NO. 15-557

In the
Supreme Court of the United States

DOUGLAS COUNTY SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Petitioners created the Choice Scholarship Program as part of a broad initiative designed to provide greater educational quality and choices for students and parents. The Choice Scholarship was modeled on the school-choice initiative that this Court upheld as vindicating the constitutional virtue of neutrality concerning religion in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). But what this Court upheld as neutral, the Colorado Supreme Court struck down by relying on Article IX, §7 of the Colorado Constitution and its ban on aid to "sectarian" schools. The Colorado Supreme Court made clear that petitioners could pursue school choice if they excluded religious schools from the program. Thus, a state constitutional provision "born of bigotry," *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality), has been interpreted to invalidate an initiative this Court has deemed "neutral" and to require petitioners to discriminate against religion.

As petitioners and a diverse array of *amici* demonstrate, that anomalous result cries out for this Court's review. Respondents' quibbles aside, §7 did not somehow avoid the "shameful" anti-Catholic animus of its time when it used the same "code" word as the federal Blaine Amendment to keep the public schools Protestant and the Catholic schools unfunded. *Id.* at 828; *see also Zelman*, 536 U.S. at 721 (2002) (Breyer, J., dissenting). And the Colorado Supreme Court did not eliminate the problems with using this discriminatory measure to invalidate a neutral program by interpreting §7 as mandating state discrimination against all religious schools, rather

than just Catholic schools. Broadening the discrimination by deeming all religious schools impermissibly "sectarian" hardly eliminates the taint of §7's history.

Even putting aside §7's sordid origins, the Constitution does not permit its use to force state and local governments to discriminate against religion. *Locke v. Davey*, 540 U.S. 712 (2004), permitted states to forgo funding the religious training of clergy, but the Court carefully cabined its holding to that narrow context. Respondents insist that this case falls in the heartland of *Locke*, but in reality, courts are split on whether *Locke*'s heartland is limited to public funding of ministerial training or extends broadly to all programs of neutral aid to religious and non-religious institutions. If *Locke* really sanctions a wholesale departure from "neutrality" and allows states to exclude religious institutions from all manner of neutral programs, this Court can say so. But if neutrality remains the guiding principle in interpreting the Religion Clauses, then this Court should make clear that the decision below overreads *Locke* and underestimates the importance of allowing local governments to pursue secular objectives by neutrally including religious and non-religious institutions alike. That is what petitioners attempted in adopting the Choice Scholarship Program, and that is what the Colorado Supreme Court stopped by applying a provision designed to discriminate against Catholics to force discrimination against all religious schools.

I. Section 7 Was Born Of Religious Bigotry And Is Being Used To Mandate Religious Discrimination Today.

A. There can be no serious dispute that §7 was the product of anti-Catholic animus. Respondents do not contest the Protestant nature of nineteenth-century public schools, the anti-Catholicism engendered by Catholics' efforts to seek funding for their own schools (culminating in the federal Blaine Amendment), or the virulent anti-Catholicism surrounding the Colorado constitutional convention (held contemporaneously with federal anti-Catholic efforts), particularly in response to Father Machebeuf's entreaties on behalf of Catholic rights. *See* Pet.5-11; Christian Legal Soc'y Br. ("CLS Br.") 5-17. As petitioners' unrebutted expert testimony demonstrated, the result of this vitriol was §7's prohibition on aid to "sectarian" institutions—the same "code" word a majority of this Court has recognized as bigoted.[1]

Respondents' attempts to deny anti-Catholic animus by invoking a few historical details and quibbles fall far short. Respondents trumpet the convention's decision not to tax church property as demonstrating a lack of anti-Catholicism. Opp.6. But Protestants and Catholics were united against such taxation—and the Protestant churches held far more

[1] Because the constitution was put to a popular vote following the convention, *see* Richard Collins & Dale A. Oesterle, *The Colorado State Constitution* 3-4 (2011), the poisonous editorials and statements by leading newspapers and ministers are germane in demonstrating the anti-Catholic animus pervading §7. *See* Pet.10-11.

property than the Catholic Church. Donald W. Hensel, *Religion and the Writing of the Colorado Constitution,* 30 Church History 349, 350-52 (1961). The protection of Catholic church property was deemed a necessary evil, and "a perceptible undercurrent of anti-Catholic hostility" pervaded the church taxation debate. *Id.* at 352.

