No. 07-1247

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff-Appellant

v.

JUDY P. WEAVER, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE MARCIA S. KRIEGER

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES:

TABLE OF AUTHORITIES (continued): **PAGE**

TABLE OF AUTHORITIES (continued): **PAGE**

STATE CASES: **PAGE**

UNPUBLISHED CASE:

FEDERAL STATUTES:

STATE STATUTES:

RULE:

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INTEREST OF THE UNITED STATES

The United States submits this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29.

The United States has a strong interest in ensuring that public educational opportunities are not denied on the basis of religion. The United States has been charged by Congress with preventing exclusion of students from educational opportunities on the basis of religion in public schools, colleges and universities. 42 U.S.C. 2000c-6. The United States also is authorized under Title IX of the

Civil Rights Act of 1964 to intervene in cases of general public importance alleging violations of the Equal Protection Clause. 42 U.S.C. 2000h-2. Accordingly, the United States was granted leave to file an *amicus curiae* brief with the district court in this case.

In addition, this case raises important questions regarding the degree to which a state's interest in seeking a greater measure of separation between church and state than that required by the United States Constitution must yield to the overarching principle of nondiscrimination on the basis of religion. The United States often participates in cases addressing issues arising under the Establishment and Free Exercise Clauses. See, *e.g.*, *Barnes-Wallace* v. *Boy Scouts of Am.*, 471 F.3d 1038 (9th Cir. 2006); *Child Evangelism Fellowship of Md., Inc.* v. *Montgomery County Pub. Sch.*, 373 F.3d 589 (4th Cir. 2004); *Donovan* v. *Punxsutawney Area Sch. Dist.*, 336 F.3d 211 (3d Cir. 2003); *Bronx Household of Faith* v. *Board of Educ. of New York*, 331 F.3d 342 (2d Cir. 2003). The United States (via the Secretary of Education) also was a party in *Mitchell* v. *Helms*, 530 U.S. 793 (2000), and participated as *amicus curiae* in *Locke* v. *Davey*, 540 U.S. 712 (2004). The scope of both decisions is directly at issue in this appeal. Accordingly, the United States has a substantial interest in this case.

STATEMENT OF THE ISSUE

Whether a state violates the First or Fourteenth Amendments by precluding students from using public tuition assistance at colleges or universities deemed by the state to be "pervasively sectarian."

STATEMENT OF THE CASE

1. Background

This case involves public tuition-assistance programs designed to help low-income Colorado residents attend college. *Colorado Christian Univ.* v. *Baker*, No. 04-cv-02512, 2007 WL 1489801, at *1 (D. Colo. May 18, 2007) (unpublished). Colorado's constitution prohibits use of public funds to aid religion, including religious education. Colo. Const. Art. IX, § 7. The tuition-assistance programs at issue permit public funds to be used only at "institution[s]." Colo. Rev. Stat. 23-3.3-401, 23-3.3-501, 23-3.5-101, 23-3.7-101. Colorado law defines the term "institution" to exclude "pervasively sectarian" institutions, Colo. Rev. Stat. 23-3.3-101(3)(d), and therefore prohibits use of public tuition assistance at "pervasively sectarian" colleges or universities, regardless of a student's chosen field of study.

Under Colorado law, a college or university is considered to be "pervasively sectarian" if any of the following factors is violated:

> (a) The faculty and students are not exclusively of one religious persuasion. (b) There is no required attendance at religious convocations or services. (c) There is a strong commitment to principles of academic freedom. (d) There are no required courses in religion or theology that tend to indoctrinate or proselytize. (e) The governing board does not reflect nor is the membership limited to persons of any particular religion. (f) Funds do not come primarily or predominantly from sources advocating a particular religion.

Colo. Rev. Stat. 23-3.5-105.

2. Proceedings Below

A. On December 6, 2004, Colorado Christian University (CCU) filed suit challenging the constitutionality of the state's exclusion of "pervasively sectarian" institutions from the universe of institutions eligible to receive public tuition assistance. CCU claimed the exclusion violated the Free Exercise and Establishment Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. Following discovery, the parties filed cross-motions for summary judgment, with the district court granting the state's motion and denying CCU's motion on May 18, 2007. *Colorado Christian*, 2007 WL 1489801, at *15.

Colorado permits Regis University, a Jesuit institution, to participate in the challenged tuition-assistance programs from which CCU is excluded. Appellant's

App. 85. The two universities are similarly situated, enrolling students and employing faculty of diverse faiths, practicing academic freedom, offering religious services on campus, requiring undergraduate students to take a small number of theology courses, and relying principally on student tuition and fees to operate. Appellant's App. 199-208.

