No. 15-556

In The
Supreme Court of the United States

FLORENCE AND DERRICK DOYLE, ET AL.,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

As the Families' petition explains, there is a deep and widely-recognized split over whether government may bar religious options from school voucher and similar student aid programs. The Sixth, Seventh, Eighth, and Tenth Circuits maintain that government may not do so; the First and Ninth Circuits, as well as the Maine and Vermont Supreme Courts, insist that it may. *See* Families' Pet. 18-36. The Colorado Supreme Court has now further compounded this split, joining the latter camp and rejecting the position of the Tenth Circuit, within which Colorado lies.

Thus, this Court again has the opportunity to resolve an issue it avoided in *Locke v. Davey*, 540 U.S. 712 (2004) – an issue Justice Kennedy dubbed "the voucher issue." Transcript of Oral Argument at 36, *Locke*, 540 U.S. 712 (No. 02-1315) (statement of Kennedy, J.). The Court should now do what it declined to do in *Locke*: "venture . . . into this . . . area" and resolve the issue once and for all. *Locke*, 540 U.S. at 725.

The plaintiffs' brief in opposition presents no reason why the Court should not do so. Rather, it simply: (1) mischaracterizes the decision below and the question presented; (2) attempts, but fails, to discount the decisions on the correct side of the split; (3) raises non-existent "vehicle problems"; (4) focuses myopically (and unpersuasively) on the history of the relevant state constitutional provision, while avoiding its text and operation; and (5) reflexively invokes

"federalism" as a supposed shield from this Court's review. The brief in opposition does nothing to undermine the Families' petition, and this Court should therefore grant certiorari.

ARGUMENT

I. The Plaintiffs Mischaracterize The Decision Below And The Question Presented.

Two fundamental mischaracterizations pervade the plaintiffs' brief in opposition. They concern the decision below and the federal constitutional question the Families are asking this Court to resolve.

First, the plaintiffs mischaracterize the Colorado Supreme Court's plurality decision. That decision does not, as they contend, "conclude[ ] that the Colorado Constitution prohibited the voucher program . . . with respect to religious *and non-religious* schools alike." Br. Opp'n 2 (emphasis added). Nor is "the District . . . currently enjoined from providing vouchers to religious *and non-religious* private schools alike," as the plaintiffs also claim. Br. Opp'n 11 (emphasis added). To the contrary, the decision below enjoins the District from implementing *this particular scholarship program*, precisely – and *only* – because it includes religious schools:

> The CSP . . . constitutes aid to *religious* institutions as contemplated by section 7. Therefore, we hold that the CSP violates section 7. Accordingly, we reverse the judgment

> of the court of appeals and remand the case . . . so that the trial court may reinstate its order permanently enjoining *the CSP*.

App. 38 (emphasis added). The reason the court enjoined the program in its entirety, rather than with respect to religious schools alone, is because the Choice Scholarship Program itself is *neutral* toward religion. Excising religious options would have required the court to, in its own words, "rewrite the CSP," App. 31 n.18, which would have exceeded the court's judicial function.

The plaintiffs also mischaracterize the question that this case presents and that the Families ask this Court to resolve. That question is not "whether the federal Free Exercise Clause *compels* a State to subsidize private religious education" or whether "the Equal Protection Clause *requires* state governments to provide religious school vouchers." Br. Opp'n i, 23 (emphasis added). Indeed, the Families are not asking this Court to compel the funding of anything. The people of Douglas County, through their democratically-elected Board of Education, *chose* to provide scholarships to students – scholarships that may be used at religious and non-religious schools alike. The question this case and the Families' petition presents is whether it violates the federal Constitution to invalidate that choice simply because it affords students the *option* of attending a religious school. *See* Families' Pet. i ("Does it violate the Religion Clauses or Equal Protection Clause of the United

States Constitution to invalidate a generally-available and religiously-neutral student aid program simply because the program affords students the choice of attending religious schools?").

