No. 07-1247

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff-Appellant,

v.

RAYMOND T. BAKER,

Defendants-Appellee.

Appeal From the United States District Court
for the District of Colorado
The Honorable Judge Marcia S. Krieger
D.C. No. 1:04-cv-02512-MSK-BNB

Brief of American Jewish Congress, Americans United for Separation of Church and State, American Civil Liberties Union, People For the American Way Foundation, the Anti-Defamation League, the American Federation of Teachers, and the American Jewish Committee as *Amici Curiae* in Support of Appellee Baker and in Support of Affirmance

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Of Counsel:
MARC STERN
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, New York

AYESHA N. KHAN
RICHARD B. KATSKEE
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C St., NE
Washington, DC 20002

WALTER DELLINGER*
(Counsel of Record)
HARVARD LAW SCHOOL
SUPREME COURT AND APPELLATE PRACTICE CLINIC

PAMELA HARRIS
ALLISON ORR LARSEN**
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 2006
Telephone: (202) 383 5300
**May be contacted at O'Melveny & Myers LLP*
***Admitted only in Virginia; supervised by principals of the firm.*

Attorneys for Amici Curiae (additional counsel listed on inside cover)

Of Counsel:
DANIEL MACH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
PROGRAM ON FREEDOM OF RELIGION AND BELIEF
915 15th Street, NW
Washington, DC 20005

MARK SILVERSTEIN
AMERICAN CIVIL LIBERTIES UNION OF COLORADO
400 Corona Street
Denver, CO 80218

JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, NW, Suite 400
Washington, DC 20036

STEVEN M. FREEMAN
STEVEN C. SHEINBERG
ANTI-DEFAMATION LEAGUE
605 Third Ave
New York, NY 10158-3560

DAVID STROM
AMERICAN FEDERATION OF TEACHERS
555 New Jersey Ave., NW.
Washington, DC 20001

JOSHUA J. KUNIS
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022

Student Participants[†]*:*
MICHAEL BERN
FRANCISKA COLEMAN
JESSICA LINDEMANN
HARVARD LAW SCHOOL
SUPREME COURT AND APPELLATE PRACTICE CLINIC

[†] *Appearing pursuant to 10th Cir Rule 46.7. Consent of Parties and Agreement of Supervising Attorney on File with Clerk's Office.*

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INTERESTS OF *AMICI*[1]

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. It has taken an active role in challenging the provision of government aid to religious institutions.

Americans United for Separation of Church and State is a 75,000-member national, non-sectarian, public-interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated as counsel for a party or as an *amicus curiae* in virtually every church-state case to come before the U.S. Supreme Court, and routinely participates in cases before this court and the other federal courts of appeals as well.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to the preservation and defense of constitutional rights and civil liberties. The ACLU of Colorado is one of its statewide affiliates, with over 11,000 members. Since its founding in 1920, the ACLU has frequently advocated in support of the religious freedoms guaranteed by the First Amendment,

[1] The parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a).

both as direct counsel and as *amicus curiae*. Because this case involves the balancing of various constitutional liberties, its proper resolution is a matter of significant concern to the ACLU and ACLU of Colorado, and to their members throughout the country.

People For the American Way Foundation ("PFAWF") is a nationwide, non-profit, non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than one million members and activists across the country, including more than 21,000 in Colorado. PFAWF is firmly committed to the principles of religious liberty and freedom of conscience protected by the Constitution, and has frequently represented parties and filed *amicus curiae* briefs in cases involving the Religion Clauses of the First Amendment.

The Anti-Defamation League ("ADL") is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. As part of its core beliefs, ADL maintains a deep commitment to the principles of religious liberty that are enshrined in the religion clauses of the First Amendment.

The American Federation of Teachers, AFL-CIO ("AFT") is a national labor union that represents over 1.3 million members who are employed in public schools, community colleges, universities, state government and health care. Over 120,000 AFT members work in higher education. Since its founding in 1916, AFT has filed numerous *amicus* briefs on First Amendment Establishment and Free Exercise Clause issues.

The American Jewish Committee ("AJC"), a national organization of over 175,000 members and supporters, with 31 regional chapters, including one in Denver, Colorado, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans.

Amici are participating in this case to address whether Colorado may choose not to fund scholarships used at pervasively-sectarian universities – schools whose curricula and policies are so entwined with religion that any public money given to them would necessarily fund religious activity. *Amici* believe that nothing in the U.S. Constitution prohibits States from making this choice, and thus file this brief in support of Colorado and urge affirmance of the district court.

