UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEPHEN & CHRISTINA THOMAS, et al., Plaintiffs, v. DOUGLAS COUNTY BOARD OF EDUCATION and DOUGLAS COUNTY SCHOOL DISTRICT Defendants, v. JAMES LARUE, SUZANNE T. LARUE, INTERFAITH ALLIANCE OF COLORADO, RABBI JOEL R. SCHWARTZMAN, KEVIN LEUNG, CHRISTIAN MOREAU, MARITZA CARRERA, SUSAN MCMAHON, TAXPAYERS FOR PUBLIC EDUCATION, CINDRA S. BARNARD, and MASON S. BARNARD Movants	**Civ. No. 1:16-cv-00876-MSK-CBS**

INTERVENORS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY PROCEEDINGS

Pursuant to Fed. R. Civ. P. 24(c), proposed Intervenors attach this Motion to Dismiss Plaintiffs' Complaint or in the alternative stay all proceedings in this matter. Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Intervenors move this Court to dismiss Plaintiffs' claims for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted.

Alternatively, Intervenors ask the Court to stay all proceedings in this case given the ongoing, parallel litigation involving the same parties, issues, and underlying school-grant program.

INTRODUCTION

This case should be dismissed as there is no genuine dispute between the nominally opposing parties over the central issue in this litigation. At the heart of this case is a common goal shared by both Plaintiffs and Defendants: to obtain an unprecedented ruling—whether from this Court or from the U.S. Supreme Court—that the exclusion of religious schools from a school voucher program violates the federal Constitution. The Defendants, Douglas County Board of Education and Douglas County School District (collectively "the School District") and Plaintiffs' counsel (the Institute for Justice[1]), are, and have for years been, working together unsuccessfully to achieve that result in the state courts of Colorado. Indeed, they continue to work together in the U.S. Supreme Court—in ongoing litigation involving the same underlying program at issue here—to try to achieve their mutual goal. This case is nothing more than an attempt to shop for a new forum in which to try to achieve the same end, but this time there is one significant difference: the School District and the Institute for Justice purport to be adverse to each other in this matter. When both sides desire the same result, however, "there is . . . no case or controversy within the meaning of [Article] III of the Constitution." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (per curiam) (dismissing case for lack of jurisdiction because both litigants desired a holding that the anti-busing statute at issue was

[1] For ease of reference, we refer to Plaintiffs in this case by their counsel, the Institute for Justice.

constitutional). Because no actual case or controversy exists, this matter should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction.

Additionally, Plaintiffs' claims are based on a legal premise that has been rejected by the U.S. Supreme Court and every other federal and state court that has ruled on the issue. The courts have held that providing public funding to secular institutions does not require governmental bodies to make public funding available to religious institutions, even when such funding would be permitted by the federal Establishment Clause. The Supreme Court settled the issue in *Locke v. Davey*, 540 U.S. 712 (2004), and a plethora of federal Courts of Appeals and state courts have interpreted *Locke* in a way that directly contradicts Plaintiffs' position. Therefore, Plaintiffs fail to state a claim upon which relief may be granted, and this case should be dismissed under Fed. R. Civ. P. 12(b)(6).

Alternatively, this Court should stay these proceedings in light of the extensive, long-standing, and ongoing litigation involving the same underlying school voucher program. A "general principle" of federal jurisdiction is to "avoid duplicative litigation" by dismissing or staying a later-filed action when parallel proceedings in another court have already begun. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The School District's and the Institute for Justice's petitions for certiorari that are currently pending before the U.S. Supreme Court in the parallel case, whether granted or denied, could moot or substantially affect the outcome of this case. Earlier today, proposed Intervenors also filed a motion in the pending, ongoing suit in the Colorado District Court for the City and County of Denver to enforce the permanent injunction against the underlying school voucher program. That injunction, which was issued in August 2011, remains in effect, and the modified Program

violates the terms of the injunction. *See* Motion for Enforcement of August 12, 2011 Permanent Injunction Restraining Defendants' Resumed Funding and Implementation of an Unlawful School Voucher Program, Ex. 2, Douglas Decl. Ex. F.[2] The outcome of that motion could also moot or substantially affect the outcome of this case. Therefore, in the interest of judicial economy and restraint, if the Court does not dismiss this case outright, the Court should stay the case pending the outcome of the parallel litigation.