II. The Split Among The Lower Courts Is Real.

In a futile effort to diminish the well-acknowledged split over whether government may bar religious options from otherwise neutral and generally-available student aid programs, the plaintiffs next attempt to discount or distinguish the decisions from the four circuits on the correct side of that split: namely, the Sixth, Seventh, Eighth, and Tenth. Their attempts to write off these decisions are baseless.

A. The Sixth Circuit's Decision In *Hartmann* And The Eighth Circuit's Decision In *Peter* Have Not Been Overruled Or Abandoned.

As the Families have noted, the split of authority at the heart of their petition began to develop in the decade before *Locke v. Davey*. *See* Families' Pet. 18-23. During that period, the Sixth Circuit, in *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), and the Eighth Circuit, in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), staked their position on one side of that split, holding that the federal Religion and/or Equal Protection Clauses preclude government from mandating

the exclusion of religious options in otherwise neutral and generally-available student aid programs.

The plaintiffs attempt to discount these pre-*Locke* decisions, suggesting that *Locke* overruled them and that subsequent Sixth and Eighth Circuit cases disavowed their holdings. *See* Br. Opp'n 18. Neither contention is correct.

Locke did not overrule *Hartmann* and *Peter* or cast doubt on their reasoning. Indeed, *Locke* does not even mention those cases. This is hardly surprising, as "the only interest at issue" in *Locke* was "the State's interest in not funding the religious training of clergy," *Locke*, 540 U.S. at 722 n.25 – an interest not involved in *Hartmann* and *Peter*.

Nor did the Sixth and Eighth Circuits abandon or overrule *Hartmann* and *Peter* in the wake of *Locke*, as the plaintiffs suggest they did in *Bowman v. United States*, 564 F.3d 765 (6th Cir. 2008), and *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015), *cert. petition pending* (No. 15-577). Like *Locke*, *Bowman* and *Trinity Lutheran* do not even mention *Hartmann* and *Peter*, much less overrule them. And that is, again, hardly surprising. After all, *Bowman*, as the Sixth Circuit explained, involved a regulation that did "*not* discriminat[e] along religious lines." *Bowman*, 564 F.3d at 774 (emphasis added). And *Trinity Lutheran*, as the Eighth Circuit explained, concerned the exclusion of church-run schools from programs that provide aid directly to schools themselves – not to students.

Trinity Lutheran, 788 F.3d at 785. As *Trinity Lutheran* recognized, *see id.* (citing *Locke*, 540 U.S. at 719), this Court "ha[s] drawn a consistent distinction between government programs that provide aid directly to religious schools" and *student* aid programs "of true private choice." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

Thus, neither *Bowman* nor *Trinity Lutheran* has anything to say regarding the constitutionality of excluding religious options from student aid programs. *Hartmann* and *Peter*, on the other hand, do, and they remain good law.

B. The Seventh Circuit's Decision In *Badger Catholic* And The Tenth Circuit's Decision In *Colorado Christian University* Are Not Distinguishable.

The plaintiffs also attempt to discount the post-*Locke* decisions of the Seventh Circuit in *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), and the Tenth Circuit in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). As the Families' petition noted, *see* Families' Pet. 28-30, these circuits joined the Sixth and Eighth Circuits in holding that the Constitution, even as interpreted in *Locke*, does not tolerate the wholesale exclusion of religious options from student aid programs.

The plaintiffs attempt to distinguish these cases, arguing that certain language in *Badger Catholic* actually *allows* "selective funding" of non-religious

options in student aid programs and that *Colorado Christian University*'s discussion of *Locke*'s reach is merely dicta. *See* Br. Opp'n 15-18. Neither contention is correct.

The language the plaintiffs point to in *Badger Catholic* does not hold that – or even speak to whether – the Constitution tolerates the exclusion of religious options from student aid programs. It merely reiterates what *Locke* held: a scholarship is not a forum for speech that implicates the Free Speech Clause. *Badger Catholic*, 620 F.3d at 780; *Locke*, 540 U.S. at 720 n.3. In fact, since *Badger Catholic*, the Seventh Circuit has held, en banc, that "the touchstone for Establishment Clause challenges *remains* 'the principle that the First Amendment mandates government neutrality between religion and religion, *and between religion and nonreligion*.'" *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 850 (7th Cir. 2012) (emphasis added) (quoting *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)).