Respondents emphasize (at 6) that "of the approximately eight Catholic delegates, only three voted against Section 7," and misleadingly imply that the other Catholic delegates voted for §7. In fact, the other Catholic delegates were absent from the vote; *none* of the Catholic delegates—who were decidedly in the minority—voted for §7. *See id.* at 353-54 (identifying delegates presenting "'the Catholic views'"); *Proceedings of the Constitutional Convention: Colorado 1875-1876*, at 357-58 (recording §7 votes). Respondents also cite (at 21) a pro-constitution rally by some Catholics. But the Constitution contained scores of provisions and paved the way for the substantial benefits of statehood. One could easily be pro-constitution and anti-§7.

Respondents' attempts to attribute benign motives to §7 also fail. They argue that it was merely a mechanism to ensure that public schools were properly funded and that church and state were strictly separated. Opp.4-6. But other provisions of the 1876 Colorado Constitution addressed the sufficiency of public school funding. *See, e.g.*, Colo. Const. art. IX, §3 (1876) ("The public school fund of the state shall forever remain inviolate and intact. … No part of this fund … shall ever be transferred to any other fund, or used or appropriated, except as herein

provided."). And the "rigid separation of church and state" respondents tout, Opp.3, was entirely absent from public institutions, especially public schools, dominated by Bible reading, public prayer, and other examples of institutionalized Protestantism. That *status quo* was threatened by surges in Catholic population, and anti-"sectarian" provisions like §7 were designed to maintain the pre-existing admixture of church and state. Section 7 succeeded in maintaining a wall between Catholics and public aid, but not between church and state. For decades after the convention, readings from the Protestant Bible were permissible in Colorado public schools because they were considered not to constitute "teaching[s] of a sectarian … doctrine." *People ex rel. Vollmar v. Stanley*, 255 P. 610, 616 (Colo. 1927), *overruled by Conrad v. City & Cty. of Denver*, 656 P.2d 662 (Colo. 1983).

Finally, respondents invoke an Illinois no-aid provision enacted in 1870 as an untainted antecedent. Opp.21 (quoting App.213-14). But the anti-Catholic politics giving rise to the federal Blaine Amendment were already underway in 1870. *See* Pet. 5-7; CLS Br. 6-12. And there is no denying that §7 was exactly contemporaneous with the federal Blaine Amendment, used the exact same "code," and that Colorado had its own unique history of anti-Catholicism giving rise to §7.

Respondents suggest that evaluating the history of §7 would require the Court to "reject the trial court's factual finding that evidence of anti-Catholic animus is 'unpersuasive'" and "independently resolve contested facts." Opp.27. But respondents misstate

the trial court's findings. What the trial court deemed "unpersuasive" was petitioners' legal "argument," because it found petitioners' "legal authority" wanting. App.203. This Court has the last word on petitioners' legal argument. While the trial court thought there was a "genuine dispute" over historical facts, App.204, this Court has not hesitated to resolve such historical facts as part of its legal analysis, *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). And the lower court record is substantially better developed here than in *Mitchell*, where the plurality was nonetheless able to conclude that the Blaine Amendment and its anti-sectarianism were "born of bigotry." 530 U.S. at 829 (plurality).[2]

B. Respondents cannot save §7 by contending that, even if it were motivated by anti-Catholic animus, the Colorado Supreme Court interpreted §7 "*today* in a way that is neutral between religions." Opp.20. That argument suffers from multiple flaws. First, this Court has not hesitated to strike down laws rooted in unconstitutional bias *even if facially neutral and neutrally interpreted*. *See Hunter v. Underwood*, 471 U.S. 222, 227 (1985); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Second, §7 is not facially neutral because

[2] Respondents' heavy reliance on scholarship by the very individual they designated as an expert but then shielded from cross-examination by declining to call as a trial witness makes their boast that petitioners' expert "came undone on cross-examination," Opp.21, not just self-congratulatory but wholly inappropriate. The fact remains that the only record evidence came from *petitioners'* expert.

