IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-02512-MSK-BNB

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff,

v.

JUDY P. WEAVER, et al.,

Defendants.

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND INTEREST OF THE UNITED STATES

Colorado Christian University ("CCU") has sued the members and executive director of the Colorado Commission on Higher Education ("CCHE") for alleged violations of the First and Fourteenth Amendments of the United States Constitution. CCU alleges that defendants violated its rights by excluding it from state-funded financial assistance programs pursuant to a Colorado statute that prohibits students from receiving financial assistance to attend "pervasively sectarian" institutions, although defendants have permitted institutions like Regis University, a Jesuit school, to participate. Amended Compl., ¶¶6-12.

Congress has recognized the United States' interest in eliminating religious discrimination in education by authorizing the United States to intervene in federal cases seeking relief from a denial of equal protection of the laws under the Fourteenth Amendment on account of, *inter alia*, religion. 42 U.S.C. §2000h-2. The United States therefore has a vital interest in

ensuring that educational opportunities are available to all individuals consistent with the First and Fourteenth Amendments.

Further, this case raises important questions about the scope of the Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), and the degree to which the principle of nondiscrimination on the basis of religion must yield to a state's interest in seeking a greater degree of separation of church and state than required by the Constitution. In *Locke*, the United States, as *amicus curiae*, argued that operating a generally available post-secondary scholarship program, but excluding from it individuals studying theology, violated the Free Exercise Clause of the First Amendment. The Court disagreed on very narrow grounds. Defendants here ask the Court to over-read *Locke* to insulate state programs that exclude students attending religiously-affiliated entities, regardless of whether a student is pursuing devotional or secular studies. Because in recent years states and the federal government have enacted programs to provide lower income students access to quality educational opportunities offered by secular and sectarian schools, the United States has a significant interest in ensuring that *Locke* is properly interpreted so as not to impede these nascent educational reforms. *See*, *e.g.*, Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3, 126-134 (creating opportunity scholarship program for K-12 students in the District of Columbia).

Pursuant to these interests, the United States hereby submits this *amicus* brief in support of plaintiff, which argues that defendants' exclusion of CCU from state-financed financial assistance programs discriminates on the basis of religion in violation of the First and Fourteenth Amendments.

LEGAL STANDARD

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In the context of Rule 56, the court's function is not to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The movant bears the burden of showing the absence of a genuine material fact. This burden may be met by showing that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-35 (1986).

For those issues on which it has the burden of proof at trial, the movant "must establish every element of its claim or defense by sufficient, competent evidence to set forth a *prima facie* case." *In re Ribozyme Pharmaceuticals, Inc. Securities Litig.*, 2009 F. Supp. 2d 1106, 1111 (D. Colo. 2002). For those issues on which it does not have the burden of proof, the movant "must point to an absence of evidence in the record to support the elements of the claim or defense which the other is obligated to prove." *Id.*

SUMMARY OF ARGUMENT

At issue is whether the State of Colorado, having determined that (1) access to higher education should not depend on one's financial resources; (2) access should be offered at a wide range of public and private institutions; and (3) access should include some sectarian institutions, may exclude other sectarian institutions from state funded financial assistance programs. The

State may not do so without violating the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise and Establishment Clauses of the First Amendment.

The touchstone of all three clauses is government neutrality toward religion. They "speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment). Yet, the clauses incorporate distinct prohibitions, and this court only need find that defendants have violated any one of them to grant summary judgment for CCU.

The Equal Protection Clause prohibits different treatment of similarly situated individuals. When different treatment is based on a suspect classification like religion, strict scrutiny applies and the state must show that its action is narrowly tailored to achieve a compelling governmental interest. *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Defendants cannot make that showing here. Although defendants argue that CCU's exclusion is justified to avoid "excessive entanglement issues" via funding of religious education, the state is in fact already doing so by providing financial assistance to students at a Jesuit university and issuing tax-exempt bonds on behalf of secular and sectarian educational institutions in Colorado. Having provided this benefit to one religious faith, defendants cannot deny it to a different faith, absent compelling justification, which the defendants cannot show. *See* Argument, §I, *infra*.

The Establishment Clause prohibits a state from passing laws which aid one religion or prefer one religion over another. *See Larson v. Valente*, 456 U.S. 228, 244 (1982). Defendants

have violated this neutrality requirement by providing financial assistance to students attending Regis but not to students attending CCU. *See* Argument, §II, *infra*.