FACTUAL BACKGROUND

The facts relating to the voucher program at issue here are not in dispute.

In March 2011, the School District created and approved a school voucher program, titled the Choice Scholarship Program ("the Program"). The Program was intended to divert millions of state taxpayer dollars designated for public elementary- and high-school education to private schools. Under the Program, any schools—including religious schools—that satisfied the School District's requirements could receive voucher funding through the Program.

Intervenors filed suit as plaintiffs against the School District, the Colorado State Board of Education, and the Colorado Department of Education, seeking a declaratory judgment that the Program violated the Colorado Constitution and state law, as well as an injunction to prohibit the School District from implementing the Program. The Institute for Justice represents a group of

[2]Intervenors respectfully request that this Court take judicial notice of certain public state and federal court filings, which are a matter of public record and whose accuracy has not been disputed. *See Port-A-Pour, Inc. v. Peak Innovations, Inc.*, No. 13-cv-01511-WYD-BNB, 2014 WL 3512851, at *6 (D. Colo. July 14, 2014) ("A court has wide discretion to allow affidavits and other documents outside the pleadings to resolve jurisdictional facts.") (citing *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002)); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) ("[F]acts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment . . . . This allows the court to take judicial notice of . . . facts which are a matter of public record.") (internal citations and quotations omitted).

intervenor-defendants in that parallel litigation, defending the Program jointly with the School District.

In August 2011, the trial court enjoined the Program as violating several provisions of the Colorado Constitution. In June 2015, the Colorado Supreme Court upheld the trial court's injunction of the Program, with a plurality concluding that the inclusion of religious schools violated the Colorado Constitution.

In October 2015, the School District and the Institute for Justice both filed petitions for certiorari in the U.S. Supreme Court, arguing that exclusion of religious schools from a school-grant program would violate the federal Constitution, and asking the Court to overturn the decision of the Colorado Supreme Court enjoining the Program. Those petitions are currently pending.

In March 2016, the School District modified the Program and renamed it the School Choice Grant Program. Because, as the School District admits, the School Choice Grant Program is not a new program, but merely a revised version of the earlier, enjoined program, we refer to both the original and the modified versions as "the Program." The modified version is similar to the original Program in all respects; the only exception is that only secular schools may participate. The School District then took steps to implement the modified version of the Program even though implementing the Program is prohibited by the injunction affirmed by the Colorado Supreme Court. The Institute for Justice promptly filed suit against the School District to enjoin the modified Program, asserting that the exclusion of religious schools violates the federal Constitution.

STANDARD OF REVIEW

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Spokeo, Inc. v. Robins*, __ U.S. __, 2016 WL 2842447, at *5 (May 16, 2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). "The determination of subject matter jurisdiction is a threshold question of law. As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them authority to hear." *Raccoon Recovery, LLC v. Navoi Mining & Metallurgical Kombinat*, 244 F. Supp. 2d 1130, 1136 (D. Colo. 2002) (citations omitted).

To survive a motion to dismiss, a complaint must "state[] a *plausible* claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added). A plausible claim for relief "must contain . . . all the material elements necessary to sustain a recovery under some viable legal theory." *Welsh v. Bishop*, No. 13-cv-01721-PAB-CBS, 2015 WL 1064155, at *2 (D. Colo. Mar. 9, 2015) (quoting *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008)). "A claim may be dismissed either because it asserts a legal theory not cognizable as a matter of law or because the claim fails to allege sufficient facts to support a cognizable legal claim." *Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270, 1271 (D. Colo. 2004).

ARGUMENT

I. This case should be dismissed because there is no actual controversy between the named Plaintiffs and the named Defendants.