B. The district court analyzed CCU's Establishment Clause claim under *Larson* v. *Valente*, 456 U.S. 228 (1982), which prohibits discrimination among religious denominations. The court concluded that, because "Colorado's tuition assistance programs * * * differentiate among sectarian institutions," they are subject to strict scrutiny. *Colorado Christian*, 2007 WL 1489801, at *13. The district court then held that the program passed strict scrutiny, concluding that the state's interest in effectuating its constitutional provision was compelling. *Id.* at *14. The court also held the state law was narrowly tailored because, "[i]n limiting the exclusion to pervasively sectarian institutions, Colorado ensures that the exclusion only affects situations where its antiestablishment interests are the most pronounced – that is, those whose purportedly 'secular' instruction is predominated over and inextricably entwined with religious indoctrination." *Ibid.*

In addressing CCU's Equal Protection claim, the district court determined that the claim "resemble[d] [CCU's] Establishment Clause claim, insofar as CCU

acknowledges that the relevant Equal Protection analysis first examines whether the statutes differentiate between religions for purposes of awarding tuition assistance, and that if such discrimination occurs, that the Commission must show that the statutes survive strict scrutiny." *Colorado Christian*, 2007 WL 1489801, at *15. The court therefore concluded that its rejection of CCU's Establishment Clause claim "applies with equal force to CCU's Equal Protection claim." *Ibid.*

Finally, in analyzing CCU's Free Exercise claim, the district court relied principally on *Locke* v. *Davey*, 540 U.S. 712 (2004). The state conceded that the challenged laws are not neutral toward religion, *Colorado Christian*, 2007 WL 1489801, at *5, a concession that ordinarily would subject the statutes to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531-532 (1993). But the district court read *Locke* as standing for the proposition that non-neutral statutes are not presumptively unconstitutional – and thus are subject only to rational-basis review – if they "do not: (i) impose criminal or civil sanctions on any religious service or rite; (ii) do not deprive religious observers of the right to participate in the political affairs of the community; (iii) do not require students to choose between their religious beliefs and receiving a government benefit; and (iv) simply reflect a governmental decision not to fund a distinct category of instruction." *Colorado Christian*, 2007 WL 1489801, at *5 (internal

quotations omitted). The district court framed the issue before it as "whether the exclusion [of pervasively-sectarian institutions from receipt of public tuition assistance] is the type of non-neutral law that *Locke* * * * subjects to only rational basis scrutiny." *Ibid.*

Applying its interpretation of *Locke*, the district court concluded that the denial of tuition assistance to students at pervasively-sectarian schools did not violate any of the four principles outlined above, and that rational-basis review therefore was appropriate. *Colorado Christian*, 2007 WL 1489801, at *5-8. The district court then held that the challenged programs satisfied the rational-basis standard because the provision of the Colorado constitution prohibiting aid to religion was similar to the one at issue in *Locke*, and Colorado therefore had a legitimate interest in preventing public funds from flowing to pervasively-sectarian institutions. *Id.* at *8. This appeal followed.

SUMMARY OF ARGUMENT

Colorado's exclusion of pervasively-sectarian institutions from public tuition-assistance programs violates the Constitution. The district court's holding to the contrary therefore should be reversed.

First, as stated by a plurality of the Supreme Court, "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from

otherwise permissible aid programs, *and other doctrines of the Court bar it*." *Mitchell* v. *Helms*, 530 U.S. 793, 829 (2000) (plurality) (emphasis added). Although the *Mitchell* plurality reached this conclusion based primarily on the Court's Free Speech cases, the exclusion of pervasively-sectarian institutions from public aid programs runs afoul of the Free Exercise and Establishment Clauses as well. The district court should have found for CCU on the basis of *Mitchell* alone.

Second, under traditional Establishment Clause, Equal Protection Clause, and Free Exercise Clause analyses, Colorado's exclusion of CCU and its students from public tuition-assistance programs is subject to strict scrutiny under each of these three constitutional provisions. In order to survive strict scrutiny, the exclusion must serve a compelling interest and be narrowly tailored to fit that interest. Because the exclusion violates the United States Constitution, Colorado's claimed interest in enforcing its own state constitutional provision regarding separation of church and state cannot qualify as a legally acceptable compelling interest.

