COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203 COURT OF APPEALS, STATE OF COLORADO Judges Jones, Graham, and Bernard Appeals Court Case No. 11CA1856 and 11CA1857 Appeal from District Court, Denver County Colorado The Honorable Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427 **Petitioners:** JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON and **Petitioners:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MARSON S. BARNARD, a minor child. vs. **Respondents:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, and **Respondents**: COLORADO STATE BOARD OF EDUCATION; AND COLORADO DEPARTMENT OF EDUCATION, and	^COURT USE ONLY^ Case No:

Respondents: FLORENCE and DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANA AND MARK OAKLEY, on their own behalf and as next friends of their child, NATHANIEL; and JEANETTE STROHM-ANDERSON AND MARK ANDERSON, on their own behalf and as next friends of their child, MAX, Attorneys for Petitioners James LaRue, Suzanne T. LaRue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Rev. Malcolm Himschoot, Kevin Leung, Christian Moreau, Maritza Carrera and Susan McMahon: Matthew J. Douglas, #26017 Timothy R. Macdonald, #29180 Michelle K. Albert, #40665 ARNOLD & PORTER LLP 370 17th Street, Suite 4400 Denver, CO 80202 Telephone: 303.863.1000 Fax: 303.832.0428 Matthew.Douglas@aporter.com Timothy.Macdonald@aporter.com Michelle.Albert@aporter.com Mark Silverstein, #26979 Sara Rich, #36904 AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO 400 Corona Street Denver, CO 82018 Msilver2@att.net Srich@aclu-co.org Daniel Mach, DC Bar #461652 Heather L. Weaver, DC Bar #495582 ACLU FOUNDATION PROGRAM ON FREEDOM OF RELIGION AND BELIEF 915 15th Street, NW, Suite 600 Washington, DC 20005 Telephone: 202.675.2330 Fax: 202.546.0738 dmach@aclu.org hweaver@aclu.org	

Ayesha N. Khan, DC Bar #426836
Alex J. Luchenitser, DC Bar #473393
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW
Suite 850 East Tower
Washington, DC 20005
Telephone: 202.466.3234
Fax: 202.898.0955
khan@au.org
luchenitser@au.org

PETITION FOR WRIT OF CERTIORARI BY LARUE PETITIONERS

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Petition complies with C.A.R. 53(a) as it contains 3,772 words.

The Petition complies with C.A.R. 53(a) as it contains under separate heading, (1) an advisory listing of the issues presented for review; (2) reference to the official or unofficial reports of the opinion or judgment and decree of the court; (3) a concise statement of the grounds on which jurisdiction of the Supreme Court is invoked; (4) a concise statement of the case containing the matters material to consideration of the issues presented; (5) a direct and concise argument amplifying the reasons relied on for the allowance of the writ; and (6) an appendix containing (a) copies of the opinions in the lower courts; and, (b) the text of any pertinent statutes or ordinances.

I acknowledge that my Petition may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.

Matthew J. Douglas

ISSUES PRESENTED FOR REVIEW

1. Does Douglas County's school voucher program violate Article IX, Section 7 of the Colorado Constitution by diverting state educational funds intended for Douglas County public school students to private elementary and secondary schools controlled by churches and religious organizations?

2. Does the County's voucher program violate the compelled-support and compelled-attendance clauses of Article II, Section 4 of the Colorado Constitution by directing taxpayer funds to churches and religious organizations, and by compelling students enrolled in a public charter school to attend religious services?

3. Does the County's voucher program violate Article IX, Section 8 of the Colorado Constitution by requiring students who are enrolled in a public charter school, and counted by Douglas County as public school students, to be taught religious tenets, submit to religious admission tests, and attend religious services?

COURT OF APPEALS OPINION

The opinion of the court of appeals is *Taxpayers for Pub. Educ. et al. v. Douglas County Sch. Dist. et al.*, 2013 COA 20, __ P.3d__, 2013 WL 791140, 2013 Colo. App. LEXIS 266 (hereinafter "App").