"sectarian" is not some neutral antonym of secular, but "code" for anti-Catholicism. And, despite respondents' contrary suggestion, the Colorado Supreme Court does not somehow avoid the problem by interpreting an anti-Catholic provision to be anti-religious. To be sure, if the Colorado Supreme Court had interpreted the provision faithfully with its original public meaning and excluded only the Catholic schools from the Choice Scholarship Program, the unconstitutionality of §7 would be even more glaring. But broadening the discrimination to exclude additional religious schools does not solve the basic problem. A provision born of bigotry is still being used to force petitioners to discriminate on the basis of religion today.

Respondents repeatedly contend (at 2, 14-15, 26-27) that the decision below does not compel discrimination against religious schools because the program was struck down in its entirety, even as applied to non-religious schools. But that is only because petitioners created a neutral program offering aid for use at private schools *without regard to religion*. Precisely because petitioners wanted to adopt such a neutral program modeled on the program this Court upheld as neutral and constitutional in *Zelman*, they did not separately provide for scholarships to be used at secular and religious schools, with only the latter provision being enjoined. But respondents do not seriously dispute that the decision below would allow petitioners to enact a new program that aids only secular schools, even though petitioners would prefer to involve both religious and secular schools on a neutral basis. There is no avoiding the reality that a provision designed to

mandate state discrimination against Catholics in 1876 is being enforced to mandate state discrimination against religious schools in 2016. Whether the Constitution sanctions this intolerable state of affairs is a question too fundamental to leave unreviewed.

II. *Locke v. Davey* Does Not Sanction Unlimited Exclusions From Neutral And Generally Available Aid Based On Religion.

Respondents contend (at 13) that categorically prohibiting all funding because of religion is a "straightforward" application of the "play in the joints" recognized by *Locke v. Davey*, 540 U.S. 712 (2004). But respondents disregard the remainder of *Locke*, which, in response to the dissent's concern about an overbroad holding, repeatedly emphasized its narrow holding and the unique concerns implicated by public funding of ministerial training. *Id.* at 725; Pet.30-31. In the wake of *Locke*, the lower courts have divided on whether the "play in the joints" allowed by *Locke* is narrowly limited to *Locke*'s specific context or applies to all manner of neutral government programs, from general education to safer playgrounds. The extent of the "play in the joints" allowed by *Locke* and whether a case like this is a straightforward application of *Locke* or an unwarranted extension is a question of profound importance that divides the courts and independently merits this Court's review.

The methodological divide in the lower courts is real. One cannot reconcile the decision below reading *Locke* as placing no limit on funding decisions with the Tenth Circuit's view that *Locke* "does not extend to the wholesale exclusion of religious institutions and their

students from otherwise neutral and generally available government support," *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (McConnell, J.). These decisions represent the opposing views that a broad array of judges and commentators have adopted regarding *Locke*'s scope. *See* Pet.27-30.

Respondents try to downplay *Colorado Christian*, but that decision squarely "reject[ed]" respondents' argument—*viz.*, that under *Locke*, "states are free to discriminate in funding against religious institutions however they wish." 534 F.3d at 1256. Declining to fund an "entire program of education" rather than "'particular categories of instruction'" goes "well beyond the holding in *Locke*." *Id.* at 1256 n.4. *Colorado Christian* and similar decisions demonstrate that there is nothing "straightforward" about whether *Locke* sanctions the wholesale exclusion of otherwise neutral and generally available aid based on religion, and why this Court's review is plainly warranted.

Respondents claim that the Establishment Clause concerns raised by overreading *Locke* are "vague." Opp.25-26. But here, the trial court divvied up the participating schools by examining, *inter alia*, whether (1) their curriculum "includes required courses in religion or theology that tend to indoctrinate and proselytize"; (2) their governing boards "reflect, and are often limited to, persons of the schools' particular faith"; (3) they "are funded primarily or predominantly by sources that promote and are affiliated with a particular religion"; (4) they "discriminate in enrollment or admissions on the basis of the religious beliefs or practices of students and

their parents"; and (5) they "require students to attend religious services." App.169-74. This "'trolling through'" religious beliefs is "precisely the type of inquiry forbidden by the First Amendment." App.95; Pet.33. And it necessarily results from an overreading of *Locke*. In *Locke*, "[t]he institution, rather than the State, determine[d] whether a student's major [was] devotional." 540 U.S. at 717. That self-evaluation of a narrow question raises no concerns about government intrusiveness. But when the scope of the interest expands to encompass denial of aid for anything loosely implicating "religion," and the courts, not the institution, have the final word, the Establishment Clause concerns are unavoidable.