ARGUMENT

COLORADO'S EXCLUSION OF "PERVASIVELY SECTARIAN" INSTITUTIONS FROM PUBLIC TUITION-ASSISTANCE PROGRAMS VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

A. Standard Of Review

This Court exercises de novo review over grants of summary judgment. *Zwygart* v. *Board of County Comm'rs of Jefferson County*, 483 F.3d 1086, 1090 (10th Cir. 2007).

B. Colorado's Use Of The Pervasively-Sectarian Distinction Is Unconstitutional

1. Disparate Treatment Of "Pervasively Sectarian" Institutions In Awarding Public Benefits Violates The First Amendment

In enacting the "pervasively sectarian" distinction in 1977, it appears Colorado did nothing more than codify then-current Supreme Court precedent that employed the pervasively-sectarian distinction. See *Americans United for Separation of Church and State Fund, Inc.* v. *State of Colorado*, 648 P.2d 1072, 1075 & n.1 (Colo. 1982) (discussing legislative history); see also *id.* at 1083 (noting that the "statutory criteria reflect a legislative effort to comply with the standards which evolved under Establishment Clause doctrine for aid to private institutions"); Appellant's Br. 8 (discussing legislative history). However, the Court's First Amendment jurisprudence has changed since that time. Because the

pervasively-sectarian distinction runs afoul of current precedent, Colorado's exclusion of pervasively-sectarian institutions from its public tuition-assistance programs is unconstitutional.

In *Mitchell* v. *Helms*, 530 U.S. 793 (2000), a plurality stated that they not only were prepared to "formally dispense" with the "pervasively sectarian" distinction, but believed the distinction violated the First Amendment. *Id.* at 826-829.[1] The plurality stated that "[i]f a program offers permissible aid to the religious *(including the pervasively sectarian)*, the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Id.* at 827 (emphasis added). The plurality went on to describe the pervasively-sectarian distinction as "offensive," stating that, "[i]t is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs," which "is just what [the pervasively-sectarian distinction] requires." *Id.* at 828.

The plurality also stated that "the application of the 'pervasively sectarian' factor collides with [the Court's] decisions that have prohibited governments from

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[1] The plurality opinion was written by Justice Thomas and joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy. *Mitchell*, 530 U.S. at 799-800.

discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.* at 828 (citing cases). The plurality concluded that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, *and other doctrines of the Court bar it*." *Id.* at 829 (emphasis added).

In a concurring opinion, Justice O'Connor, joined by Justice Breyer, also abandoned the pervasively-sectarian distinction. They rejected the notion "that the secular education function of a religious school is inseparable from its religious mission." *Mitchell*, 530 U.S. at 853 (O'Connor, J., concurring). They held that for there to be a constitutional violation there must be *actual* diversion to religious use; providing public aid that merely "has the capacity for, or presents the possibility of, such diversion" is not automatically unconstitutional. *Id.* at 854. Thus, like the plurality, Justices O'Connor and Breyer abandoned the pervasively-sectarian distinction under which some institutions were deemed so religious that any aid they touched automatically became constitutionally tainted.

The district court recognized the language in *Mitchell* but concluded it was "irrelevant." *Colorado Christian Univ.* v. *Baker*, No. 04-cv-02512, 2007 WL 1489801, at *12 (D. Colo. May 18, 2007) (unpublished). This was so, the court stated, because, in the context of this case, the pervasively-sectarian distinction "is

not a judicial tool used to analyze whether a government program violates the Establishment Clause, but is instead, a statutory [sic] implementing [the state constitution]." *Ibid.* The district court therefore concluded that the pervasively-sectarian distinction "remains a viable means of applying [the relevant state constitutional provision], notwithstanding *Mitchell*." *Ibid.* The district court also concluded that, "at least in the Free Exercise context," CCU's argument that the pervasively-sectarian distinction was illegal "appear[ed] to be inconsistent with the Supreme Court's ruling in *Locke* that a state may validly differentiate between varying levels of religious influence in education." *Ibid.*

This was error. Although the holding in *Mitchell* addressed the question whether the challenged government aid program in that case violated the Establishment Clause by providing aid to religious schools, the plurality was correct in concluding that the Court's doctrines "bar" "the exclusion of pervasively sectarian schools from otherwise permissible aid programs." 530 U.S. at 829. The plurality reached this conclusion based primarily on the Court's Free Speech cases. See *id.* at 828 (citing *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Widmar* v. *Vincent*, 454 U.S. 263, 277-278 (1981), for the proposition that "the application of the 'pervasively sectarian' factor

collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity"). But the exclusion of pervasively-sectarian institutions from public aid programs runs afoul of the Free Exercise and Establishment Clauses as well.