JURISDICTION

This petition arises from the trial court's order dated August 12, 2011 (R. ID #39266572, hereinafter "Order") granting Plaintiffs' motion for preliminary injunction, and the court of appeals' February 28, 2013 decision reversing the trial court and vacating the injunction. This Court has jurisdiction pursuant to C.R.S. § 13-4-108 and C.A.R. Rule 49.

STATEMENT OF THE CASE

Introduction

In 2011, Douglas County implemented the "Choice Scholarship Program" (the "Voucher Program"), a "pilot" school-voucher program that would divert to private schools millions of dollars designated for elementary and secondary public education in Colorado. The vast majority of the participating private schools are controlled by churches or religious organizations. The district court declared the program unconstitutional on numerous grounds. The court of appeals reversed by a 2-1 vote.

This case is plainly important for the State of Colorado. If the decision of the court of appeals stands, Douglas County will implement the Voucher Program, and any other Colorado school district could follow suit. This could impose a potentially devastating economic hardship on Colorado's constitutionally mandated public school system, which is already facing serious funding problems.

Petitioners thus respectfully request that this Court grant *certiorari*. Review by this Court is warranted for three principal reasons:

First, the decision below conflicts with prior decisions of this Court and the plain text of the Colorado Constitution. The court below failed to apply, almost entirely, this Court's established factors for determining whether education funding

programs violate the religion clauses of the Colorado Constitution. Instead, the court of appeals applied an analysis indistinguishable from the analysis called for under the federal Establishment Clause, effectively rendering the more specific restrictions in Colorado's Constitution meaningless.

Second, the decision below effectively reads the United States Constitution as preventing states from adopting stricter limits on public funding of religious institutions than those imposed by the federal Establishment Clause—a reading that is in conflict with the decisions of the United States Supreme Court and numerous decisions of the federal circuits and of other states.

Third, the court below erred in holding that acts of school districts must be upheld unless proven unconstitutional beyond a reasonable doubt—another novel conclusion that this Court has never adopted. This ruling is likely to have broad and troubling implications that could affect the ability of parents, students, and district employees to vindicate their rights in a variety of contexts.

The LaRue Plaintiffs also join in the Petition for a Writ of Certiorari filed in this case by Plaintiffs Taxpayers for Public Education, Cindra S. Barnard and Marson S. Barnard.

FACTS

The Voucher Program is funded entirely through the receipt of "per-pupil" revenue allocated by the State to primary and secondary students enrolled in Colorado public schools. Order, 3. In order to receive such revenue for Program students, the Program purports to operate as a public charter school, the "Choice Scholarship Charter School." Order, 5. This Charter School is not a "school" in any common meaning of the word—it has no classrooms, teachers, or curriculum. Order, 6.

Instead, all "Charter School" students attend classes at one of the Program's private "partner" schools. Order, 3. To take part in the Program, students must apply to and be admitted to one of these private schools. Order, 5. Many of the private schools have religious tests for admission. Order, 11. Almost all of the participating schools require attendance at religious services. Order, 13. And high school students *must* enroll in a religious school if they wish to take part in the Program, unless they are special-needs students, as the only participating non-religious high school is a special-needs school. Order, 9.

Once a student has been accepted to a participating private school, the student's parents receive a check in the amount of 75% of the per-pupil revenue allocated by the State for that student (the School District retains the other 25%).

Order, 3. The parents must restrictively endorse the check to the private school. *Id.* The private school may use these state funds for any purpose, including religious instruction, services, facilities, or clergy salaries. Order, 13. For example, one participating school used Program funds to support operation of its chapel facilities and repay debt. Order, 41. Another simply reduced its financial aid to a Program student by the amount of the voucher. *Id.*

PROCEEDINGS

In 2011, Petitioners sought and obtained an injunction against the Program. The district court concluded, upon extensive factual findings, that Petitioners demonstrated a "clear and certain right to mandatory or permanent injunctive relief" with respect to their claims under the Colorado Constitution, including Article IX, Sections 7 and 8, and Article II, Section 4. Order, 68.