INTRODUCTION

The Supreme Court has already answered the question presented by this case: Although a State may not directly encroach on religious beliefs, it is not affirmatively compelled to fund religious education when it funds a secular counterpart. The Court applied this rule just three years ago in *Locke v. Davey*, reiterating that there is room in the U.S. Constitution for a "play in the joints" between the two Religion Clauses, and holding that a State may decline to fund religious education consistent with the Free Exercise Clause even when such funding would not violate the Establishment Clause. 540 U.S. 712, 718-21 (2004).

We agree with the State of Colorado that *Locke* controls this case. And contrary to the intimations of Colorado Christian University ("CCU") and its *amici*, this Court need have no concern that *Locke* is somehow out of step with mainstream Free Exercise doctrine. Quite the opposite: *Locke* falls neatly into line with the whole of the Supreme Court's Free Exercise jurisprudence, simply reaffirming that a State's discretionary decision not to subsidize certain religious activity does not burden religious exercise in violation of the Free Exercise Clause.

Nor can *Locke* sensibly be limited, as CCU and its *amici* urge, to restrictions on funding of theology degrees or ministerial training, rather

than religious education generally. No court has adopted such a narrow reading of *Locke*, and for good reason: There is no legal or historical basis for cabining *Locke* in that way. CCU may disagree with the outcome in *Locke*, but that of course provides no basis for re-litigating a Supreme Court decision here.

Finally, there is nothing about the state-law distinction between pervasively-sectarian and non-pervasively-sectarian institutions that raises concerns about denominational discrimination under *Larson v. Valente*, 456 U.S. 228 (1982). Colorado's bar on funding pervasively-sectarian institutions – a concept with roots in the Supreme Court's own Establishment Clause jurisprudence – does not discriminate against any religious denomination, nor does it reflect an impermissible hostility to minority or "traditionalist" religious faiths. *See* Brief for the Center for Public Justice et al. as *Amici Curiae* in Support of Appellant ("P.J. Br.") at 28-29.

ARGUMENT

I. *LOCKE V. DAVEY* IS FULLY CONSISTENT WITH THE SUPREME COURT'S FREE EXERCISE CLAUSE JURISPRUDENCE.

Though the district court properly held that *Locke* controls this case, it also cast that decision as a doctrinally curious "deviation" from general Free

Exercise Clause principles. *Colorado Christian Univ. v. Baker*, No. 04-02512, 2007 WL 1489801, at *4 (D. Colo. May 18, 2007). Likewise, CCU and its *amici* describe *Locke* as a "narrow [] exception" to ordinary Free Exercise rules, *see* Opening Brief of Appellant CCU ("App. Br.") at 34; *see also* Brief for United States as *Amicus Curiae* ("U.S. Br.") at 24-25, in particular tension with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). That is simply not so.

Locke is, of course, binding on this Court, regardless of the parties' views of its merits. But *Locke* also is a straightforward application of well-established Free Exercise precedent, including *Lukumi*. Far from marking some radical doctrinal departure, *Locke* simply reaffirms the Supreme Court's long-standing commitment to a healthy "play in the joints" between the two Religion Clauses.

A. *Locke* Is Entirely Consistent With The Whole Of Free Exercise Doctrine.

CCU and its *amici* argue (and the district court agreed) that *Lukumi* establishes a "categorical conclusion that non-neutral statutes" – statutes not neutral as to religion – "are *always* presumptively unconstitutional." *Baker*, 2007 WL 1489801, at *4 (emphasis in original); *see* App. Br. at 33; U.S. Br. at 22. It follows, they claim, that *Locke*, which upheld Washington's religion-specific funding statute without even subjecting it to strict scrutiny,

cannot be reconciled with the *Lukumi* rule and must be limited to its facts. App. Br. at 34.[2]

That account is incorrect. The Supreme Court has never held that a failure to fund religious activity necessarily violates the Free Exercise Clause, nor that any differential treatment of religion, without more, renders a statute presumptively unconstitutional. CCU's myopic focus on *Lukumi* ignores that decision's doctrinal background. Once *Lukumi* is placed back in context, it becomes obvious that its holding is not what CCU and its *amici* claim – and equally obvious that *Locke* is fully consistent with *Lukumi* and other Free Exercise precedent.