The Free Exercise Clause requires that a law substantially burdening the exercise of religion must be neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993). When the law in question is not neutral or not generally applicable but singles out religion generally, or a particular faith, the state must show that its action advances interests of the highest order and is narrowly tailored in pursuit of those interests. Defendants' exclusion is not neutral and generally applicable: it permits Regis students to receive financial assistance, but not CCU students. It also targets institutions that the defendants deem "pervasively sectarian" but not other institutions that defendants deem sufficiently secular. The defendants have failed to show that such discrimination is supported by compelling governmental interests pursued in a narrowly tailored fashion, and they thus have violated the Free Exercise Clause. *See* Argument, §III, *infra*.

ARGUMENT

I. First Claim (Equal Protection Clause)

A. Undisputed Facts

1. The State of Colorado's policy is to provide financial assistance for qualified low-income students to attend public and private institutions of higher education in Colorado who would otherwise be financially unable to attend college. Colo. Rev. Stat. §23-3.5-101; Pls.' Mot. for Summ. J. ("MSJ") Exs. 10 (CCHE Mem. of 4/4/03 at 1) ("Colorado has defined access to higher education as its number one priority. Access is gained through controlled tuition increases

and increased financial aid funding, especially for students in lower income groups."), & 11 (State-Funded Financial Aid Policy of 3/4/04).

2. Since 1977, Colorado has awarded financial assistance through a variety of need- and merit-based programs administered by the Colorado Commission of Higher Education (CCHE). *Ams. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1074 (Colo. 1982). These programs today include Colorado Student Grants, Colorado Graduate Grants, the Centennial Scholars and Colorado Graduate Scholars programs, and the Colorado Work Study Program. (Pls.' MSJ Ex. 11 at 6.)

3. Students may use CCHE financial assistance to attend any public or private post-secondary institution in Colorado except a "pervasively sectarian" one. Colo. Rev. Stat. §§23-3.3-101(d), 23-3.5-105. The Colorado state legislature enacted this exclusion in 1977 based on its understanding at that time of the Supreme Court precedents governing state aid to religious institutions. *Ams. United*, 648 P.2d at 1075 n.1.

4. CCHE is responsible for determining whether an institution is eligible to participate in the state financial assistance programs, including determining whether an institution is pervasively sectarian. *See* Colo. Rev. Stat. §23-3.3-102(2).

5. "Pervasively sectarian" institutions are statutorily defined by Colorado law as those (1) whose faculty and students are exclusively of one religious persuasion; (2) which require attendance at religious convocations or services; (3) which do not have a strong commitment to principles of academic freedom; (4) which require students to take courses in religion or theology that tend to indoctrinate or proselytize; (5) whose governing board's membership reflects or is

limited to persons of a particular religion; and (6) whose funds come primarily from sources advocating a particular religion. *See* Colo. Rev. Stat. § 23-3.5-105(1)(a) - (f).

6. These criteria are "very difficult . . . to apply and to verify." They are not to be used as a mechanical checklist, but as part of "a holistic analysis." "[Y]ou look at all the factors involved that may or may not be present, and make a decision based upon that complete picture." (Pls.' MSJ Ex. 26 (O'Donnell Dep. at 48:25-49:12, 93:6-8).)

7. CCU is a fully-accredited private non-denominational Christian college in Lakewood, Colorado. CCU enrolls approximately 2,000 students in undergraduate and graduate programs, and offers bachelor's and advanced degrees in 23 fields of study, including, for example, accounting, mathematics, history and theology. (Defs.' MSJ Ex. A-5 (CCU Letter of 9/30/04 & Attachs. at CCHE 1005).)

8. In 2003, CCU applied to participate in the CCHE financial assistance programs. (Defs.' MSJ Ex. A-3 (CCU Application of 9/30/03).) In November 2004, CCHE determined that CCU "meets all academic accreditation and financial criteria, but is a 'pervasively sectarian' institution," and, therefore, rejected CCU's application. (Pls.' MSJ Ex. 16 (CCHE Mem. of 2/6/04 at CCHE 1229)); Defs.' MSJ Ex. A-7 (CCHE Letter of 11/4/04); Ex. A-8 (CCHE Letter of 11/5/04).)

9. CCHE, however, has determined that Regis University, a private Jesuit institution in Denver which is virtually indistinguishable from CCU under the pervasively sectarian criteria, is eligible to participate in the state financial assistance programs. (Amended Compl., ¶ 12; Answer, ¶ 9.) CCHE first approved Regis' application in 1977. *Ams. United*, 648 P.2d at 1076.