"[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). As the *Mitchell* plurality noted, the "pervasively sectarian" distinction "reserve[s] special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." 530 U.S. at 827-828. It therefore runs afoul of the Free Exercise Clause. See *Larson* v. *Valente*, 456 U.S. 228, 245 (1982) (holding that the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause"); *Peter* v. *Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (state law granting government-funded services to private non-religious schools but not religious schools violates Free Exercise Clause); see also *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 121 (2001) (Scalia, J., concurring) ("[T]he private right to exert and receive [the

compulsion of ideas] is *protected* by the Free Speech and Free Exercise Clauses * * * not banned by the Establishment Clause.").

The "pervasively sectarian" distinction also contravenes the Establishment Clause, violating the principles underlying the Court's decisions in *Larson* and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). As discussed more fully below in Section B.2.a.i, *Larson* prohibits Colorado from discriminating among religious institutions. And *Zelman* demonstrates that the Establishment Clause does not require the state to do so with respect to public tuition assistance. In *Zelman*, the Court held that the Establishment Clause does not prohibit public financial aid from flowing to religious schools – regardless of type or extent of religious doctrine – where, as here, the scholarship program is religion-neutral and government money is directed to religious schools only by the private choices of individuals. 536 U.S. at 649. Indeed, *Zelman* states that the Court "ha[s] never found a program of true private choice to offend the Establishment Clause." *Id.* at 653.

Read together, *Larson* and *Zelman* stand for the proposition that, under a public tuition assistance program, aid may flow to religious – even very religious – educational institutions if directed there by private choice (*Zelman*), and the public program may not discriminate in the provision of such aid against certain religious

institutions (*Larson*).

Thus, contrary to the district court's holding, the reasoning of the *Mitchell* plurality cannot be distinguished by the fact that it was addressing "a judicial tool" as opposed to a state statute. *Colorado Christian*, 2007 WL 1489801, at *12. The pervasively-sectarian distinction is equally unconstitutional whether it is being used as an analytical tool or employed as part of state law. In either case, its implementation violates the Free Speech Clause (because it runs afoul of the Court's decisions in *Rosenberger*, *Lamb's Chapel*, and *Widmar*); the Free Exercise Clause (because it is particularly hostile to "those who take their religion seriously," see *Mitchell*, 530 U.S. at 827-828; *Larson*, 456 U.S. at 245); and the Establishment Clause (because it needlessly and improperly discriminates among religious institutions, see *Zelman*, 536 U.S. at 649; *Larson*, 456 U.S. at 244). The *Mitchell* plurality therefore was correct in concluding that, in many ways, the First Amendment "bar[s]" "exclusion of pervasively sectarian schools from otherwise permissible aid programs." *Mitchell*, 530 U.S. at 829.

It necessarily follows that a state cannot exclude pervasively-sectarian schools from aid programs in an effort to implement state law regarding separation of church and state. See *Widmar*, 454 U.S. at 277-278 (holding that a state's interest in giving effect to its constitution and "achieving greater separation of

church and State than is already ensured under the Establishment Clause of the Federal Constitution" is limited by the Free Exercise and Free Speech Clauses). Colorado's highest court has conceded as much. In *Americans United*, the court stated, "[i]n interpreting the Colorado Constitution * * * we cannot erode or undermine any paramount right flowing from the First Amendment [of the United States Constitution]." 648 P.2d at 1078. A contrary ruling plainly would run afoul of the Supremacy Clause. See *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause * * * any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.") (internal quotations omitted).

Accordingly, this Court should reverse the district court's ruling on this basis alone, and need not reach the question whether Colorado's use of the pervasively-sectarian distinction survives strict scrutiny.

2. Colorado's Exclusion Of Pervasively-Sectarian Institutions From Its Tuition-Assistance Programs Cannot Survive Strict Scrutiny

The challenged tuition-assistance programs also fail under traditional First and Fourteenth Amendment analysis. Each of CCU's claims is subject to strict scrutiny, and Colorado is unable to demonstrate a compelling interest to justify its exclusion of pervasively-sectarian institutions from its tuition-assistance programs.

a. Strict Scrutiny Applies To All Of CCU's Claims

The district court held that strict scrutiny applied to CCU's Establishment Clause and Equal Protection claims, but applied rational-basis review to CCU's Free Exercise claim. As explained below, the district court was correct with respect to CCU's Establishment Clause and Equal Protection claims, but erred with regard to CCU's Free Exercise claim. All of CCU's claims are subject to strict scrutiny.

i. Establishment Clause Claim. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Thus, "[t]he government may not * * * impose special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 877 (1990). Cf. *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents.") (citation and internal quotations omitted).