As the district court itself acknowledged, *Lukumi* is properly understood in sequence, as a decision following and clarifying the Supreme Court's watershed holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990). *See Baker*, 2007 WL 1489801, at *4 (*Smith* is "starting point" for "sequential analytical framework"). In the years before it decided *Smith*, the Supreme Court had established a two-part test for evaluating Free Exercise

[2] Even on its own terms, the argument that *Locke* must be read narrowly to reconcile it with *Lukumi* makes no sense. There is no reason why *Lukumi*, an earlier and more general decision, would take precedence over *Locke*, a more recent decision that specifically addresses the issue presented here. In fact, as we show below, the two decisions are perfectly consistent. But were there any tension between the two, then it is *Locke*, as the subsequently-decided case directly on point, that would govern.

claims: Religious adherents were entitled to a Free Exercise exemption from any law that (a) substantially burdened their religious exercise and (b) did not serve a compelling state interest. *See Smith*, 494 U.S. at 883. In *Smith*, the Court significantly revised that doctrine, holding that a substantial burden on religious exercise need *not* be justified by a compelling interest when the burden results from a neutral law of general applicability. *Id.* at 885.

Lukumi, decided three years after *Smith*, did not work some massive doctrinal overhaul on the Free Exercise Clause. It simply delineated the boundaries of the *Smith* rule, clarifying that a law burdening religious exercise qualifies for rational-basis review under *Smith* only if it is truly religiously neutral. *Lukumi* involved a state law that substantially burdened – indeed, criminalized – ritual animal sacrifice, a central element of Santeria religious practice. 508 U.S. at 525-27. The imposition of that burden, the Court held, remained subject to strict scrutiny, rather than to *Smith*'s rational-basis test. Though the law in question made no mention of the Santeria faith or of religion in general, the Court reasoned that it was not actually religiously neutral: It effectively singled out for criminalization only religious killings of animals, and appeared to be motivated by raw animus against the Santeria. *Id.* at 542-43.

Thus, as the Supreme Court explained in *Locke* – rejecting precisely the reading of *Lukumi* now advanced by CCU – *Lukumi* did *not* establish that a law "is presumptively unconstitutional [solely] because it is not facially neutral with respect to religion." *Locke*, 540 U.S. at 720; *see id.* ("We reject [the] claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning.") *Lukumi* held only that a law amounting to a "religious gerrymander" that suppresses or burdens religious exercise triggers strict scrutiny even after *Smith*. *Lukumi*, 508 U.S. at 535; *id. at* 534 ("[S]uppression of the central element of the Santeria worship service was the [law's] object"); *see id.* at 542 ("[L]aws burdening religious practice must be of general applicability" under *Smith*).

The Supreme Court's subsequent decision in *Locke* is, not surprisingly, fully consistent with that holding. The Washington bar on funding of post-secondary studies "devotional in nature or designed to induce religious faith," *Locke*, 540 U.S. at 716, obviously was not religiously neutral. But Washington's "cho[ice] not to fund a distinct category of [religious] instruction," the Court held, nevertheless was fully consistent with the Free Exercise Clause as construed by *Lukumi*. *Id.* at 721. Any impact on religious activity that flowed from Washington's funding

restriction was "of a far milder kind" than that at issue in *Lukumi* or other cases finding Free Exercise violations: By simply declining to subsidize religious activity, Washington 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 [adherents] to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21 (citing, *inter alia, McDaniel v. Paty,* 435 U.S. 618 (1978), and *Sherbert v. Verner*, 374 U.S. 398 (1963)). Nor was there any evidence of "animus toward religion," *id.* at 725, a key factor in the *Lukumi* analysis. In short, *Locke*'s funding restriction neither substantially burdened religious exercise nor reflected religious hostility, taking it entirely outside the ambit of the *Lukumi* rule. *See, e.g.*, *Eulitt v. Maine*, 386 F.3d 344, 355 (1st Cir. 2004) (applying *Locke* and distinguishing *Lukumi* where funding restriction reflects no "impermissible animus" and does not "impos[e] any civil or criminal sanction on religious practice, den[y] participation in the political affairs of the community, or require[] individuals to choose between religious beliefs and government benefits").

Indeed, *Locke*'s core holding – that a state's discretionary choice not to fund religious education is permissible under the Free Exercise Clause – is both consistent with and compelled by a long line of Supreme Court

precedent extending well beyond *Lukumi*. The Court has never held that a failure to fund religious activity, without more, burdens religious exercise in violation of the Free Exercise Clause. On the contrary, the Court has made clear that a law making religious practice more expensive than it would have been under a different law is not by itself a Free Exercise violation. *E.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 605-06 (1961). As the State's brief details, it is *CCU*'s position, affirmatively requiring the State to fund religious activity, that would be the constitutional outlier, running counter to well-established law granting States and the federal government ample discretion to decide which activities, including constitutionally-protected activities, they will subsidize. *See* Appellees' Answering Brief ("State Br.") at 19-22.