10. Regis enrolls a student body that is 80% Catholic, 14% "unspecified," and 6% other Christian denominations comprising Baptists, Episcopalians, Lutherans, Methodists and Presbyterians. (Pls.' MSJ Ex. 23 (Hall Letter of 10/18/04 at 3).)[1] CCU enrolls a student body that is 40% non-denominational Christian, 14% Baptist, and 11% Evangelical. The remaining students include Pentecostals, Presbyterians, Roman Catholics, Jews and Hindus. CCU also enrolls a small number of students identified as atheist or agnostic. (*Id.* at 3-4.)

11. Regis employs a faculty that is largely Roman Catholic (20 of 49 faculty members), but also includes Episcopalians, Methodists, Lutherans, Mormons and Jews. (Pls.' MSJ Ex. 23 at 4-5.) Approximately 85% of CCU's faculty comprises Presbyterians, non-denominational Christians, Evangelical Christians, Baptists and Lutherans. Other faculty members are Episcopal, Methodist, Pentecostal, and Roman Catholic. (*Id.* at 5-6.)

12. Regis offers religious services on campus but attendance by students is not required. (Pls.' MSJ Ex. 23 at 6.) Full-time undergraduate, but not graduate or part-time undergraduate, students at CCU are required to attend 25 of 30 chapel services each semester. (*Id.*) Undergraduate students with unavoidable work conflicts are exempted from chapel attendance on a semester basis. (Defs.' MSJ Ex. A-16 (2003-04 CCU Academic Catalog at 20).) Nearly 14%

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[1]The facts pertaining to Regis are taken from the Colorado Supreme Court's opinion in *Americans United*, which involved a challenge to a forerunner of the current CCHE financial assistance programs. There, CCHE successfully argued that the program did not violate the Establishment Clause of the First Amendment by providing financial assistance to religious colleges or universities, and that Regis was a proper recipient of that assistance. *See id.* at 1077-81.

of CCU's full-time undergraduate students were exempted from attending chapel services during the 2004-05 academic year. (Pls.' MSJ Ex. 9 (McCormick Dep. at 39:8-13).)

13. Both Regis and CCU have adopted the 1940 Statement of Principles on Academic Freedom and Tenure promulgated by the American Association of University Professors. (Pls.' MSJ Ex. 23 at 6-7.)

14. Regis requires nine semester hours of religious study for a bachelor's degree in courses not limited to Roman Catholicism. There is no effort made in these classes to indoctrinate or proselytize. (Pls.' MSJ Ex. 23 at 7.) CCU requires undergraduate students to take four courses in theology and biblical studies. (*Id.*) Courses fulfilling that requirement include History and Literature of Ancient Israel, The Bible in the Church and the Academy, Introduction to Theology, and Historical Theology. 2005-06 CCU Undergraduate & Graduate Academic Catalog Biblical Studies Courses, *available at* http://www.ccu.edu/catalog/2005-06/courses/bib.htm, Theology Courses, *available at* http://www.ccu.edu/catalog/2005-06/courses/the/htm.[2]

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[2]"[A] district court may utilize the doctrines underlying judicial notice in hearing a motion for summary judgment substantially as they would be utilized at trial." *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1171-72 (10th Cir. 1979) (citations omitted). Thus, a court may take judicial notice of information in the public record, including webpages, *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607-08 (7th Cir. 2002); and newspaper articles, *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 598 n.2 (3rd Cir. 2000). Webpages cited in this brief are collected at Attachment 2.

15. The Regis Board of Trustees has 29 members, of whom 27 are Roman Catholic. CCU's Board of Trustees comprises seven Presbyterians, six non-denominational Christians, six Evangelical Christians, and three Baptists. (Pls.' MSJ Ex. 23 at 8-9.)

16. Both Regis and CCU are funded primarily or predominantly from student tuition payments. (Defs.' MSJ at 13.)

17. Also as part of its policy to ensure broad access to colleges and universities in the state, Colorado has enacted the Colorado Educational and Cultural Facilities Act ("CECFA") to allow educational and cultural institutions to issue tax-exempt bonds. *See* Colo. Rev. Stat. §23-15-101, *et seq.* All public and private post-secondary institutions in Colorado are eligible to participate in the bond program, regardless of whether they are pervasively sectarian or otherwise have a religious affiliation. *See id.*, § 23-15-103(8)(a).