The standard framework for analyzing Establishment Clause claims comes from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), as modified in the context of aid

to religious schools by *Agostini* v. *Felton*, 521 U.S. 203 (1997). See *Mitchell*, 530 U.S. at 807-808 (summarizing the changes made to *Lemon* by *Agostini*). But the *Lemon* test does not directly apply where, as here, "it is claimed that a denominational preference exists." *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 695 (1989). Instead, such claims are analyzed under the *Larson* framework. See *Hernandez*, 490 U.S. at 695 ("*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary [*Lemon* test]."). See also *Children's Healthcare Is A Legal Duty, Inc.* v. *Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000); *Wilson* v. *National Labor Relations Bd.*, 920 F.2d 1282, 1286-1287 (6th Cir. 1990).

Under *Larson*, state laws basing aid on denominational preferences are suspect because they discriminate among religious adherents; such laws therefore are subject to strict scrutiny. *Larson*, 456 U.S. at 246. To withstand strict scrutiny, such laws must be "closely fitted" to serve a compelling interest. *Id.* at 246-247.

Here, the district court, citing *Larson*, concluded that the tuition-assistance programs discriminate among religious institutions. See *Colorado Christian*,

2007 WL 1489801, at *13 ("Colorado's tuition assistance programs * * * differentiate among sectarian institutions. It [sic] gives tuition assistance to those which segregate religious indoctrination from secular education, and denies assistance to those which, by policy or doctrine, freely mix the two."). The district court therefore held that, under *Larson*, Colorado's tuition-assistance programs were subject to strict scrutiny. *Ibid.*

This holding is correct. "[A] law need not expressly distinguish between religions by sect name" in order "[t]o facially discriminate among religions." *Children's Healthcare*, 212 F.3d at 1090 (citing *Larson*, 456 U.S. at 232 n.3). Instead, "[s]uch discrimination can be evidenced by objective factors such as the law's legislative history and its practical effect while in operation." *Children's Healthcare*, 212 F.3d at 1090. See also *University of Great Falls* v. *National Labor Relations Bd.*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (citing *Larson* for the proposition that "an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns" because it would "discriminat[e] between kinds of religious schools"). Here, the district court held, Colorado's tuition-assistance programs have the practical effect of discriminating against sectarian institutions that refuse to segregate religious indoctrination from secular education. See *Colorado Christian*, 2007 WL 1489801, at *13. Indeed, the

discrimination in this case between sectarian institutions eligible to receive public tuition assistance and pervasively-sectarian institutions ineligible for such assistance is much like that in *Larson*.

In *Larson,* the statute discriminated between established churches (which under state law were exempted from the challenged reporting requirement) and newer churches that "lack[ed] * * * a constituency, or * * * as a matter of policy * * * favor[ed] public solicitation over general reliance on financial support from members" (which were subject to the reporting requirement). *Larson*, 456 U.S. at 247 n.23. Likewise, Colorado's use of the pervasively-sectarian distinction discriminates among religious institutions. A student attending CCU cannot receive tuition assistance, while one attending an institution that also has a religious character but, in the view of the state, is not as "pervasively" religious – such as Regis – may receive public funding. And this holds true even if the CCU student elects to study a purely secular subject such as accounting, mathematics, or history, while the similarly situated Regis student decides to major in religion.

Thus, as in *Larson*, the disparate treatment at issue does not depend on the specific religion of the institution (*e.g.*, Catholic, Jewish, Presbyterian, *etc.*), but on other factors that distinguish the institution's operations. Accordingly, the district court correctly held that, as in *Larson*, strict scrutiny is the appropriate

standard for analyzing CCU's Establishment Clause claim.

ii. Equal Protection Claim. Classifications based on religion are suspect classifications under the Equal Protection Clause. See *Burlington N. R.R. Co.* v. *Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). As the Supreme Court stated in *Parents Involved in Community Schools* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2757 (2007) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995)): "[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." See also *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial."). Classifications based on religion are therefore subject to strict scrutiny under the Equal Protection Clause. *Burlington*, 504 U.S. at 651; *City of New Orleans* v. *Dukes*, 427 U.S. at 303.

iii. Free Exercise Claim. Under the Free Exercise Clause, the government is barred from "impos[ing] special disabilities on the basis of religious views or religious status," *Smith*, 494 U.S. at 877; excluding religious believers "because of

their faith, or lack of it, from receiving the benefits of public welfare legislation," *Everson* v. *Board of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947); or failing to meet "the minimum requirement of neutrality * * * that a law not discriminate on its face" toward religion, *Lukumi*, 508 U.S. at 533.