B. *Locke* Reaffirms The Supreme Court's Commitment To "Play In The Joints" Between The Religion Clauses.

Locke is fully of a piece with Religion Clause jurisprudence in a second respect, as well. The crux of Davey's claim in *Locke* – precisely the same as that advanced here by CCU, *see* App. Br. at 67-68 – was that because Washington *could*, under the federal Establishment Clause, fund his degree in devotional theology, it was *required* to do so under the Free Exercise Clause. *Locke*, 540 U.S. at 719. In rejecting that claim, the Supreme Court did no more than reaffirm decades of precedent establishing

that "there is room for play in the joints" between the two Religion Clauses of the federal Constitution. *Id.* at 718 (quoting *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970)).

The Supreme Court has long carved out a zone of discretion between the Establishment and Free Exercise Clauses. Under *Smith*, for instance, the Free Exercise Clause very rarely requires States to accommodate religious practices burdened by their laws. But as the Court has made clear, that does not by itself mean that the Establishment Clause forbids such accommodations. *See Smith*, 494 U.S. at 890; *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding broad Title VII exemption for religious institutions). Rather, States have some latitude to exercise their own discretion and protect free exercise values to a degree greater than is mandated by the federal Constitution. *Walz*, 397 U.S. at 673.

Locke simply applies the obvious corollary to this rule: That a state action may be "permitted by the Establishment Clause" does not mean that it is "required by the Free Exercise Clause." *Locke*, 540 U.S. at 719. In this context, too, there remains some room for state legislators to exercise their own judgment in balancing the values underlying the Religion Clauses. And as *Locke* confirms, a State's interest in not funding religious instruction may be exceptionally weighty, and fully deserving of deference, even when

a given funding restriction is not compelled by the federal Establishment Clause. *Id.* at 718-19, 722.

Here again, it is CCU's position, not *Locke*, that would dramatically change Religion Clause law. For years, of course, the difficult question under the First Amendment has been identifying which forms of public assistance to religious education are *permitted, see Mitchell v. Helms* 530 U.S. 793 (2000) (Court divided 4-2-3 on permissibility of loan of educational equipment to private schools including Catholic schools); the Supreme Court has never held that such funding is constitutionally *required*. The rule advanced by CCU and its *amici* – that all forms of aid permissible under the Establishment Clause are compelled by the Free Exercise Clause – would leave the States and the federal government in an untenable position, facing Establishment Clause challenges when they extend disputed forms of aid to religion and Free Exercise challenges when they do not. *Cf. Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) (Religion Clauses should not be "the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny"). *Locke* broke no new ground in rejecting that constitutional "rigidity," *see Walz*, 397 U.S. at 669, but simply

and convincingly reaffirmed that the Religion Clauses leave room for State policy choices not to fund religious education.

II. HISTORY PROVIDES NO BASIS FOR DISTINGUISHING *LOCKE* FROM THIS CASE.

CCU cannot ask expressly that this Court overrule the Supreme Court's decision in *Locke*. Instead, CCU argues that *Locke* should be limited entirely to its facts, applied only to bars on funding of ministerial training and not to cases involving religious education more generally. App. Br. at 34. But there is no basis for CCU's grudging reading of *Locke* other than CCU's disagreement with that decision; and read fairly, *Locke* clearly governs the funding restriction at issue here.

In truth, this is not a hard question. The State's brief amply illustrates the futility of trying to distinguish this case from *Locke* on any principled ground. *See* State Br. at 11-29. And every court to consider the issue since *Locke* was decided in 2004 has concluded that *Locke* extends beyond clergy training and allows the States more general discretion in declining to fund religious education of any kind. *See Eulitt v. Maine*, 386 F.3d 344, 355 (1st Cir. 2004); *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 838 (W.D. Mich. 2005), *aff'd*, 479 F.3d 403 (6th Cir. 2007), *cert. denied*, -- U.S. -- (2007); *Bowman v. United States*, 512 F. Supp. 2d 1056, 1066 (N.D. Ohio 2007);

Anderson v. Town of Durham, 895 A.2d 944, 961 (Me. 2006); *Bush v. Holmes*, 886 So. 2d 340, 360 (Fla. Dist. Ct. App. 2004).

CCU nevertheless insists that *Locke* can be distinguished from this case on the basis of history. According to CCU, *Locke* must be understood as resting on a long tradition of aversion to public funding for ministerial training. Because there is "no similar historical pedigree" behind the failure to fund religious education generally, CCU argues, *Locke* does not apply in that context. App. Br. at 38; *see also* U.S. Br. at 24-25. As we have shown already, the premise of CCU's claim is false: *Locke* rests not on history alone, but also on longstanding Religion Clause principles that would in any event compel the same result. *See supra* Part I. But CCU's historical analysis is also badly flawed. In fact, State prohibitions on public funding of sectarian education have a long and substantial "historical pedigree" of their own.

