permits this categorical, religion-based exclusion from public benefits programs. Only this Court can provide the necessary guidance by resolving the split in authority.

Respondents advance a number of vehicle arguments, none of which should give this Court pause. The plurality opinion that struck down the Program was decisive and controlling. Indeed, the ruling below is precisely what Respondents asked for throughout this litigation, and it is precisely what Respondents will use as precedent if Douglas County or any other Colorado school district attempts to adopt a similar voucher or scholarship program in the future.

I. This case presents a federal question of fundamental importance.

A. Whether a state mandate to categorically discriminate against religion is consistent with the United States Constitution is a question of federal, not state, law.

In *Locke v. Davey*, this Court granted certiorari to review whether a State, "pursuant to its *own constitution*," could "deny … funding [of tuition at a religious school for a ministry degree] without

violating the Free Exercise Clause." 540 U.S. at 719 (emphasis added). Here, the question is directly analogous and was expressly left unanswered in *Locke*: can state courts, without identifying or analyzing any "historic and substantial state interest," *id*. at 725, deny public benefits solely because those benefits indirectly flow to religious institutions?

This is not a question of state law, as Respondents argue. Br. Opp'n 1, 12. Petitioners are not challenging the Colorado Supreme Court's interpretation of Section 7. Petitioners instead ask whether Section 7, so interpreted, can be used to deny public benefits based on religion without violating the First Amendment. This case is thus no different from the many cases (including *Locke*) in which this Court has reviewed whether state law is consistent with federal constitutional provisions. *See, e.g.*, *Locke*, 540 U.S. at 712; *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1629 (2014); *Romer v. Evans*, 517 U.S. 620, 623 (1996); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 482 (1986).

Nor should this federal constitutional question be left to individual state interpretation. *See* Br. Opp'n 12; *id.* at 1 (stating that the decision below "exemplifies the spirit of federalism"). If that were true, the petitions for certiorari in *Locke* and *Witters* were improvidently granted. Federalism is no excuse to violate the First Amendment.

Respondents battle a straw man when they describe the question before the Court as whether the Free Exercise Clause "compels" or "requires" a state to "subsidize religious education." Br. Opp'n (i), 1, 12, 30. No one in this case has made that claim. What Petitioners do argue is that when a government

chooses to create a public benefits program—such as a system of school vouchers—the First Amendment prohibits that government from categorically denying otherwise neutral and generally available aid simply because of religion. This case is not a mere "policy debate" about whether religious schools should receive public funding. *Id.* at 2. It presents a fundamental question about the scope of the First Amendment, a question left open by this Court's decision in *Locke*.

B. The question presented is of national importance.

Although the decision below was made in the context of a particular school voucher program, its ramifications are broader. As noted by three justices in dissent, the court's "breathtakingly broad interpretation" would invalidate "numerous … state programs that provide funds to students and their parents who in turn decide to use the funds to attend religious schools." Pet. App. 48a–49a (Eid, J., dissenting); *id.* at 57a–58a (Eid, J., dissenting). And the court's prohibition on "indirect funding" is broad enough that it "would invalidate the use of public funds to build roads, bridges, and sidewalks adjacent to such schools, as the schools … 'rely on' state-paid infrastructure to operate their institutions." *Id.* (Eid, J., dissenting). If Petitioners' understanding of *Locke* is correct, the reasoning and holding of the decision below represents a marked expansion of the generally understood reach of a state's power to make funding distinctions based on religion. That expansion is particularly troubling given the dozens of states with constitutional provisions similar to Section 7, which have led to endless litigation and conflicting decisions in the wake of *Locke*. *See, e.g.*, Douglas Cty. Pet. 34–36 (citing cases); Amicus Br. of Ariz. *et al.* 12–15, 19–

20; Amicus Br. of Okla. 2–7 (describing Oklahoma's attempt to implement a voucher program).

Respondents dismiss the ramifications of the decision below by arguing that its "potential implications" should be left "for another day." Br. Opp'n 25. But the effects of the limitless interpretation of *Locke* endorsed by the decision below are being felt now, in current ongoing litigation across the country. *See* Pet. 23 (citing cases); Pet. for Cert., *Trinity Lutheran Church of Columbia v. Pauley* (No. 15-577) (seeking review of state decision to deny a scrap tire recycling grant to a church preschool); Amicus Br. of Okla. 2–13.