The School Board and the Institute for Justice are nominally on opposite sides of this case, but in reality, they both seek the same goal: a school voucher program that includes religious schools. They have argued together to the Colorado Supreme Court, and continue to

argue to the U.S. Supreme Court, that the federal Constitution prohibits the exclusion of religious schools from a publicly funded school voucher program, and therefore that the original program, which includes religious schools, should be reinstated. *See* Pet'rs.' Pet. for Writ of Cert., *Douglas Cty. Sch. Dist., et al. v. Taxpayers for Pub. Educ., et al.*, Ex. 2, Douglas Decl. Ex. D., at 3 (School District petition arguing that "[f]orcing school districts to deviate from . . . neutrality is nothing less than unconstitutional discrimination against religion"); *id.* at 30 ("the restriction of available schools to those without religious affiliations is not just artificial and counterproductive, but unconstitutional"); Pet'rs.' Pet. for Writ of Cert., *Doyle, et al. v. Taxpayers for Pub. Educ., et al.*, Ex. 2, Douglas Decl. Ex. C, at 3 (Institute for Justice petition arguing that a government may not bar religious schools from a voucher program); Intervenors' Combined Resp. Br. Opp. Pls.' Mot. for Prelim. Inj., Ex. 2, Douglas Decl. Ex. I, at 3 (Institute for Justice brief in the Colorado Supreme Court arguing that excluding religious schools from the program would "violate religious protections in the U.S. Constitution"). That issue—whether the exclusion of religious schools from a school-grant program violates the federal Constitution—is the core of the Institute for Justice's claims against the School District in this case. And yet, the School District and the Institute for Justice, as joint petitioner-appellants in ongoing litigation involving the same school-grant program, continue to advocate for the same position on that key issue. They are not adverse. Quite the contrary; they both desire the same result. Therefore, no case or controversy exists.

Because "Article III of the Constitution ensures that federal courts are not roving commissions assigned to pass judgment on the validity of the nation's laws, but instead address only specific cases and controversies," the joint effort by the School District and the Institute for

Justice to obtain a federal-court ruling they both desire is fatal to Plaintiffs' Complaint. *See Ward v. Utah*, 398 F.3d 1239, 1246 (10th Cir. 2005) (internal quotation marks and citations omitted).

An "actual controversy exists only when the parties 'ha[ve] taken adverse positions.'" *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1385 (10th Cir. 2011) (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242 (1937)). Moreover, "colluding to create federal jurisdiction is strictly prohibited." *Prier v. Steed*, 456 F.3d 1209, 1214 n.4 (10th Cir. 2006) (citing *United States v. Johnson*, 319 U.S. 302, 305 (1943)). It is well settled that when "there is no real dispute between the plaintiff and defendant"—when "their interest in the question brought [to the Court] for decision is one and the same, and not adverse"—federal courts lack jurisdiction. *Lord v. Veazie*, 49 U.S. 251, 254 (1850); *see also Charlotte-Mecklenburg*, 402 U.S. at 47-48 (dismissing case because "both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution."). Particularly "when [a court] assumes the grave responsibility of passing upon the constitutional validity of legislative action," if the parties to a case are not genuine adversaries "[i]t is the court's duty to . . . dismiss the cause without entering judgment on the merits." *Johnson*, 319 U.S. at 304-05.

Here, the School District and the Institute for Justice simply are not "genuine adversaries." Acting in concert, both have taken and continue to take the same position on the key issue in this case—including before the U.S. Supreme Court—arguing that it is unconstitutional for a governmental body like the School District to implement a voucher program that excludes religious schools.

The alignment between the two sides in this case is already apparent at this early stage, not only from the *pro forma* Answer filed by the School District, but also from the Proposed Scheduling Order filed in this case on May 18, 2016. The following is listed as an "undisputed fact" agreed to by both parties:

> Article IX, section 7 of the Colorado Constitution is a "Blaine Amendment"; it was motivated by an anti-religious and, more specifically, anti-Catholic animus, and its history, text, and operation evince an object of anti-religious animus. It has as its object and purpose the suppression of religion and religious conduct.