The general approach to Free Exercise claims is well established: "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. However, a law that is not neutral or not generally applicable "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-532. "Neutrality and general applicability are interrelated, and * * * failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

Here, the state conceded that the challenged tuition-assistance programs are not neutral toward religion. *Colorado Christian*, 2007 WL 1489801, at *5. This concession places CCU's Free Exercise claim squarely within the type of claim that *Lukumi* held is subject to scrutiny.

The district court, incorrectly in our view, reached a different conclusion. It read *Locke* as carving out an exception to the above-described and well-

established approach to Free Exercise claims. The district court held that, under *Locke*, statutes that are not neutral toward religion nevertheless are subject to less stringent rational-basis review if they "do not: (i) impose criminal or civil sanctions on any religious service or rite; (ii) do not deprive religious observers of the right to participate in the political affairs of the community; (iii) do not require students to choose between their religious beliefs and receiving a government benefit; and (iv) simply reflect a governmental decision not to fund a distinct category of instruction." *Colorado Christian*, 2007 WL 1489801, at *5 (internal quotations omitted).

This was error, as *Locke* creates no such exceptions. *Locke* involved the narrow question whether a state permissibly could deny public tuition assistance to students training to become ministers. 540 U.S. at 719. As in this case, the state constitution at issue in *Locke* provided for greater separation of church and state than does the United States Constitution. *Ibid.* Unlike this case, however, the tuition-assistance program at issue in *Locke* did not prohibit students from attending pervasively-sectarian schools. *Id.* at 724. It also did not prohibit them from taking some courses in "devotional theology." *Ibid.* All it did was prevent students from "pursuing a degree in devotional theology." *Id.* at 717.

The Court rejected the plaintiff's challenge to the program in *Locke*,

concluding that the state's decision not to fund the training of those who would become members of the clergy was consistent with historical precedent disfavoring the use of taxpayer funds to support the training of clergy. 540 U.S. at 722-723.

Nothing in *Locke* suggests the Court intended to announce a new rule of constitutional interpretation or carve out a new category of religion cases for less-exacting, rational-basis scrutiny. Rather, the majority opinion in *Locke* reveals that the Court focused not on the factors the district court identified in this case, but on this country's historical aversion to use of public funding to train clergy. See *Locke*, 540 U.S. at 722 ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion."); *id.* at 723 ("Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry."); *ibid.* ("That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk."); see also *id.* at 721 ("[T]raining for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious

endeavor."); *ibid.* ("That a State would deal differently with religious education for the ministry than with education for other callings is a product of [distinct views favoring free exercise but opposing establishment], not evidence of hostility toward religion.").

Indeed, the Court specifically reinforced this notion in *Locke* and indicated its opinion should be read narrowly. 540 U.S. at 722 n.5 ("[T]he only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands."). Thus, the proper reading of *Locke* is that the decision was driven by historical concern over use of public funds to train clergy, and therefore is limited to its facts.[2]

Because *Locke* is inapposite, CCU's Free Exercise claim is governed by the Free Exercise Clause principle articulated in *Lukumi* that laws that are not neutral or are not generally applicable are subject to scrutiny.

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[2] The *Locke* Court's statement in footnote five was a response to the suggestion in Justice Scalia's dissent that the state's rationale for refusing to fund the training of clergy "is a pure philosophical preference" that "has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context." *Locke*, 540 U.S. at 730 (Scalia, J., dissenting). At least two courts have refused to limit *Locke* to its facts. See *Eulitt* v. *Maine*, 386 F.3d 344, 355 (1st Cir. 2004); *Bush* v. *Holmes*, 886 So. 2d 340, 364 (Fla. 2004). But neither accounts for or makes any attempt to distinguish the Court's limiting statement in footnote five. Accordingly, we believe both were wrongly decided.

b. Colorado Is Unable To Satisfy Strict Scrutiny Because Its Asserted Interest Conflicts With the United States Constitution And Is Therefore Not Compelling As A Matter Of Law

In holding that the challenged tuition-assistance programs withstood strict scrutiny, the district court concluded the programs furthered the state's compelling interest by implementing the provision of the Colorado constitution prohibiting aid to religion. However, Colorado's claimed "compelling interest" conflicts with the United States Constitution.