Respondents also belittle the decision below by asserting that Douglas County could enact a scholarship program that includes religious schools "tomorrow," "if [Colorado's] citizens so choose." Br. Opp'n 24. This refers to Colorado's initiative process, whereby if a citizen sought to amend the Colorado Constitution to alter or eliminate Section 7, and obtained sufficient signatures to put the measure on the ballot, and if the measure passed in a general election (and was upheld against legal challenge), Douglas County could then re-implement a voucher program without being required to categorically exclude religious schools. But the possibility of "overruling" an unconstitutional state court decision by amending the state constitution does not make that decision any less worthy of this Court's attention. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2593; *Schuette*, 134 S. Ct. at 1629; *Romer*, 517 U.S. at 631. By making this argument, Respondents merely concede that the Choice Scholarship Program in fact satisfies the requirements of the First Amendment. And this only highlights how directly the decision below clashes with a narrower reading of *Locke*.

II. The split among state and federal courts is genuine and longstanding.

There is a clear split of authority regarding whether a state can categorically deny otherwise neutral and generally available public aid on the basis of religion. *See* Pet. 18–24; Douglas Cty. Pet. 27–30; Families' Pet. 18–31. The differing rationales in these decisions are irreconcilable, and the divide cannot be bridged absent guidance from this Court.

Respondents' attempts to explain away the cases on one side of the split—those that contradict the decision below—are unavailing. First, Respondents claim that *Colorado Christian* presents no conflict because "[d]iscrimination among religions was decisive" in that case. Br. Opp'n 15–16. Respondents are correct that the scholarship program in *Colorado Christian* improperly discriminated between institutions based on their degree of "religiosity." *See* 534 F.3d at 1256. But that was not all the court held. The Tenth Circuit also responded to, and ruled on, the argument that *Locke* required the program to be upheld because a State's ability to discriminate against religion in public benefits programs is subject to "no more than rational basis review." *See id.* at 1254–55 (quotation omitted). In rejecting that argument, the court interpreted *Locke* to mean that a "State's latitude with respect to funding decisions has limits" and "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* at 1255. That application of *Locke* directly contravenes the decision below and cases on the opposite side of the *Locke* split. *See Trinity Lutheran Church of Columbia, Inc. v. Pauley,* 788 F.3d 779, 783–85 (8th Cir. 2015);

Eulitt v. Me. Dep't of Educ., 386 F.3d 344, 355 (1st Cir. 2004).

Second, Respondents seek to distinguish *Badger Catholic, Inc. v. Walsh* as a case about free speech rather than free exercise. Br. Opp'n 17–18. But like *Colorado Christian*, that case also involved the disposition of a *Locke* claim in direct conflict with the Colorado Supreme Court's decision below. As Respondents attempt to do here, the defendants in *Badger Catholic* sought to justify denying public funds based on religion by citing *Locke*'s holding that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 620 F.3d 775, 780 (7th Cir. 2010) (quoting *Locke*). The Seventh Circuit rejected that argument in part because the program upheld in *Locke* allowed scholarships to be used at colleges "where prayer and devotion were part of the instructional program." *Id.* In contrast, the program in *Badger Catholic* excluded "programs that include prayer or religious instruction." *Id.* By interpreting *Locke* to prohibit categorical discrimination against religion, and by recognizing that "only training to become a minister was off limits" in *Locke*, *id.*, *Badger Catholic* necessarily interpreted *Locke*'s "play in the joints" to be far narrower than the Colorado Supreme Court's expansive interpretation below.

Finally, Respondents deny any disagreement among the state cases because the decision below "does not conflict with any decision from any other state high court." Br. Opp'n 18. Because each state case turns on its own constitutional provision, of course there is not a direct split in the sense of courts from multiple states interpreting a single state constitutional provision differently. The relevance of the state decisions that

approve categorical exclusion of religion is that they conflict with the federal decisions in *Colorado Christian* and *Badger Catholic* and deepen the split.

Respondents posture the decision below as "a straightforward application of *Locke*'s holding." Br. Opp'n 13–14; *see also id.* at 26 ("[T]he citizens of Colorado have 'merely chosen not to fund a distinct category of instruction.'") (quoting *Locke*, 540 U.S. at 721). But that assumes the answer to the fundamental question: how far can *Locke* be stretched? Respondents construe *Locke*'s statement that there are "few areas in which a State's antiestablishment interests come more into play" than the training of clergy, 540 U.S. at 722, as more broadly endorsing state preferences against "fund[ing] religious instruction." Br. Opp'n 13. *Colorado Christian* and *Badger Catholic* explicitly reject that argument; other cases, like *Eulitt*, endorse it. *Compare Colo. Christian*, 534 F.3d at 1255 *and Badger Catholic*, 620 F.3d at 780, *with Eulitt*, 386 F.3d at 355. This Court was clear in *Locke* that "the only interest at issue … is the State's interest in not funding the religious training of clergy." 540 U.S. at 722 n.5.[1] Whether *Locke* can be extended to all educational settings, as Respondents desire, is the very point on which the courts are split and which requires clarification from this Court.