In fact, the district court in the parallel state court action found that the School District and Institute for Justice had failed to prove their contention that Article IX, section 7 of the Colorado Constitution was borne of anti-Catholic animus. August 12, 2011 Order, Ex. 2, Douglas Decl. Ex. A, at 35. As the district court explained, "Colorado's 'no aid' provision is nearly identical to a provision in the Illinois Constitution, Article VIII, Section 3, which was enacted prior to the proposal of the Blaine amendments." *Id.* Moreover, the School District's and Institute for Justice's own expert, who was presented in their joint witness list and at trial, admitted under oath that some "Catholics even conducted a 'pro-constitution' rally in Denver just days before ratification." *Id.* Throughout the litigation, Intervenors and their *amici* have submitted voluminous exhibits and briefing, citing numerous secondary sources, that disprove the allegations of anti-Catholic animus. That the parties here represent this issue as being "uncontested" demonstrates the ongoing collusion of the parties and why there is no actual controversy here.

The circumstances of this case are analogous to what the Supreme Court prohibited in *United States v. Johnson*, 319 U.S. 302 (1943). In *Johnson*, a tenant and landlord conspired to

bring a case in district court to challenge the constitutionality of the Emergency Price Control Act of 1942. *Id.* at 302-03. The United States, as intervenor, appealed the district court's ruling that the law was unconstitutional. *Id.* at 303. After examining the record, the Supreme Court vacated the district court's judgment with instructions to dismiss for lack of jurisdiction, because the "cooperation of the two original parties" proved the suit to be "collusive." *Id.* at 304-05. Without the "honest and actual antagonistic assertion of rights to be adjudicated," federal courts lack jurisdiction to decide the merits of a case. *Id.* at 305 (internal quotations and citations omitted).

The Institute for Justice asks this Court to do exactly what Article III prohibits: opine on issues of constitutional law without the requisite adversarial nature and concreteness. The Court therefore lacks subject-matter jurisdiction to hear this case.

II. This case should be dismissed because Plaintiffs' claims are foreclosed by existing precedent of the United States Supreme Court

In order to survive a motion to dismiss, a complaint must show some "cognizable legal theory" upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The issue that the Institute for Justice brings to this Court—whether governments may decline to fund religious education while choosing to fund secular education—has already been decided by the U.S. Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004).

In *Locke*, the Supreme Court held that a state law barring university students from using state scholarship funds to pursue a degree in theology did not violate the U.S. Constitution, even though allowing such use of scholarship funds would be permitted under the Establishment Clause. *Id.* at 715, 719, 720 n.3, 725 n.10. Addressing an argument that the law violated the Free Exercise Clause, the Court first noted that "'there is room for play in the joints'" between

that Clause and the Establishment Clause; "[i]n other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19 (internal quotations and citations omitted). The Court then explained that the law did not significantly burden students' religious-exercise rights. The law did not impose "criminal [or] civil sanctions on any type of religious service or rite," "deny to ministers the right to participate in the political affairs of the community," or "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21. "The State ha[d] merely chosen not to fund a distinct category of instruction," and the students were not prohibited from undertaking theological study. *Id.* at 721.

The Court then found that the law was motivated by a "historic and substantial state interest" in ensuring that religious education is supported by private money instead of tax dollars. *Id.* at 721-23, 725. The Court held that because any burden on religion was "minor," while the state interest was "substantial," the law did not violate the Free Exercise Clause. *Id.* at 725.

The Court also rejected in a footnote the argument that the law violated the Equal Protection Clause, explaining that because the program did not violate the Free Exercise Clause, it was subject only to rational basis scrutiny under the Equal Protection Clause. *Id.* at 720 n.3; *accord Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (holding that a religion-related Equal Protection claim merited only rational basis scrutiny because the Free Exercise claim failed). In the same footnote, the Court dismissed the plaintiff's Free Speech claim, explaining that scholarships are "not a forum for speech." 540 U.S. at 720 n.3. The Court similarly rejected in a footnote the plaintiff's Establishment Clause claim, explaining that the state's decision not to subsidize religious instruction did not reflect "animus toward religion." *Id.* at 725, 725 n.10.