That should not be surprising. At the time of their adoption, the Religion Clauses were thought to advance two distinct interests: freedom of conscience and the integrity of religion itself. Thomas Jefferson famously explained that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom*

(1779); *see* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785). At the same time, the "most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities. Guaranteed State support was thought to stifle religious enthusiasm." Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1439 (1990). Both those broad principles are implicated as much by state sponsorship of religious education as they are by state funding of clergy training.

Indeed, recognition of those principles stimulated an early and widespread movement in the States towards nonsectarian education and the rejection of funding for sectarian schools. As "the momentum for popular education increased and in turn evoked strong claims for State support of religious education, contests not unlike that which in Virginia had produced Madison's Remonstrance appeared in various forms in other States." *See McCollum v. Bd. of Educ.*, 333 U.S. 203, 214 (1948) (Frankfurter, J., dissenting). The result of the ensuing debates, "often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and

feeling, of the American people." *Id.* at 215; *see* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 113-14 (2002).

Early America's unwillingness to provide public support for religious education, moreover, extended fully to the university context at issue here. Madison and especially Jefferson were heavily involved in the creation and oversight of the state-funded University of Virginia, where they excluded religious education as incompatible with the principles behind the First Amendment. Leonard Levy, *Jefferson and Civil Liberties: The Darker Side* 8 (1986). Furthermore, Jefferson made clear in his personal correspondence that "constitutional reasons" compelled a stance "against a public establishment of any religious instruction." Letter from Thomas Jefferson to Dr. Thomas Cooper (November 2, 1822), *available at* http://etext.lib.virginia.edu (last visited December 6, 2007). The principle against funding sectarian education at schools of higher education was so firmly accepted in Virginia that when a resolution was introduced to establish an Episcopal school within the College of William and Mary, it "drew immediate animadversions from the press," which prompted Madison to caution others against incurring the same wrath by repeating the experience. Letter from James Madison to Edward Everett (March 19,

1823), *available at* http://www.constitution.org/jm/18230319_everett.htm (last visited December 6, 2007).

CCU is therefore incorrect when it suggests that there never has been substantial popular opposition to "modest aid to college students training in secular professions" at schools with sectarian commitments. App. Br. at 38. In fact, several States reacted strongly against public funding for sectarian colleges,[3] and the Framers most responsible for the Religion Clauses rejected state aid for such religious education at Virginia's state-sponsored university. In short, the historical opposition to state-funded clergy training noted by *Locke*, 540 U.S. at 722-23, extends also to state-funded religious education more generally, and provides no basis for refusing to apply *Locke* to cases like this one.

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[3] In Connecticut, for instance, where a Congregationalist establishment continued until 1818, the State's financial support of then-sectarian Yale College – where individuals were educated for secular as well as ministerial fields – was an important grievance leading to disestablishment. *See* Paula Shakelton, *Remembering What Cannot Be Forgotten: Using History as a Source of Law in Interpreting the Religion Clauses of the Connecticut Constitution*, 52 Emory L.J. 997, 1023 n.142 (2003). And in Massachusetts, debate over public funding for sectarian education in 1820 precipitated an ultimately unsuccessful constitutional amendment to condition Harvard's continued state funding on the university's willingness to accept that its "Board of Overseers . . . shall not be confined to ministers of churches of any particular denomination of Christians." 2 Josiah Quincy *The History of Harvard University* 332 (1840).

III. BARRING FUNDING OF PERVASIVELY-SECTARIAN INSTITUTIONS DOES NOT CONSTITUTE DISCRIMINATION ON THE BASIS OF RELIGIOUS DENOMINATION IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

CCU and its *amici* offer one final argument against applying *Locke* in this case: They claim that Colorado's pervasively-sectarian distinction itself violates the Establishment Clause under *Larson v. Valente*, 456 U.S. 228 (1982). Even absent any burden on religious exercise cognizable under the Free Exercise Clause, in other words, CCU argues that the pervasively-sectarian distinction violates the separate command of the Establishment Clause by discriminating among denominations.[4] *See* App. Br. 43; U.S. Br. 9-10; P.J. Br. at 4. That is incorrect.

[4] CCU and its *amici* press their denominational discrimination claim under the Free Exercise and Equal Protection Clauses, as well, but focus on *Larson*. That focus is entirely appropriate. Under *Lukumi*, as explained above, disparate denominational effects may be highly probative of an absence of religious neutrality, but some cognizable burden on religious exercise remains a prerequisite for a Free Exercise Clause violation. *See supra* pp. 8-9. Absent such a burden, the Supreme Court has identified the Establishment Clause as the constitutional provision most directly concerned with denominational discrimination, and in *Larson*, set out the framework for considering such claims. If Colorado's pervasively-sectarian distinction does not violate the Establishment Clause under *Larson* – and we show below that it does not – then there is no basis for upholding claims of denominational discrimination under any other constitutional provision.