[1] Respondents also misconstrue *Locke*'s discussion of an early Virginia bill, Br. Opp'n 13–14, which this Court noted was intended to support the clergy, not religious instruction generally, 540 U.S. at 722 n.6.

III. The decision below directly presents the question and there are no vehicle problems.

Respondents argue that because the decision below enjoined the entire Douglas County voucher program, and not just the portion that allowed distribution of funds to religious schools, it did not discriminate against religion. Br. Opp'n 26–27; *see also id.* at 2 (calling this an "insurmountable vehicle problem"). That argument conflates the holding with the remedy. The decisive rationale below was that the Program violated Section 7 because it permitted public funds to go to religious schools. *See* Pet. App. 25a–26a (holding that the Program "violates the clear constitutional command of section 7" because it "awards public money to students who may then use that money to pay for a religious education"). If, as Petitioners contend, that holding violates the First Amendment, it is not immunized from review merely because the court granted Respondents' request that the entire Program be enjoined. *See id.* at 29a n.18. The decision to enjoin rather than judicially rewrite the Program does not present a vehicle problem or alleviate the unconstitutional religious discrimination that is now embedded in Colorado law.

Respondents also claim that because the opinion below was a three-justice plurality, it "does not constitute a definitive and controlling interpretation of state law" and "a future panel of the Colorado Supreme Court is free to adopt [or reject] the interpretation." Br. Opp'n 28. But the plurality's language was clear: it "h[e]ld … that the [Program] violates article IX, section 7 of the Colorado Constitution" and on that basis "reverse[d] the judgment of the court of appeals and remand[ed] the

case." Pet. App. 10a. That the Colorado Supreme Court could decide the issue differently in a subsequent case does not change matters, as that is true even for unanimous decisions. *See People v. Porter*, 348 P.3d 922, 927 (Colo. 2015). The relevant point is this: if a Colorado county implemented a new voucher program similar to the Choice Scholarship Program, Respondents would argue that the decision below is a controlling interpretation of Section 7, is consistent with the First Amendment, and prohibits such a program. Indeed, the ruling below is exactly what Respondents asked for through four years of litigation. That they now characterize it as "not binding" is disingenuous and inconsistent with their other arguments: they acknowledge that the plurality's "interpretation of [Colorado's] constitution is *binding on this Court*," Br. Opp'n 20 (emphasis added), and they concede that Section 7 would have to be *repealed by popular vote* to allow the County to include religious schools in a voucher program, *id.* at 24.

Respondents claim that certiorari is not merited because in the lower Colorado courts, they raised other challenges that were not ruled on by the Colorado Supreme Court. *Id.* at 28. That is often true of cases reviewed by this Court and does not present a vehicle problem. *See, e.g.*, *Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3, 8 (2012) (per curiam) (reversing on federal question and remanding to address other claims under state constitution); *Witters*, 474 U.S. at 489 (same). A decision in Petitioners' favor here would resolve the claim ruled on by the Colorado Supreme Court and require reversal of that ruling.

Finally, Respondents claim that whether the Program is "neutral and constitutional" under this Court's decision in *Zelman v. Simmons-Harris,* 536

U.S. 639 (2002), is a contested issue. Br. Opp'n 29. That is incorrect. Respondents never raised a *Zelman* claim in the courts below; rather, they based their claims entirely on state grounds.[2] The Colorado Supreme Court explicitly acknowledged that fact, ultimately basing its ruling on its belief that *Locke* grants free license to categorically discriminate against religion:

> "Had [Plaintiffs] claimed that the [Program] violated the Establishment Clause, *Zelman* might constitute persuasive authority. But they did not. Rather, [Plaintiffs] challenged the [Program] under article IX, section 7 of the Colorado Constitution. By its terms, section 7 is *far more restrictive than the 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."

Pet. App. 33a (emphasis added) (citing *Locke*). It is this very reasoning that is at issue here and which has divided state and federal courts since *Locke* was decided. There is no barrier to the Court granting the Petition and putting an end to the confusion.

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[2] Neither the district court nor the court of appeals considered the Program to be non-neutral. *See* Pet. App. 97b. The Colorado Supreme Court did not expressly address the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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