And although the plaintiffs attempt to write off *Colorado Christian University*'s interpretation of *Locke* as dicta, it was not, as evidenced by the fact that the Tenth Circuit itself and the district courts within it follow that interpretation as the law. As the Tenth Circuit held just last year, that interpretation "prohibits preferences" for "non-sectarian" schools and institutions. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1201 (10th Cir. 2015), *cert. granted*, 136 S. Ct. 446 (2015); *see also Rocky Mountain Christian Church v. Bd. of*

Cnty. Comm'rs of Boulder Cnty., 612 F. Supp. 2d 1163, 1185 (D. Colo. 2009) (citing *Colorado Christian University* for proposition that the Constitution prohibits laws that "discriminate[ ] between religion and non-religion"), *aff'd*, 613 F.3d 1229 (10th Cir. 2010).

The plaintiffs also try to make much of the fact that, in the *Colorado Christian University* opinion he authored, then-Judge Michael McConnell explained that *Locke* "suggests" – but does not necessarily "hold" – that the "wholesale exclusion" of religious options in student aid programs is unconstitutional. *Colo. Christian Univ.*, 534 F.3d at 1255. The very reason Judge McConnell used the word "suggests," however, is that he and his brethren viewed "[t]he precise bounds of the *Locke* holding" as "far from clear." *Id.* at 1254. That Michael McConnell – a preeminent authority on the Religion Clauses – cannot discern the bounds of *Locke* is a reason to grant, not deny, the Families' petition. *Locke*'s bounds clearly need clarifying.

III. There Are No "Vehicle Problems" With The Petition.

The plaintiffs next contend that there are "vehicle problems" with this case that should give the Court pause. *See* Br. Opp'n 26-29. There are none.

A. The Colorado Supreme Court's Plurality Decision Was Outcome Determinative.

First, the plaintiffs make much of the unremarkable fact that the decision below was a plurality decision and that, even upon reversal and remand from this Court, the Colorado Supreme Court might invalidate the Choice Scholarship Program on some other state constitutional ground. *See* Br. Opp'n 28. That argument is disingenuous and irrelevant.

It is disingenuous to complain that the opinion below was merely a plurality and therefore not "definitive and controlling." Br. Opp'n 28. The plaintiffs, after all, ascribe the same opinion the force of law when they argue that its "interpretation of [Colorado's] constitution is binding on this Court." Br. Opp'n 20.

In any event, the plurality's conclusion on the federal constitutional question was outcome determinative, *see* Families' Pet. 17 n.7, 39, which the plaintiffs do not dispute. If this Court were to disagree with the plurality's conclusion on that question, reversal of the Colorado Supreme Court's judgment and remand would be required, as there is no independent and adequate state ground upon which that court's judgment could rest.

Moreover, that the Colorado Supreme Court might, on remand, invalidate the program on some other state constitutional ground is utterly irrelevant. *See* Br. Opp'n 28. State courts of last resort *commonly*

resolve state constitutional issues on remand from this Court, sometimes ruling for the plaintiff and sometimes for the defendant. *Compare Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004) (invalidating tax statute after remand from this Court), *with Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989) (upholding vocational assistance denial after remand from this Court). All that matters *now* is the judgment the Colorado Supreme Court already rendered, and that judgment turned on one point only: the plurality's (erroneous) conclusion that invalidating the Choice Scholarship Program under Article IX, section 7 of the Colorado Constitution does not violate the federal Constitution.

B. The Families Have Standing.

There is likewise no basis for the plaintiffs' suggestion that the Families' petition be denied because "[t]hey no longer have children eligible to participate in the Voucher Program." Br. Opp'n 29. As the Families have noted, they continue to have standing to challenge the decision below because it "will bar *every* school district in Colorado, *including the Andersons' new school district*, from adopting voucher programs that include religious schools." Families' Pet. 9 n.2. The Andersons continue to want access to a voucher program that includes religious schools, yet they and the other Families are now foreclosed even from lobbying for such a program. That is itself a legally cognizable injury. *See Romer v. Evans*, 517 U.S. 620, 631, 633 (1996) (invalidating provision of

Colorado Constitution that imposed "special disability" of making it "more difficult for one group of citizens than for all others to seek aid from the government").