On February 28, 2013, in a 2-1 decision, the Colorado Court of Appeals reversed. The majority concluded that the factors this Court established for whether public educational funding complies with the Colorado Constitution, set out in *Americans United for Separation of Church & State Fund v. State*, 648 P.2d 1072 (Colo. 1982), are almost entirely barred by the U.S. Constitution. App. 41-44, 50. Furthermore, for the first time in Colorado jurisprudence, the majority applied a presumption of constitutionality to a school-district program: that the

Program must be upheld "unless we conclude that plaintiffs prove[] that it is unconstitutional beyond a reasonable doubt." App. 23-24.

In a strong dissent, Judge Bernard explained that Article IX, Section 7 renders the Voucher Program unconstitutional because it unambiguously "prohibits public school districts from channeling public money to private religious schools." App. 61. Consistent with this Court's decision in *Americans United*, Judge Bernard concluded that Article IX, Section 7 "establishes greater protection against the establishment of religion in Colorado's public elementary, middle, and high schools than does the First Amendment's Establishment Clause." App. 62.

REASONS TO ALLOW THE WRIT

This case is important to the State of Colorado for a number of reasons. If the majority's decision is allowed to stand, any other school district in the state could enact a school voucher program similar to Douglas County's, which would result in widespread public funding of religious institutions and education throughout the state. The constitutionally-mandated public education system in Colorado, already facing serious financial difficulties, could be devastated.

Furthermore, the majority's opinion conflicts with this Court's prior decisions, effectively nullifies specific language in the Colorado Constitution, and

adopts novel legal positions, including on matters not previously decided by this Court.

I. The decision below conflicts with the decisions of this Court and with the plain text of the Colorado Constitution.

The decision below failed to follow the analysis set forth by this Court in *Americans United* for evaluating claims under the church-state provisions of Colorado's Constitution. Instead, the majority applied an analysis that is indistinguishable from the standard applied under the federal Establishment Clause, nullifying the additional factors prescribed by this Court. The majority erroneously assumed that the federal Constitution prohibits consideration of these factors. But the majority's decision was unfaithful to—and effectively rendered meaningless—the Colorado Constitution's specific and strict language, which provides heightened protection against the diversion of public funds to religious institutions. Because the court below disregarded its obligation to apply these valid, longstanding constitutional provisions, as well as this Court's interpretation of them, review should be granted.

A. The decision below conflicts with this Court's interpretation of Article IX, Section 7, as well as that clause's plain text.

Article IX, Section 7 of the Colorado Constitution is specific and unequivocal. It provides, in relevant part:

> Neither the general assembly, nor *any* county, . . . school district or other public corporation, shall *ever* make *any* appropriation, or pay from *any* public fund or moneys *whatever*, *anything* in aid of *any* church or sectarian society, or for *any* sectarian purpose, or to help support or sustain *any* school . . . controlled by *any* church or sectarian denomination whatsoever . . . .

(Emphasis added.)

The majority's conclusion that the Voucher Program does not violate this provision conflicts with the clause's plain text. As Judge Bernard noted in dissent, the language in Section 7 is an "unambiguous," "direct and clear constitutional command." App. 61. Section 7 prohibits the payment of "any" public moneys "whatever" that are "in aid of any church or sectarian [religious] society" or to help support "any" school controlled by "any" church or sectarian denomination.

Judge Bernard's conclusion was correct. The Program plainly provides aid and support to religious schools and organizations. Voucher payments go to the participating private schools (although the checks are made out to the parents, they must be restrictively endorsed to the private school where the student has enrolled). The Program imposes no restrictions on how a private school may use the voucher payments, *e.g.*, for religious instruction, clergy salaries, or other religious purposes.

The ruling below also conflicts with this Court's decision in *Americans United*, 648 P.2d 1072. There, in upholding a statutory college-grant program

under Article IX, Section 7, this Court relied on a number of factors that are simply not present here. Specifically, the Court reasoned that (1) the aid was unlikely to "seep over into the nonsecular functions" of the receiving colleges; (2) the program was structured to "create[] a disincentive for an institution to use grant funds other than for the purpose intended—the secular educational needs of the student"; and (3) program scholarships were available only to students at higher educational institutions. *Id.* at 1083-84.