A. Colorado's Pervasively-Sectarian Distinction Does Not Discriminate Among Denominations.

First, at the most basic level, nothing about the pervasively-sectarian distinction draws lines among denominations. As the State explains, *see* State Br. at 5-6, that restriction is a functional rule designed to protect the core prohibition on public funding of religious education; "pervasively sectarian" is simply the term-of-art that describes an institution in which religious and educational missions are so intertwined that it is impossible to separate out a purely secular component for receipt of government funds. *See* Colo. Rev. Stat. § 23-3.5-105 (2007); *see also Mitchell v. Helms*, 530 U.S. 793, 841 (2000) (O'Connor, J., concurring) (the "purpose of [] inquiring whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion") (citing *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring)). Nothing about that rule turns on an institution's denominational identity.

The facts of this case illustrate the point. Regis University, a Jesuit institution, and the University of Denver, a Methodist institution, both participate in Colorado's tuition assistance program. App. Br. at 12; *Baker*, 2007 WL 1489801, at *7 (D. Colo. 2007). Two institutions have been deemed ineligible to participate: CCU, a Christian university not affiliated

with any specific denomination, App. Br. at 18, and Naropa University, a Buddhist institution. What separates eligible from ineligible institutions obviously is not denominational identity. Nor does the line track a division between majority faiths, on the one hand, and "small, new, or unpopular denominations," on the other. *Cf.* App. Br. at 50 (quoting *Larson*, 456 U.S. at 245). Rather, what CCU and Naropa have in common (and what distinguishes them from Regis and Denver under Colorado law) is a matter of institutional design: that they require attendance at religious services or meditation; or, perhaps most fundamentally, indoctrinate or proselytize during required courses. *See* Colo. Rev. Stat. § 23-3.5-105 (defining "pervasively sectarian").[5] In short, Colorado's pervasively-sectarian distinction turns on institutional and educational policy, not religious belief or identity.

[5] CCU's *amici* question the criteria used by Colorado to determine pervasively-sectarian status, suggesting that some of the statutory factors are insufficiently related to curriculum. *See* P.J. Br. at 10-11, 30-31. As the State explains, CCU has waived any objection to application of the statutory factors. *See* State Br. at 10. More fundamentally, the facts of this case present no occasion to consider *amici*'s claim: CCU's own mission statement makes clear that on the basis of curriculum alone, the institution qualifies as pervasively-sectarian. *See* App. Br. at 18 ("CCU offers students an education framed by a Christian world view" and "a Christ-centered [] education . . . that integrates biblical concepts with the arts, sciences, and professional fields"); *see also* State Br. at 34-37 (describing CCU curriculum).

B. Mere Disparate Denominational Effects, Without More, Do Not Render State Laws Subject to Strict Scrutiny Under the Establishment Clause.

Despite the fact that Colorado's pervasively-sectarian restriction does not discriminate among denominations, CCU and its *amici* argue that it violates *Larson's* command of denominational neutrality because its *effects* are not felt equally by all denominations. *See* App. Br. at 50; U.S. Br. at 18-21. But as the Supreme Court has held, statutes that affect different denominations differently are not, for that reason alone, presumptively unconstitutional under *Larson*.

Indeed, *Larson* itself made clear that it was not adopting a "disparate impact" test under the Establishment Clause. In *Larson*, the Court considered a provision exempting some, but not all, religious organizations from solicitation-related registration and reporting requirements. In striking down the exemption, the Court emphasized that the provision was "*not* simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations." 456 U.S. at 247 n.23 (emphasis added). Instead, the Court relied critically on evidence that the exemption, which once had extended to all religions, had been amended with an intent to discriminate against certain denominations. *Id.* at 253.

Similarly, the Court in *Gillette v. United States*, upheld a federal

provision exempting from the draft only those conscientious objectors with religious objections to all wars – despite the fact that the provision, as applied, favored pacifist denominations (like the Quakers) at the expense of those (like the Catholic Church) that distinguished between just and unjust wars. 401 U.S. 437, 448-54 (1971). As *Gillette* explained, and *Larson* confirmed, absent evidence of discriminatory intent to craft a "religious gerrymander," *id*. at 452, the fact that legislation touching on religion has different effects on different denominations does not call into question its constitutionality.