Locke was but the latest of a long line of U.S. Supreme Court decisions establishing that states have the right to deny public funding to religious schools, even when they offer comparable funding to secular private schools. In *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), *aff'g mem.*, 332 F. Supp. 275 (E.D. Mo. 1971) (three-judge court), for example, the Court summarily rejected a free-exercise and equal-protection challenge to Article IX, Section 8 of the Missouri state constitution, a clause which is virtually identical to Article IX, Section 7 of the Colorado Constitution (on which the Colorado Supreme Court's injunction against the Program principally rests) and prohibits the state from aiding religious but not secular private schools. *See also Sloan v. Lemon*, 413 U.S. 825, 834-35 (1973) (rejecting an argument that the Equal Protection Clause would bar a voucher-like "tuition reimbursement" program from funding secular private schools but not religious private schools; explaining, "valid aid to nonpublic, nonsectarian schools [provides] no lever for aid to their sectarian counterparts"); *accord Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973); *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974), *aff'g mem.*, 364 F. Supp. 376 (W.D. Mo. 1973).

Numerous federal and state appellate courts have accordingly rejected arguments that providing funding to secular institutions requires extension of funding to religious institutions. For example, in *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 354 (1st Cir. 2004), the court held that a state did not violate the U.S. Constitution by paying tuition for students in secular but not religious private schools, noting, "[*Locke*] confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity."

In *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007), the court, relying on *Locke*, ruled that a state did not violate the U.S. Constitution by denying a religious facility for troubled youths public funding available to non-religious entities. In *Bowman v. United States*, 564 F.3d 765, 775 (6th Cir. 2008), the court upheld a federal regulation that provided former military service-members credit toward retirement for secular but not religious public-service work, explaining that "[t]he withholding of a retirement credit for [a former soldier's] work as a youth minister does not burden his right to practice or adhere to his religious beliefs." And in *Gary S. v. Manchester School District*, 374 F.3d 15, 21 (1st Cir. 2004), the court ruled that a school district was not obligated to provide disabled children at private schools with special-education benefits equal to those given to such children at public schools, for "the mere non-funding of private secular and religious school programs does not 'burden' a person's religion or the free exercise thereof." *See also Trinity Lutheran Church of Columbia, Inc. v. Pauley,* 788 F.3d 779 (8th Cir. 2015) (holding that a state did not violate the U.S. Constitution by denying a religious preschool funding for playground renovations that was available to secular schools), *cert. granted*, 136 S. Ct. 891 (Jan, 15, 2016) (No. 15-577); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 750 F.3d 184, 198 (2d Cir. 2014) (holding that city board of education's rule barring the use of school facilities for religious worship after hours did not violate the U.S. Constitution); *Wirzburger v. Galvin*, 412 F.3d 271, 279–82 (1st Cir. 2005) (upholding against federal constitutional challenge prohibition in Massachusetts Constitution on use of initiative process to repeal constitutional provision restricting public aid to religious organizations).

State courts have reached similar conclusions. In *Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006), the Maine Supreme Court rejected a federal constitutional challenge

to the program that was also at issue in *Eulitt*, 386 F.3d 344, stating, "[t]he statute merely prohibits the State from funding [religious parents'] school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner." In *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 680 (Ky. 2010), the Kentucky Supreme Court spurned a federal constitutional attack on a state constitutional provision that restricts state funding to religious educational institutions, concluding that any free-exercise interests had to yield to "the state's legitimate and fully constitutional antiestablishment concerns." *Accord Bush v. Holmes*, 886 So. 2d 340, 362–66 (Fla. Dist. Ct. App. 2004) (rejecting federal constitutional challenge to state constitutional provision barring state funding of religious schools), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006).

There is no case law in conflict with this long-standing and broad line of authorities. No case has held that a state that chooses to provide funding to students attending secular schools is required to provide funding to students attending religious schools. The Institute for Justice's reliance on *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), is misplaced. The Tenth Circuit there only held that states may not discriminate between different kinds of religious institutions in allocating public funding, or conduct extremely intrusive inquiries into the internal religious affairs of such institutions to determine which religious entities should receive state aid. *Id.* at 1250. And the Tenth Circuit declined to reach the issue presented in this case and in cases such as *Eulitt*. *See id.* at 1256 ("We need not decide if we would have upheld the same program [as in *Eulitt*], because Colorado's funding scheme raises constitutional problems not confronted there."). Thus, it would take a change in the law overturning *Locke* and its progeny for Plaintiffs to prevail in this case. Plaintiffs are asking this

Court to speculate as to whether the Supreme Court might make such a change in the *Trinity Lutheran* case pending before it, for as the Eighth Circuit succinctly stated, "[u]ntil the [Supreme] Court rules otherwise," the Court's opinion in *Locke* is controlling. *Trinity Lutheran*, 788 F.3d at 785 n.3. And *Locke* forecloses the Institute for Justice's argument. The Institute for Justice therefore has no legal theory on which this Court may provide relief.