The *Americans United* Court emphasized the importance of the distinction between colleges and universities on the one hand, and elementary and secondary schools on the other. The Court explained that at institutions of higher education, "there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id.* at 1084. The importance of this distinction has been recognized in various other contexts, including by the United States Supreme Court. *See, e.g.*, *Tilton v. Richardson*, 403 U.S. 672, 685-87 (1971) (quoted with approval in *Americans United*, 648 P.2d at 1080); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-12 (2000); *Chaudhuri v. Tennessee*, 130 F.3d 232, 238-39 (6th Cir. 1997).

Yet the majority refused to consider this factor or others applied by this Court in *Americans United.* App. 45-46. The majority asked only whether the Program was intended to benefit students and parents, whether it was neutral toward religion (in the sense of being available to students attending non-religiously affiliated schools),[1] and whether the funds made their way to religious schools through parental choice. App. 49-50. This analysis was based on an erroneous assumption that the other factors applied by this Court in *Americans United* were "foreclosed by the First Amendment's Religion Clauses" (a conclusion that, as discussed below in Section II, conflicts with rulings of the United States Supreme Court and of many other courts). App. 50. Consequently, the court of appeals judged the Program according to an analysis indistinguishable from the analysis used to evaluate whether voucher programs are *permissible* under the federal Establishment Clause. *See* App. 49-50; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (cited often by the majority).

As the dissent noted, the majority's analysis fails to give meaning to the text of Article IX, Section 7, which is "significantly different" from the text and

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[1] In concluding that the Program was neutral, the court below simply ignored the fact that the Program does not include a single non-religious high-school option for non-special-needs students.

purpose of the federal Establishment Clause and "creates an obligation that does not appear anywhere in the United States Constitution." App. 68, 79. It was for this very reason that this Court conducted entirely separate analyses under the Colorado Constitution and under the federal Establishment Clause in *Americans United*, 648 P.2d at 1078, 1081. The majority's analysis, in contrast, effectively renders Article IX, Section 7 meaningless.

B. The decision below conflicts with this Court's interpretation of the compelled-support clause of Article II, Section 4, as well as that clause's plain text.

Nor can the decision below be squared with the compelled-support clause of Article II, Section 4, which provides that "[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." Because the Voucher Program is funded with taxpayer dollars, and because those dollars are used to support chapel facilities and other religious functions (*see, e.g.*, Order, 13, 41), the Program is contrary to the clear language of the compelled-support clause.

As with Article IX, Section 7, the majority below failed to apply the factors considered by this Court in *Americans United*, 648 P.2d at 1081-82, to ascertain compliance with the compelled-support clause. App. 41. For example, the majority failed to address the fact that, unlike the college-grant program upheld in

Americans United, the Voucher Program lacks restrictions that "significantly reduce any risk of fallout assistance to the participating institution." *Cf.* 648 P.2d at 1082. Instead, the majority again applied an analysis indistinguishable from federal Establishment Clause analysis. App. 45. As a result, the decision below conflicts with this Court's ruling in *Americans United*, 648 P.2d at 1081, that the compelled-support clause is "considerably more specific" than the federal First Amendment.

C. The decision below conflicts with the plain text of the compelled-attendance clause of Article II, Section 4.

The compelled-attendance clause of Article II, Section 4 provides that no person "shall be required to attend . . . any ministry or place of worship . . . against his consent." The decision below conflicts with this clause because most Program schools require attendance at religious services, and the Program provides no opt-out from such attendance. Order, 10, 13-14.

The majority below concluded that the Program complies with the compelled-attendance clause because students voluntarily decide to participate in the Program and attend a particular school. App. 47. But this reasoning ignores the undisputed fact that the Program provides *no* non-religious options (other than to special-needs students) at the high school level. Order, 9. High school students must choose between accepting religious education and attending religious services

on the one hand, or foregoing the government benefit of the voucher on the other. As the United States Supreme Court has found, placing public school students in such a position is religiously coercive and negates the voluntary nature of any so-called choice. *See, e.g.*, *Santa Fe*, 530 U.S. at 312. The government improperly supports religion when a government-funded benefit is conditioned upon participation in religious activity. *See, e.g.*, *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 412 (2d Cir. 2001).