18. CECFA formerly excluded "pervasively sectarian" institutions from participating in bond issues. The state legislature repealed this exclusion effective May 22, 2003, via "An Act Concerning Repeal of Provisions *That Discriminate Against Religious Entities in the Receipt of Services from the Colorado Educational and Cultural Facilities Authority*." 2003 Colo. Legis. Serv. Ch. 323 (H.B. 03-1363) (emphasis added), *available at* 2003 CO LEGIS 323. Since the repeal, CECFA has issued bonds on behalf of at least one sectarian educational institution, a $34.5 million bond issue for Fuller Theological Seminary. John Rebchook, *Bond Change a*

Boon for Religious Schools, Rocky Mountain News, May 25, 2004 at 5B, *available at* 2004 WLNR 1227078.[3]

19. Students may use CCHE financial assistance to pursue any field of study at any eligible institution. (Pls.' MSJ Ex. 11 at VI-F-4, VI-F-5 (defining eligible programs of studies and students).) For example, a student can use CCHE financial assistance to obtain a bachelor's degree in religious studies at the University of Colorado, to minor in religious studies at Colorado State University, or to take a lay ministry practicum at Regis University to learn to "create[] and lead[] community prayer and prayerful scripture study, understand the parts of the Mass, roles and skills of liturgical ministers, understand ministry as service, develop skills in self reflection, theological reflection, practical application in catechetical leadership, youth and campus ministry, social justice work, and parish leadership." Regis Religious Studies Course Descriptions, *at* http://www.regis.edu/coursedescription.asp?sctn=apg&p1=ut&p2=rs&p3=cd.

20. During the 2002-03 school year, CCHE awarded $6.2 million in financial assistance to 1,952 students attending four-year private institutions, an average of $3,178 per student. (Pls.' MSJ Ex. 10 (CCHE Mem. of 4/4/03 at 2, 5).) Regis students received $2.6 million in financial assistance. (*Id.* at 5) CCU's semester tuition is $8,295. CCU Fall 2005 Tuition & Fees, *at* http://www.ccu.edu/finaid/cus_tuition.asp?semester=Fall2005.

21. CCU's exclusion affects students seeking to attend CCU and the university itself. "Students, prospective students have chosen not to attend CCU. . . And one or more of the

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[3]Copies of these Westlaw secondary sources are collected in Attachment 1.

reasons that such persons have stated they have chosen not to attend CCU, is because CCU does not participate in state-funded financial aid programs." (Pls.' MSJ Ex. 6 (Bissell Dep. at 161:15-21).)

B. Burden of Proof

The Equal Protection Clause is violated "when the government treats someone differently than another who is similarly situated." *Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth.*, 933 F.2d 853, 859 (10th Cir. 1991). Plaintiff has the burden of showing that a state actor has treated similarly situated individuals differently based on religion, a suspect classification. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (government actions that "classify along suspect lines like race or religion" are subject to strict scrutiny); *New Orleans v. Dukes*, 427 U.S. 287, 303 (1976) (same); *see Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in judgment) ("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.").[4]

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[4]Defendants argue, citing *Locke*, that CCU's Equal Protection claim derives from its Free Exercise claim and is thus subject only to rational basis review. (Defs.' MSJ at 24-25, citing *Locke*, 540 U.S. at 721 n.3.) The Supreme Court, however, was addressing a different track of Equal Protection analysis, namely, heightened scrutiny of state action that burdens a fundamental right, rather than state action based on suspect classifications such as race, alienage or religion. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating, under Equal Protection Clause, law that permitted sterilization of certain criminals, on ground that law burdened fundamental right of procreation). *Locke* found an Equal Protection Clause claim to be redundant of plaintiff's Free Exercise claim, citing to a prior case rejecting an Equal Protection claim premised on the argument that "the challenged classification interferes with the fundamental constitutional right to the free exercise of religion." *Johnson v. Robinson*, 415 U.S.
(continued...)

Upon plaintiff making the showing of discrimination based on the suspect classification of religion, the burden shifts to defendant to show that such classification is narrowly tailored and "necessary" to achieve a "compelling governmental interest." *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984). This justification must be genuine, fact-based and not a *post hoc* rationalization. *United States v. Virginia*, 518 U.S. 515, 533 (1996).[5] A hypothesized or "generalized assertion" is insufficient. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

C. Plaintiffs Have Shown that Defendant Employs a Suspect Classification

It is undisputed that CCHE permits Regis, a Jesuit institution, to participate in the state-funded financial assistance programs, but not CCU, a non-denominational Christian institution. *See* Undisputed Facts, ¶9. The two universities are similarly situated in all relevant respects, 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. *See id.*, ¶¶10-16.