In order for Colorado to establish that its interest in enforcing its state constitutional provision precluding aid to religion is legally "compelling," it first must demonstrate that such enforcement does not conflict with the United States Constitution. See *Widmar*, 454 U.S. at 275-276. As in this case, the state constitution at issue in *Widmar* required a greater degree of separation between church and state than that required by the First Amendment. Also as in this case, the defendant state university in *Widmar* "claim[ed] a compelling interest in complying with the applicable provisions of the [state] Constitution." 454 U.S. at 275.

Widmar held that a state's interest "in achieving greater separation of church and State than is already insured under the Establishment Clause of the Federal Constitution" was limited by both the Free Exercise and Free Speech

Clauses of the First Amendment. *Id.* at 276. *Widmar* further held that the state failed to satisfy the compelling-interest requirement because the asserted interest ran afoul of the United States Constitution. *Ibid.* Other courts similarly have recognized that a state's interest in pursuing the goals of its own constitution must yield to the First Amendment. See *Locke*, 540 U.S. at 719 (describing the issue before the Court as whether the state, under its own constitution, could deny funding to students studying devotional theology "without violating the Free Exercise Clause"); *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 172-173 (3d Cir. 2002) (citing *Widmar* and the court of appeals' decision in *Locke* for the proposition that "a government interest in imposing greater separation of church and state than the federal Establishment Clause mandates is not compelling in the First Amendment context"); see also *Republican Party of Minnesota* v. *White*, 416 F.3d 738, 752 n.7 (8th Cir. 2005) (court unable to find any case holding "that a state's interest in maintaining a separation of powers is sufficiently compelling to abridge core First Amendment freedoms"), cert. denied, 546 U.S. 1157 (2006).

Here, Colorado's exclusion of pervasively-sectarian institutions from its tuition-assistance programs violates the United States Constitution under a number of separate analyses. It therefore cannot serve as a compelling state interest for

purposes of satisfying strict scrutiny.

First, as explained above (Section B.1), use of the "pervasively sectarian" distinction to exclude institutions from otherwise permissible public aid programs violates the Free Speech, Free Exercise, and Establishment Clauses. This alone is sufficient to reject the asserted compelling interest.

Second, Colorado's implementation of the pervasively-sectarian distinction also violates the *Lemon* test. Under the *Lemon* test, the Court "consider[s] whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion." *Mitchell*, 530 U.S. at 807. The test has been modified "for purposes of evaluating aid to schools." *Ibid.* Under this modification, the Court considers "only the first and second factors," but "recast[s] *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect." *Id.* at 808. To survive an Establishment Clause challenge, a program must satisfy each element of the *Lemon* test. *Edwards* v. *Aguillard*, 482 U.S. 578, 583 (1987).

Here, the parties agreed the first element of the test was satisfied. *Colorado Christian*, 2007 WL 1489801, at *13. But the state law here clearly does not survive the entanglement inquiry.

The factors relevant to determining whether excessive entanglement exists are whether the challenged program (1) requires "pervasive monitoring by public authorities"; (2) requires "administrative cooperation" between government officials and religious schools; and (3) "might increase the dangers of political divisiveness." *Agostini*, 521 U.S. at 233 (internal quotations omitted). Of these three factors, the final two "are insufficient by themselves to create an 'excessive' entanglement." *Id.* at 233-234.

In order to determine whether an institution is pervasively sectarian, Colorado law requires the state to examine (1) the "religious persuasion" of both students and faculty; (2) whether students are required to attend religious services; (3) whether "[t]here is a strong commitment to principles of academic freedom"; (4) whether "required courses in religion or theology * * * tend to indoctrinate or proselytize"; (5) the religion of members of the institution's governing board; and (6) the religion – if any – advocated by those who provide the institution's funding. Colo. Rev. Stat. 23-3.5-105.

Simply stated, it is difficult to imagine criteria that would entail a greater degree of entanglement than those described above. In order to reach a determination, the state must, in the case of each college or university to which public aid might flow, (1) examine the private religious beliefs of students,

faculty, members of the institution's governing board, and donors; (2) examine the strength of the faculty's "commitment to principles of academic freedom" in the context of religion, to the extent such an amorphous concept is capable of objective measurement in the first instance; and (3) monitor the institution's course offerings to ensure required courses do not "tend to indoctrinate or proselytize," again assuming such a determination is subject to objective analysis at all.