III. The Court Should Grant Review In This Case.

Respondents repeatedly contend that Colorado has simply made the "choice" not to provide vouchers for religious schools. Opp.1, 12-13, 24, 27, 31. That distorts the issue. Petitioners'—and Colorado's—choice is neutrality. The question is whether the Colorado Supreme Court can force a different choice on popularly elected governments by virtue of a provision born of bigotry. The answer is no twice over. A provision born of bigotry cannot constitutionally be construed to mandate discrimination today. And the First and Fourteenth Amendments do not tolerate the discrimination against religion that the Colorado Supreme Court has mandated.

Relatedly, respondents claim that "Colorado could enact a voucher program tomorrow that includes religious schools," if only the state amended its constitution. *Id.* at 24. But this Court routinely

reviews federal constitutional challenges to state laws and constitutional provisions, even though every one of them could be wiped away by a subsequent amendment. That remote possibility is no obstacle to this Court's review.

Respondents downplay the implications of the decision below by dismissing them as mere "hypothetical horribles." Opp.25. This is the same head-in-the-sand approach adopted by the dispositive plurality, which, like respondents, could not articulate any principled limit to its reasoning. Pet.36. And while the outcome here is bad enough, the horribles from the use of discriminatory state provisions and an overreading of *Locke*—from denying toddlers safe playgrounds to denying educational opportunities to disabled children—are all too real. *See, e.g.*, CLS Br.22-25; Gardner Br.2, 20-21; Okla. Br.2-7.

Respondents further argue that review is unnecessary because §7 "is unique to Colorado." Opp.27. But any animus case involves some analysis particular to the specific provision under review. That has not discouraged this Court from conducting such review. *See, e.g.*, *Lukumi*, 508 U.S. at 520; *Romer v. Evans*, 517 U.S. 620 (1996); *Hunter*, 471 U.S. at 222; *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). And because many of the relevant facts regarding §7 are not unique to Colorado, *see* App.143 (Bernard, J., dissenting) ("Section 7 was not, and is not, unique."), review here would provide important guidance on this question of national importance.

Respondents' remaining vehicle arguments are unavailing. First, the fact that a three-judge plurality,

rather than a four-judge majority, rendered the dispositive decision should not affect this Court's intervention. Opp.28. There is no question that petitioners' Choice Scholarship Program was invalidated because of the Colorado Supreme Court's interpretation of §7 as mandating discrimination against religious schools.

Second, the existence of respondents' alternative arguments unaddressed below is no obstacle to review. *Id.* This Court routinely reviews certworthy issues despite the possibility that the respondent might prevail on some alternative argument on remand. What matters is the certworthiness of what the Colorado Supreme Court decided, and there are few issues more momentous than those implicated by that court's §7 analysis.

Finally, this case is a particularly good vehicle for this Court's review because the Colorado Supreme Court has used §7 to invalidate a program this Court has already deemed constitutional and neutral in *Zelman*. Respondents complain that the Choice Scholarship Program is different because it did not provide any private nonreligious high school opportunities beyond special-education schools. Opp.29. But petitioners offer entirely secular public high schools. *Cf. Zelman*, 536 U.S. at 655. And *Zelman* flatly rejected the argument that neutrality turns on the percentage of participating schools that are religiously affiliated, let alone quibbles about what types of nonreligious schools participate in certain grades. *Id.* at 656-57. Moreover, respondents can hardly decry the lack of additional school options when they swiftly filed suit to enjoin the Program in its pilot

phase. In reality, petitioners adopted a neutral program, and the Colorado Supreme Court has told them that they can preserve a choice program only if they remove the religious schools. That is the antithesis of the neutrality applauded and upheld in *Zelman*.

* * *

Section 7 is the product of nineteenth-century anti-Catholic animus, deployed today to require anti-religious discrimination. This Court's review is urgently needed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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