III. In the alternative, this case should be stayed pending the outcome of parallel state litigation

Alternatively, this Court should defer ruling on the pending motions in this case and instead stay all proceedings in light of the ongoing state-court litigation involving the Program, the results of which will either moot the Institute for Justice's claims entirely or substantially affect the analysis that this Court would need to undertake in order to decide those claims. A stay is appropriate to avoid duplicative litigation and conserve judicial resources. "[T]he power to stay is 'incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Franklin v. Merck & Co., Inc.*, No. 06-cv-02164-WYD-BNB, 2007 WL 188264, at *2 (D. Colo. Jan. 24, 2007) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). A stay is particularly appropriate when substantially similar claims are already pending in another court, the disposition of which may render a case moot. *See Gerbino v. Sprint Nextel Corp.*, Nos. 12-2722-CM, 13-2235-CM, 2013 WL 2405558 (D. Kan. May 31, 2013) (staying a federal claim pursuant to the *Colorado River* doctrine when substantially similar claims were brought in state and federal court and the state court action would dispose of the claims).

The rationale for issuing a stay is compelling here. First, in implementing the Program, the School District is violating the existing permanent injunction granted by the state trial court

and upheld by the Colorado Supreme Court. As mentioned above, Intervenors have concurrently filed a Motion for Enforcement of August 12, 2011 Permanent Injunction Restraining Defendants' Resumed Funding and Implementation of an Unlawful School Voucher Program. If that motion is granted, the Institute for Justice's claims would be moot.

Second, the U.S. Supreme Court is currently considering petitions for certiorari involving the Program filed by the School District and the Institute for Justice, which present the same legal issues as the claims in this case. A decision by the Supreme Court in the parallel litigation could moot or otherwise dictate the result in this case.

There is no reason to move forward with this case in light of these two ongoing proceedings. The Institute for Justice's attempts in its Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction to create an exigent situation do not alter that analysis. The alleged urgency contrived there provides no basis for the Court to rule, or rule in an expedited manner, on Plaintiffs' claims. The original Program that included religious schools, including the school which Plaintiffs plan to have their children attend (Valor Christian), has been enjoined for nearly five years, and it has been nearly a year since a plurality of the Colorado Supreme Court announced that the inclusion of religious schools such as Valor Christian in the Program violates the Colorado Constitution. Essentially, Plaintiffs argue that they have an urgent need to know if the ruling by the Colorado Supreme Court is going to be overturned by ***the U.S. Supreme Court*** at some future point, and they therefore ask ***this Court*** to make new law—law that conflicts with Supreme Court precedent and a uniform line of appellate decisions—predicting what the Supreme Court might do, in order to help them make educational decisions

for the upcoming school year. This Court should resist such an attempt to improperly use a federal district court.

As the status quo in Douglas County for nearly five years has been no voucher program at all, this Court should ensure that there is ample time for thorough briefing and investigation into the important issues raised in this Motion and in this case, particularly given the unorthodox circumstances under which this case has been brought and the clear alignment between the purportedly adverse parties.

CONCLUSION

For the reasons set forth above, Intervenors respectfully request that this Court dismiss Plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) for lack of any actual controversy, given the alignment of the parties on the ultimate questions and issues in this case. Furthermore, this case warrants dismissal under Fed. R. Civ. P. 12(b)(6) because Plaintiffs fail to state a claim upon which relief can be granted, for their claims are foreclosed by the decisions of the U.S. Supreme Court and related federal precedents. Alternatively, Intervenors ask the Court to stay this proceeding given the ongoing, parallel litigation over the underlying school-grant program involving the same parties and issues.

Respectfully submitted this 24th day of May, 2016.

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