This well-settled rule reflects the reality that virtually every State law in the area of religion affects different denominations differently. Whenever the government seeks to accommodate religious exercise or belief, for instance, its efforts are likely to accrue to the benefit of particular denominations. For example, both United States and Colorado law exempt the religious use of peyote from their controlled substance laws, 21 C.F.R. § 1307.31; Colo. Rev. Stat. § 12-22-317 (2007) – a permissive accommodation that indisputably favors practitioners of certain American Indian faiths. Similarly, Colorado law provides that reliance on prayer in lieu of medical treatment does not constitute child neglect, Colo. Rev. Stat. § 19-3-103 (2007) – another permissive accommodation with a disparate

denominational effect, this time on Christian Scientists. The examples are legion – indeed, it is hard to conceive of a permissive accommodation that does not have disparate denominational effects – but the point is the same: If disparate impact were enough to trigger strict scrutiny under *Larson*, then virtually all permissive accommodations would be rendered presumptively unconstitutional.

Locke itself illustrates the inevitability of differential effects – both advantageous and disadvantageous – when States legislate in a way that touches on religion. *Locke*'s restriction on funding of theology degrees had a disparate impact across denominations, with its burden felt exclusively by those few denominations that offered theological instruction within the State in an accredited undergraduate setting. Conversely, a rule allowing such funding would have worked to the exclusive advantage of those same few denominations, *see* Brief for American Civil Liberties Union et al. as *Amici Curiae* Supporting Petitioners, *Locke* v. *Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21715031 at *7 – just as funding of pervasively-sectarian universities in Colorado would favor those denominations well-established and populous enough to support such institutions. The Court in *Locke*, of course, upheld the Washington funding restriction despite its disparate impact. CCU and its *amici* may believe *Locke* was incorrectly

decided – and indeed, it is impossible to reconcile that case with their expansive reading of *Larson* – but that is not grounds for this Court to depart from *Locke*.[6]

C. Colorado's Decision Not To Fund Education At Pervasively-Sectarian Institutions Is Not Tainted By Religious Bigotry.

Perhaps recognizing that disparate impact alone is not enough to trigger *Larson*, CCU and its *amici* also argue that Colorado's application of the pervasively-sectarian distinction is "tainted by . . . historical [anti-Catholic] prejudice associated with the federal Blaine Amendment," and thus constitutes the kind of intentional and invidious denominational discrimination clearly prohibited by the First Amendment. P.J. Br. at 17; *see id.* at 12-23; App. Br. at 16 & n.3; *see generally* Brief of the Beckett Fund For Religious Liberty as *Amicus Curiae* in Support of Appellant. That argument is without merit.

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[6] CCU and *amici*'s related suggestion that the pervasively-sectarian distinction discriminates against those who take religion most seriously (U.S. Br. at 15; P.J. Br. at 25-26) is likewise foreclosed by *Locke*. In *Locke*, the respondent made precisely the same argument – that the restriction on aid to theology majors impermissibly targeted those who took religion *most* seriously, by training for the ministry. *See* Brief of Respondent, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 22137308 at *19-*20. The Supreme Court necessarily and properly rejected that claim when it upheld the Washington provision.

CCU and its *amici* rely heavily on a passage from *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000), linking historical unwillingness to fund religious education to a "shameful" "hostility to the Catholic Church and to Catholics in general" that surfaced in connection with the federal Blaine Amendment in the 1870s. The actual historical record, as detailed below, does not bear out that charge. And likely for that reason, *Mitchell*'s provocative language is not a holding of the Court, but merely *dicta* that appears in a plurality opinion joined by only four Justices. Indeed, the two other Justices who agreed with the outcome in *Mitchell* felt it necessary to write a separate concurring opinion that declined to embrace the plurality's historical account. *See Mitchell*, 530 U.S. at 797 (opinion of O'Connor and Breyer, JJ.).

The Supreme Court as a whole, of course, far from calling into question the legitimacy of the pervasively-sectarian distinction, has enforced that distinction as a binding rule of constitutional law for over thirty years. *See, e.g.*, *Hunt v. McNair*, 413 U.S. 734, 743 (1973).[7] If CCU and its *amici*

[7] Contrary to CCU's claim, CCU Br. at 16, the Supreme Court has never "rejected the 'pervasively sectarian' test as a means of analyzing Establishment Clause claims." As discussed above, four Justices in *Mitchell v. Helms* may have taken that view, but the concurring Justices decidedly did not; nothing in their controlling opinion can be understood to overrule decades of Supreme Court precedent applying the pervasively-sectarian distinction, "implicitly" or otherwise. *See Steele v. Indus. Dev. Bd. of Metro.*

are right, then the Supreme Court has for decades imposed on the states and the federal government a rule that is itself unconstitutional, fueled by no more than religious bigotry. This Court should not lightly adopt such an extraordinary proposition. *Cf. Dickerson v. United States.*, 530 U.S. 428, 438 (2000) (declining to hold that *Miranda* rule is not constitutionally required primarily because such a holding would mean that Court itself had for decades mistakenly and impermissibly imposed rule on the states).