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[4](...continued)
361, 375 n.14 (1974). *Locke* did purport to overturn the established rule that religion is a suspect classification that triggers strict scrutiny, which is the basis for the United States' equal protection argument here.

[5]*Virginia* involved a challenge to the Virginia Military Institute's male-only admissions policy. A gender-based classification is not considered suspect and is subject to a less exacting standard of review. *Id.* at n.6. But if a genuine, fact-based justification is required to uphold a gender classification, it follows, *a fortiori*, that the same requirement applies to a suspect classification like religion.

D. Defendants Cannot Carry Their Burden

1. Defendants Cannot Show a Compelling Governmental Interest

Defendants' sole proffered justification for excluding CCU is "to avoid[] excessive entanglement issues by placing limitations on funding of religious education" as purportedly required by the state constitution. (Defs.' MSJ at 22.)[6] In fact, however, the state legislature enacted the exclusion as part of the Colorado Student Incentive Grant Act "[i]n an attempt to conform to First Amendment doctrine developed by the United States Supreme Court," which, in 1977, the state believed precluded direct government aid to "pervasively sectarian" institutions. *Ams. United*, 648 P.2d at 1075; Undisputed Facts, ¶3. The Act's sponsor acknowledged as much during committee hearings:

> [T]here is some compelling reason to recognize that we have in this state some non-public, non-profit higher education institutions where a great many Colorado residents are enrolled . . . We are attempting in this list of (criteria for determining the eligibility of an institution) to help in the definition of a non-profit institution . . . We do have some recent court decisions on this particular question . . . and the key words are "pervasively sectarian." . . . So the . . . *bill as it is presently before us seems to be legal under the Supreme Court decision relating to this topic* because it says that the term ["institution of higher education"] does not include an institution which is "pervasively sectarian."

Ams. United, 648 P.2d at 1075 n.1 (emphasis added).

The "pervasively sectarian" concept has been abandoned by the Supreme Court, however, as unworkable and of dubious origin. Although the statute's language has not been repealed, its

[6]Defendants peg this interest to a state constitutional provision that prohibits any "appropriation, or pay from any public funds or moneys whatever . . . to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever." *Id.* (citing Colo. Const. art. IX. §7).

underpinnings, and thus any argument that there is a weighty state interest sufficient to justify discrimination against CCU, has been repudiated.

The Supreme Court reversed the pervasively sectarian doctrine in *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding program of loaning computer and other equipment to public and private schools, including private religious schools). Under the pervasively sectarian doctrine, aid was presumed to advance religion when it was given to organizations, such as parochial schools, that were thought to be so infused with religion that even secular aid would effectively become the equivalent of religious aid in their hands. *See Hunt v. McNair*, 413 U.S. 734, 743 (1973). The plurality in *Mitchell* observed that the concept had not been invoked since 1985, despite subsequent cases permitting aid to parochial schools; that the concept had failed to give due recognition to the fact that government aid could fulfill its secular purpose when given to any recipient; and that the "pervasively sectarian" concept "collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." 530 U.S. at 826-28. The plurality also noted that the term "pervasively sectarian" had its origins in the anti-Catholic Nativist movements of the late 19th Century, when "it was an open secret that 'sectarian' was code for Catholic." The plurality concluded that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Id.* at 828.

Justice O'Connor, joined by Justice Breyer, wrote separately, but also abandoned the pervasively sectarian concept. They rejected the notion "that the secular education function of a religious school is inseparable from its religious mission." *Id.* at 853 (O'Connor, J., concurring

in judgment). They held that for there to be a constitutional violation there must be actual diversion to religious use. Aid that "has the capacity for, or presents the possibility of, such diversion" is insufficient. *Id.* at 854. Like the plurality, they abandoned the pervasively sectarian doctrine under which some institutions were deemed so religious that any aid they touched became constitutionally tainted. And most relevant to the aid at issue in this case, two years later, a majority of the Court upheld a school voucher plan that permitted students to use government aid to attend religious schools, holding: "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

Beyond the fact that defendants' concern with federal constitutional law no longer has any foundation, defendants' concern with avoiding government entanglement with religion is also unfounded. The clearest way to avoid entanglement is to allow students to choose schools that meet various objective, religion-neutral criteria. Defendants instead have chosen to enter the dangerous thicket of deciding what is too religious and what is permissibly religious. They have already permitted at least one religiously affiliated university, which, as noted above, is materially indistinguishable from CCU, to participate in the CCHE programs, thus violating the constitutional command of neutrality among religions. Undisputed Facts, ¶9; *see Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). They have, whatever their

intentions, become more entangled with religion than if they awarded financial aid on a religion-neutral basis.