D. The decision below conflicts with the plain text of Article IX, Section 8.

The Program attempts to be treated like a public school for funding purposes, but like a private school for purposes of avoiding the church-state provisions of the Colorado Constitution. *See* Order, 5-6. Participating students are "enrolled" in a public "charter school" so that the School District may obtain per-pupil funding from the State. Charter schools in Colorado are public schools (*see* C.R.S. 22-30.5-104) and are, therefore, subject to the same constitutional prohibitions as all public schools in the State. As a condition of enrollment in the Charter School, however, Program students must apply, be admitted to, and attend a participating private school. Order, 5. Contrary to the decision below, this aspect of the Program conflicts with Article IX, Section 8 in three ways.

First, Section 8 mandates that no student of "any public educational institution of the state . . . shall ever be required to attend or participate in any religious service whatsoever." In contrast, students enrolled in the Charter School may be required by participating private schools to attend religious services, and in fact most of the schools in the Program require such attendance. Order, 10.

Second, Section 8 provides that "[n]o religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state." The application for admission to the Charter School states, however, that "[t]o be eligible for enrollment in [the Charter School], a student must . . . be accepted [to] and attend" a participating private school. Many of those schools require applicants to profess adherence to a specific faith or to sign doctrinal statements. Order, 10-11.

Third, Section 8 requires that "[n]o sectarian tenets or doctrines shall ever be taught in the public school." Yet most of the students enrolled in the Charter School will be taught religious doctrines as part of their daily curriculum. Order, 11-12.

Without citing any legal authority, the majority below rejected Petitioners' Section 8 claims, reasoning that Program students can simultaneously be treated as public school students for "administrative purposes" (such as being counted toward

the public school population for purposes of receipt of state funds) and as private school students for purposes of Section 8. App. 54. No legal authority supports this novel exception crafted by the majority. If allowed to stand, the court of appeals' opinion would enable schools to use this loophole to largely eviscerate Section 8. Indeed, record evidence showed that Douglas County carefully deliberated over the structure of the Program and created the Charter School facade as part of an attempt to circumvent constitutional limitations of which it was very much aware. Order, 2-3.

II. The majority's ruling conflicts with decisions of the United States Supreme Court, federal circuits, and other states.

As explained above, the majority effectively held that the U.S. Constitution prohibits the church-state provisions of the Colorado Constitution from imposing greater restrictions on public funding of religious schools than does the federal Establishment Clause. App. 41, 43. This conclusion conflicts with the United States Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), which upheld Washington State's application of its constitution to impose greater restrictions than those of the U.S. Constitution on public funding of religious education.

The majority's view further conflicts with numerous federal appellate rulings applying *Locke* to reject arguments that the U.S. Constitution prohibits

government bodies from denying to religious institutions public funding that is offered to secular institutions. *See, e.g.*, *Bowman v. United States*, 564 F.3d 765, 773-74 (6th Cir. 2008); *Teen Ranch v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007); *Wirzburger v. Galvin*, 412 F.3d 271, 280-85 (1st Cir. 2005); *Eulitt ex rel. Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 353-57 (1st Cir. 2004); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 21-23 (1st Cir. 2004). The majority's position also conflicts with a host of state-court decisions interpreting state constitutions to bar voucher or other programs and rejecting arguments similar to the majority's reasoning here. *See, e.g.*, *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 673, 679-81 (Ky. 2010); *Cain v. Horne*, 202 P.3d 1178, 1180, 1182-83, 1185 (Ariz. 2009); *Bush v. Holmes*, 886 So.2d 340, 343–44, 357-66 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So.2d 392 (Fla. 2006); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 546- 47, 563 (Vt. 1999).