In no way can such an invasive and continuing inquiry be squared with the Court's precedent on entanglement. Rather, efforts by state officials to probe the religious beliefs of students, faculty, members of the institution's governing board, and donors unquestionably result in excessive entanglement. See *Lemon*, 403 U.S. at 619 ("Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."); *Mitchell*, 530 U.S. at 828 ("It is well established * * * that courts should refrain from trolling through a person's or institution's religious beliefs.") (plurality). And the Court repeatedly has warned of the dangers inherent in permitting government officials to make such judgments regarding religion. See, *e.g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 20 (1989) ("The prospect of inconsistent treatment and government embroilment in

controversies over religious doctrine seems especially baleful where * * * a statute requires that public officials determine whether some message or activity is consistent with the teaching of the faith.") (internal quotations omitted); *Widmar*, 454 U.S. at 269-270 n.6 (rejecting distinction that would require inquiry "into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith," because "[s]uch inquiries would tend inevitably to entangle the State with religion in a manner forbidden by [the Court's] cases"); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs."). See also *National Labor Relations Bd.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979) ("Implicit in the Board's distinction between schools that are 'completely religious' and those 'religiously associated' is also an acknowledgment of some degree of entanglement."); *Lee* v. *Weisman*, 505 U.S. 577, 616-617 (1992) (Souter, J., concurring) ("I can hardly imagine a subject less amendable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology.").

Further, under the Colorado law, such inquiries would not be one-time

events. Rather, state law would require constant surveillance – precisely the type of "pervasive monitoring by public authorities" that is the primary factor in the excessive-entanglement inquiry. See *Widmar*, 454 U.S. at 272 n.11 (effort by university to exclude "religious worship" and "religious speech" from its facilities "would risk greater 'entanglement,'" in part because of the "continuing need to monitor group meetings to ensure compliance with the rule"); *Lemon*, 403 U.S. at 619 (finding excessive entanglement where "comprehensive, discriminating, and continuing state surveillance will inevitably be required" to ensure compliance). Conversely, when finding no excessive entanglement exists, the Court repeatedly has noted the absence of such continuing scrutiny. See, *e.g.*, *Hernandez*, 490 U.S. at 696-697 (finding no excessive entanglement where the required interaction between government and religious officials involved, *inter alia*, "no inquiries into religious doctrine * * * and no 'detailed monitoring and close administrative contact' between secular and religious bodies") (quoting *Aguilar* v. *Felton*, 473 U.S. 402, 414 (1985)); *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 305 (1985) (challenged recordkeeping requirements bore "no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion"); *Tilton* v. *Richardson*, 403 U.S. 672, 687 (1971) (finding no excessive entanglement in part

because "religious indoctrination [wa]s not a substantial purpose or activity of the[] church-related colleges and universities" involved in the case, thereby diminishing "the necessity for intensive government surveillance * * * and the resulting entanglements between government and religion").[3]

Thus, rather than avoiding excessive entanglement with religion, Colorado's decision to exclude pervasively-sectarian institutions from public funding has the opposite effect. See *Hartmann* v. *Stone*, 68 F.3d 973, 981-982 (6th Cir. 1995) ("Ironically, it is the regulations as they now stand that put the Army at great risk of unconstitutionally entangling itself with religion. The regulations require the Army to determine exactly how much religion is too much, what is substantive about particular religions and what is merely educational, and when a Provider is using a religious symbol in a 'proselytizing manner.'").

In sum, the state's pervasively-sectarian distinction violates the United

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[3] This Court's precedent is in accord. See *Lanner* v. *Wimmer*, 662 F.2d 1349, 1360-1361 (10th Cir. 1981) (The "constitutional problem" with school program that does not grant students credit for released-time courses that are "mainly denominational" "is that it requires the public school officials to entangle themselves excessively in church-sponsored institutions by examining and monitoring the content of courses offered there to insure they are not 'mainly denominational.'"); see also *Snyder* v. *Murray City Corp.*, 159 F.3d 1227, 1238-1239 (10th Cir. 1998) (en banc) (Lucero, J., concurring) (effort to police legislative prayers "in an attempt to exclude proselytization or disparagement will inevitably 'call[] for official and continuing surveillance leading to an impermissible degree of entanglement'") (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970)).

States Constitution on a number of grounds. It therefore cannot qualify as a compelling interest for purposes of satisfying strict scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's holding that Colorado's exclusion of pervasively-sectarian institutions from its public tuition-assistance programs is constitutional.

Respectfully Submitted,

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