This entanglement is further demonstrated by the state's program to provide financial assistance to help directly support sectarian educational institutions. The state has created the Colorado Educational and Cultural Facilities Authority ("CECFA") to help all educational institutions in Colorado issue tax free bonds in the state's name. *See* Colo. Rev. Stat. §23-15-102(a) ("It is the intent of the general assembly to create [CECFA] to *lend* money to educational institutions] . . . [and] to permit . . . the bonds and certificates of participation of [such institutions] *to be designated as Colorado education savings bonds or certificates*") (emphasis added). "Pervasively sectarian" schools were excluded from this program until 2003, when the state legislature repealed the exclusion through an amendment targeting "provisions that discriminate against religious entities in the receipt of services from [CECFA]." Undisputed Facts, ¶¶ 17-18. Since the repeal, CECFA has issued bonds on behalf of religious schools. *Id.*, ¶18.

Because the theory underlying Defendants' pervasively sectarian justification has been repudiated by the Supreme Court, and because their entanglement arguments are misplaced as a factual matter, Defendants have failed their burden of showing a compelling justification for discriminating between CCU and comparably situated colleges and universities like Regis. CCU thus has established a violation of its Equal Protection Rights.

2. Defendants Cannot Show That the Exclusion Is Narrowly Tailored

Even if Defendants had demonstrated a compelling interest, CCU has still established a violation because Defendants have not shown that they have pursued that interest in a narrowly tailored manner. Application of the statute results in financial assistance to students pursuing "religious education" in a variety of ways. Students can attend the University of Colorado and major in religious studies. They can minor in religious studies at Colorado State University. They can attend Regis to learn "to create and lead community prayer and prayerful scripture study," "to develop skills in youth and campus ministry," and to assume "parish leadership. Undisputed Facts, ¶19. They can even pursue a degree in a secular field which may facilitate religion, for example, obtaining a business degree in order to better manage the business affairs of a church. Yet a CCU student majoring in English or history or mathematics can receive no financial assistance from the state. *Id.*, ¶8.

As the record indicates, it has pursued this goal in a subjective fashion that has resulted in disparate application, with some students able to pursue religious studies at secular schools, others able to pursue various courses of studies, including religious studies, at a religious school, but no student able to pursue secular or religious studies at CCU. Thus Defendants' objectives have not been pursued in a narrowly tailored fashion. For this additional reason, CCU has demonstrated a violation of its rights under the Equal Protection Clause.

II. Second Claim (Establishment Clause)

A. Undisputed Facts

The facts supporting plaintiff's equal protection claim also support plaintiff's Establishment Clause claim.

B. Burden of Proof

The Supreme Court has consistently "adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson*, 456 U.S. at 246 (citing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)). This requirement of neutrality is "absolute." *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968). Plaintiff has the burden to show that the challenged state action is not neutral toward all religions.

Upon plaintiff making that showing, the burden shifts to defendant to show that the challenged action is "closely fitted" to a "compelling governmental interest." *Larson*, 456 U.S. at 246-47; *see id.* at 246 (when presented with state action "granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.").

C. Defendants' Exclusion of CCU Violates the Establishment Clause

CCU's exclusion fails strict scrutiny under the Establishment Clause for the same reasons that it fails strict scrutiny under the Equal Protection Clause: plaintiff has shown that defendants' application of the exclusion is not neutral toward all religions, and defendants' application is not

"closely fitted" and does not advance a "compelling governmental interest." *See* Argument at §I, *supra*.

Defendants argue that its disparate treatment of Regis and CCU "at the most . . . would give rise to an Establishment Clause argument that [Regis] was ineligible for funding." (Defs.' MSJ at 21-22.) But this is correct only if the "pervasively sectarian" exclusion is constitutional, which it is not, and the state has incorrectly evaluated Regis as not being subject to the exclusion. Nothing in the record suggests that to be the case; quite the contrary, CCHE in 1977 approved Regis' application to participate in state funded financial assistance program and then vigorously defended its decision in the courts. *See* Undisputed Facts, ¶9*; Ams. United*, 648 P.2d at 1074-76, 1087-88.

Without doubt, a state can, consistent with the Establishment Clause, fashion a financial assistance program that is available only to students attending public institutions. Similarly, a state can choose for a valid secular purpose to fund scholarships for those majoring in specific areas like agriculture or medicine in order to increase the number of farmers and doctors. But a state cannot create a program which includes some religious faiths but not others.