The majority reached its extraordinary view by interpreting *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), as prohibiting courts from analyzing whether institutions are sectarian or engage in religious indoctrination. App. 42-43. But reading *Colorado Christian* in this manner conflicts with the decisions of the United States Supreme Court, which *require* courts in a host of different contexts to analyze whether institutions are religious

(*see, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 699, 707 (2012)), and—in order to determine when direct public aid to religious institutions violates the federal Establishment Clause—to analyze whether the institutions engage in religious indoctrination (*see Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (four-Justice plurality); *id.* at 840, 845 (O'Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203, 219 (1997). In fact, while *Colorado Christian* found that states cannot discriminate among different kinds of religious institutions, and that courts must not delve too deeply into a religious institution's affairs, application of the Colorado Constitution's religion clauses does not require—and the district court did not engage in—such inquiry. The Colorado Constitution simply requires a court to determine whether an institution is religious; it does not direct an inquiry into the nature or extent of the religiosity.

III. The majority's ruling that a presumption of constitutionality applies to acts of school districts is unsupported by precedent.

The majority held that acts of school districts are presumed constitutional and must be upheld unless they are proved "unconstitutional beyond a reasonable doubt." App. 23-24. The issue of whether this presumption applies to independent acts of a school district is a question of substance not yet determined by this Court; in fact, no other Colorado court has extended the presumption as the majority did. For example, in *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1103 (Colo.

1998), this Court evaluated the constitutionality of a school district policy without applying this presumption.

Furthermore, Colorado law calls for such a presumption only with respect to legislative acts. *See, e.g., Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1366 (Colo. 1988). As this Court has recognized, school districts are inherently different than a state legislature. *See Bagby v. Sch. Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974). Extending the presumption of constitutionality to school districts could have widespread effects on the rights of parents, students and school district employees, and this Court should be heard on this important issue.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

ARNOLD & PORTER LLP

Matthew J. Douglas (#26017)
Timothy R. Macdonald (#29180)
Michelle K. Albert (#40665)
370 Seventeenth Street, Suite 4400
Denver, CO 80202-1370
Telephone: 303.863.1000

Ayesha N. Khan, DC Bar #426836
Alex J. Luchenitser, DC Bar #473393
AMERICANS UNITED FOR
SEPARATION OF
CHURCH AND STATE
1301 K Street, NW
Suite 850 East Tower
Washington, DC 20005
Telephone: 202.466.3234
Fax: 202.898.0955
khan@au.org
luchenitser@au.org

Mark Silverstein, #26979
Sara Rich, #36904
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF COLORADO
400 Corona Street
Denver, CO 82018
Msilver2@att.net
Srich@aclu-co.org

Daniel Mach, DC Bar #461652
Heather L. Weaver, DC Bar #495582
ACLU FOUNDATION PROGRAM ON
FREEDOM OF RELIGION AND BELIEF
915 15th Street, NW, Suite 600
Washington, DC 20005
Telephone: 202.675.2330
Fax: 202.546.0738
dmach@aclu.org
hweaver@aclu.org

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2013, a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI** was served by U.S. Mail, postage prepaid, to the following:

James M. Lyons
L. Martin Nussbaum
Eric V. Hall
David M. Hyams
Michael Francisco
Renee A. Carmody
Rothgerber, Johnson, & Lyons, LLP
One Tabor Center, Suite 3000
1200 Seventeenth Street
Denver, Colorado 80202

Attorneys for Defendant Douglas County Board of Education and Douglas County School District RE-1

William H. Mellor
wmellor@ij.org
Richard D. Komer
rkomer@il.org
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Michael E. Bindas
Institute for Justice
101 Yesler Way, Suite 603
Seattle, WA 94104

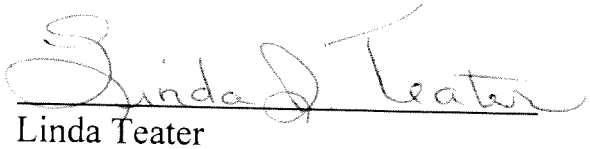
Attorneys for Intervenors

Antony B. Dyl
Nicholas G. Stancil
Office of the Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

Attorneys for Defendants Colorado Department of Education and Colorado State Board of Education

Michael S. McCarthy
Colin C. Deihl
Caroline Lee
Nadia G. Malik
Sarah A. Kellner
Faegre & Benson, LLP
3200 Wells Fargo Center
1700 Lincoln
Denver, CO 80203-4532

Attorneys for Taxpayers for Public Education, Cindra S. Barnard, and Marson S. Barnard



Linda Teater