Moreover, as this Court reiterated in *Horne v. Flores*, 557 U.S. 433 (2009), "in all standing inquiries, the critical question is whether *at least one petitioner* has 'alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'" *Id.* at 445 (emphasis added and omitted) (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009)); *see also McConnell v. FEC*, 540 U.S. 93, 233 (2003) ("[T]he Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants. . . ."), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010). If at least one petitioner "has standing to challenge the lower courts' decision[ ]," this Court "need not consider whether [the other petitioners] also have standing to do so." *Horne*, 557 U.S. at 446. In such situations, the Court has granted the petitions of *all* petitioners. *See Horne*, 129 S. Ct. 893 (Jan. 9, 2009) (Nos. 08-289, 08-294). It should do the same here, as the plaintiffs do not question the County and State defendants' standing.

IV. That The Plaintiffs Dispute The Anti-Catholic Origins Of Article IX, Section 7 Is No Reason To Deny The Petition.

The plaintiffs also spend much of their brief in opposition erroneously arguing that "there is no basis to attribute Section 7 to anti-Catholic animus" and warning this Court not to "insert" itself "into a factual dispute about the origin of a Colorado constitutional provision." Br. Opp'n 6, 19. Although the anti-Catholic history of the provision is certainly relevant and this Court's jurisprudence certainly calls for its consideration, *see* Families' Pet. 34-36; Douglas County's Pet. 20-25, history is not the primary concern of the Families' petition. The primary concern is that Article IX, section 7 has a discriminatory object, as evidenced by its *text* and *operation*.

As this Court held in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), "[t]o determine the object of a law" in the Religion Clause context, "we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. The inquiry does not end with the text, however, because "the effect of a law in its real operation is [also] strong evidence of its object." *Id.* at 535.

There is no doubt that the text and operation of Article IX, section 7 evince an object of hostility toward religion, regardless of the provision's history. That text and operation are dispositive, as well, in

the equal protection context, as Article IX, section 7 "imposes a special disability upon those persons" who desire a religious education for their children, making it "more difficult for [this] one group of citizens than for all others to seek aid from the government." *Romer*, 517 U.S. at 631, 633. That "is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

V. The Plaintiffs' "Federalism" Refrain Rings Hollow.

Finally, the plaintiffs reflexively invoke "federalism" as a shield that supposedly insulates the decision below from this Court's review. *E.g.*, Br. Opp'n 1, 24, 31. They even accuse the Families of attempting to thwart "legitimate policy choices that states may make on a state-by-state basis." Br. Opp'n 12-13; *see also* Br. Opp'n 24.

This talismanic invocation of "federalism" does not excuse a constitutional violation or legitimize religious discrimination. This Court has rejected the oft-repeated argument that enforcing the protections of the Bill of Rights "is inconsistent with principles of federalism and will stifle experimentation." *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010) (plurality opinion). "[I]f a Bill of Rights guarantee is fundamental from an American perspective, then . . . that guarantee is fully binding on the states and thus *limits* . . . their ability to devise solutions to social problems that suit local needs and values." *Id.* at 784-85;

see also Obergefell v. Hodges, ___ U.S. ___, 135 S. Ct. 2584, 2605 (2015) ("[W]hen the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking." (internal quotation marks omitted)).

Nor is it any answer for the plaintiffs to suggest that the people of Colorado may repeal Article IX, section 7 by constitutional amendment. *See* Br. Opp'n 24. In fact, this Court rejected that very argument in *Romer*. There, the fact that impacted citizens could "obtain . . . protection" against a discriminatory provision of the Colorado Constitution "by enlisting the citizenry of Colorado to amend" it did not excuse the provision's federal unconstitutionality. *Romer*, 517 U.S. at 631. The same is true here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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