III. Third Claim (Free Exercise Clause)

A. Undisputed Facts

The facts supporting plaintiff's equal protection claim also support plaintiff's free exercise claim.

B. Burden of Proof

Under the Free Exercise Clause, the government is barred from "impos[ing] special disabilities on the basis of religious views or religious status," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); excluding religious believers "because of their faith, or lack of it, from receiving the benefits of public welfare legislation," *Everson*, 330 U.S. at 16; 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.[7] State action "that is neutral and generally applicable need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531.

Defendant has the burden of showing that the challenged practice is a "neutral rule of generally applicability." *Axson-Flynn v. Johnson*, 356 F.2d 1277, 1294 (10th Cir. 2004). If it cannot, then the defendant must show that the practice "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi* at 546 (internal quotations omitted); *see Axson-Flynn* at 1294 ("Unless Defendants succeed in showing that the script requirement was a neutral rule of general applicability, they will face the daunting task of establishing that the requirement was narrowly tailored to advance a compelling governmental interest.").

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[7]*See also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.").

C. **Defendants Cannot Carry Their Burden**

1. **Defendants Cannot Show that the Exclusion is a Neutral, Generally Applicable Rule**

Defendants are not acting neutrally by excluding CCU from the CCHE programs. First, they are burdening CCU and its students in a manner that at least one other religious institution and its students are not burdened. *See* Undisputed Facts, ¶9. Such discrimination triggers heightened scrutiny. *See Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (finding that ordinance was applied unconstitutionally when interpreted to prohibit use of public park for preaching by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service); *Axson-Flynn*, 356 F.3d at 1298 (disparate treatment of Jewish students seeking excused absence for religious holiday and Mormon student seeking exemption based on religious objection to class exercise could establish Free Exercise Clause violation).

Second, defendants are discriminating against institutions that defendants deem to be "pervasively sectarian," and in favor of those that it finds less religious or sufficiently secular. Undisputed Facts, ¶¶ 3, 8-9. Such facial discrimination against the religious violates the Free Exercise Clause. As the Court stated in *Lukumi*: "At a minimum, the 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." 508 U.S. at 532 (emphasis added). In *Lukumi*, the Court found that the law was not neutral toward the plaintiffs, who were adherents of the Santeria religion, because it granted exemptions from animal cruelty ordinances for various secular reasons for killing animals but not for the plaintiffs' religious

reasons. The ordinances, the Court held, "devalue [] religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment." *Id.* at 537-38. Defendants' exclusion here fails under *Lukumi*. By targeting "pervasively sectarian" institutions, but not merely "sectarian" ones or secular ones, defendants "discriminate[ ] against some or all religious beliefs." *Id.* at 532.

2. Defendants Cannot Show That the Exclusion Advances an Interest of the "Highest Order" and is Narrowly Tailored to Achieve Such an Interest

Defendants' exclusion of CCU from the scholarship based on religion does not serve an interest "of the highest order." *Lukumi*, 508 U.S. at 546. The entanglement justification proffered by the defendants, as discussed in Section I of the Argument above, does not hold up to analysis. Making the distinction between pervasively sectarian and merely sectarian, or religious and nonreligious, entangles the state in religious matters to a far greater degree than if there was no religion exclusion. Under defendants' system, the state must scrutinize and dissect religious practice and doctrine to decide who is in and who is out. To determine whether students at an institution should be excluded from receiving financial assistance, CCHE must delve into the religious faith of the students, faculty and board of trustees; and determine how any religion or theology classes are taught. Undisputed Facts, ¶5; *see 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."). To determine whether indoctrination or proselytization is occurring, CCHE must inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Words and practices that may tend to indoctrinate or

proselytize in the Roman Catholic faith, may not tend to in the Protestant faith or in Hinduism. *See Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology.").

At the same time that the exclusion fails to fully protect defendants' stated ends, it proscribes more religious conduct than is necessary. It not only denies assistance to CCU students pursuing religious and devotional studies, but also denies assistance to CCU students pursuing secular studies and careers like English, mathematics and computer information systems. Undisputed Facts, ¶8. The exclusion is also underinclusive because it does not apply to all studies that would "excessively entangle" the state in "religious education." CCHE provides financial assistance to students to pursue religious studies, to become a lay minister, or to study a secular field for the purpose of aiding a religious organization. *Id.*, ¶19. Defendants' exclusion of CCU from the scholarship funds therefore violates the Free Exercise Clause.

In arguing that the exclusion does not violate free exercise rights, defendants make two fallacious arguments. First, they misread *Locke* as holding that a state can exclude all religious organizations from a government benefit program. Second, they argue that the exclusion does not burden plaintiffs but merely denies them a subsidy to exercise a constitutional right. (Defs.' MSJ at 14-18.)

In *Locke*, the Supreme Court held that a state may carve out an exception to a scholarship program in order to avoid funding ministerial or clerical training; specifically, it did not violate the Free Exercise Clause to deny a divinity student the ability to use a $1,125 annual state

scholarship toward his divinity degree. In so holding, the Court did not undo its prior understanding of the First Amendment religion clauses. Rather, it drew two critical distinctions.

First, the Court stressed the long and distinguished pedigree of the principle that government should not fund the training of ministers: "[W]e can think of few areas in which a State's antiestablishment interests come more into play." 540 U.S. at 722. Opposition to "procuring taxpayer funds to support church leaders," dates back to the founding, and "was one of the hallmarks of 'established' religion." *Id.* The Court recounted how Jefferson and Madison strongly opposed the practice, and observed that "[m]ost 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." *Id.* at 723. The fact that "early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforce[d] [the Court's] conclusion that religious instruction is of a different ilk." *Id.*

Second, the Court noted the *de minimis* nature of the burden imposed by the rule. Unlike prior Free Exercise Cause cases, the Washington State program placed no meaningful disability on the divinity student. Barring use of the scholarship toward divinity degrees did not "require students to choose between their religious beliefs and receiving a government benefit," *id.* at 720-21, since Washington's program permitted students to attend "pervasively religious schools so long as they are accredited" and even to take "devotional theology courses" while there. *Id.* at 724. The state, the Court stressed, simply bars recipients from using the scholarship toward a ministerial degree program. *Id.* at 723-24.

Defendants' exclusion is far broader that the one upheld in *Locke*. It is not limited only to the historical exclusion of minister training but applies to an entire category of institutions and all fields of secular and religious study offered there. Undisputed Facts, ¶3. Further, the financial burden to CCU students of being excluded from the CCHE financial assistance program is nearly triple the amount at issue in *Locke*. *See id.*, ¶20.

Nor is the exclusion, as defendants assert, within the "well-established principles that government is not required to subsidize citizens' exercise of their constitutional rights." (Defs.' MSJ at 17.) The Supreme Court has repeatedly recognized that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). Thus, for example, in *Rust* the Court upheld regulations limiting the ability of certain federal funding recipients to engage in abortion counseling as a method of family planning. As the Court explained, in crafting social policy, the government is free to choose "to subsidize family planning services which will lead to conception and childbirth, and declin[e] to 'promote and encourage abortion.'" *Id.* at 193. In *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Court similarly upheld federal funding restrictions that allowed recipients to use funds for medical services related to childbirth but not for abortions.

That line of government funding cases, however, does not authorize the sort of religious classification at issue here. As the Court itself recognized in *Maher*, one of the primary decisions on which *Rust* is built, *see Rust*, 500 U.S. at 192-94, those funding cases do not control the "significantly different context" in which a funding decision impinges on the constitutionally

imposed "'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." 432 U.S. at 475 n.8. When benefits are denied to individuals who otherwise meet a program's eligibility criteria solely because of a *religious* classification, the state is not simply declining to subsidize a constitutional right–a harm that the Supreme Court has held insufficient in other contexts. *See Rust*, 500 U.S. at 194-95. Rather, the state is singling out religion for "distinctive treatment," *Lukumi*, 508 U.S. at 534, in a manner that disrupts the neutrality commanded by the First Amendment in matters of religion.

Government funding cases like *Rust* emphasize that the state may make "value judgment[s]" about what conduct it seeks to promote or discourage through the dispensation of public funds. 500 U.S. at 192-93. But in matters of religion, the First Amendment strictly scrutinizes and disallows any "value judgments" that religion should be explicitly and exclusively disfavored. Thus, although a state may decide to subsidize medical services for the poor for childbirth but not abortion, it may not decide to fund medical services for Catholics, but not atheists. Viewed this way, plaintiff's claim is simply an extension of the general requirement that when the government offers a benefit to eligible persons, it must do so on a religion-neutral basis. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 393-94 (1993) (equal access to facilities); *Rosenberger*, 515 U.S. at 831 (equal access to funding of student activity groups); *Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir. 2002) (equal access to school staff, supplies and vehicles).

CONCLUSION

For the foregoing reasons, this Court should grant plaintiff's motion for summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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