In any event – and perhaps not surprisingly, as the issue was never briefed in the case – the dicta in the *Mitchell* plurality is historically inaccurate. First of all, any claim of a direct link between opposition to aid for religious education and anti-Catholic animus during the Blaine Amendment period founders on the timing: The historical movement towards non-sectarian public schools, *see supra* at 15-18, significantly predates the large-scale arrival of Catholics in America in the late 1830s and early 1840s and consideration of the Blaine Amendment in the 1870s. Proposals for non-sectarian schools were advanced by Thomas Jefferson as early as 1778, Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge* (1778), for example, and the early 1820s saw efforts in New

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Gov't, 301 F.3d 401, 408 (6th Cir. 2002). The question here, of course, is not whether federal law requires application of the pervasively-sectarian rule, but only whether Colorado may apply that rule as a matter of state law without running afoul of the federal Constitution.

York City to keep public funds from Protestant sectarian schools, *see* William Bourne, *History of the Public School Society of the City of New York* 9, 38, 641 (1870).

More fundamentally, the claim that late-1800s opposition to aid for religious schools was born entirely of anti-Catholic animus badly oversimplifies the debate around the Blaine Amendment, conflating reasoned opposition to the Catholic Church's position on public education with anti-Catholic bigotry. At the time of the proposed Blaine Amendment, official Catholic doctrine rejected the entire enterprise of public schools, condemning non-sectarian schools as incompatible with Catholic doctrine. Pope Pius IX, Syllabus of Errors PP 48 (1864), *http://www.papalencyclicals.net/Pius09/p9syll.htm* (last visited December 6, 2007); Diane Ravitch, *The Great School Wars: A History of the New York City Public Schools* 45 (2000). On the other side of the debate were proponents of non-sectarian public education, who worried that public funding for Catholic schools "would lead to division and dissolution of the emergent common educational system into many denominational schools," Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 92 (2002), or doubted the compatibility of Catholic schools with the inculcation

of civic republican ideology, Marc Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 First Amend. L. Rev. 153, 176 (2003).

Whatever the relative merits of those positions, it is clear that support for the Blaine Amendment derived at least in part from "legitimate concerns – both constitutional and practical – about the affect of [state] funding [for] religious education." Steven K. Green, *The Lure of History in Establishment Clause Adjudication*, 81 Notre Dame L. Rev. 1717, 1743 (2006). It may well be that some proponents of the federal Blaine Amendment were animated by a deeply regrettable anti-Catholic sentiment. But the Blaine Amendment debate was about the future and role of public education in this country, and there were ample "civic, secular reasons," Stern, *supra*, at 175, for supporting non-sectarian public education and opposing the funding of alternative Catholic religious schools – reasons that cannot simply be equated with raw anti-Catholic bigotry.

Finally, there is the problem of transposing any anti-Catholic sentiment voiced during the 1870s Blaine Amendment debate across a century to a 1977 Colorado statute declining to fund scholarships for use at pervasively-sectarian institutions. Colo. Rev. Stat. § 23-3.3-101(3)(d) (2007); *see also id.* § 23-18-102(5)(a) (applying the pervasively-sectarian limitation to the 2004 College Opportunity Fund Program). Even on CCU's

account, App. Br. at 7-12, that statute clearly was intended to advance Establishment Clause values, not an anti-Catholic agenda. Indeed, the entire premise of CCU's disparate-impact claim is that Colorado's pervasively-sectarian distinction operates to *favor* Catholic institutions, like Regis University. App. Br. at 50; *see* U.S. Br. at 20.

Nor is there any reason to think that Colorado's contemporary enforcement of the pervasively-sectarian distinction reflects legislative hostility toward religion generally, *see Locke*, 540 U.S. at 724-25 & n.8 (no suggestion of "animus toward religion" in current operation of funding restriction), or toward minority faiths or "orthodox" faiths in particular, *cf.* P.J. Br. at 25-30 (arguing that major religious divide today is between "orthodox" or "traditionalist" faiths on one hand, and "progressive" faiths on the other). Colorado's statute books include dozens of provisions specially accommodating religious practices, including the practices of both "traditionalist" and minority denominations. *See, e.g.*, Colo. Rev. Stat. § 25-6-102(9) (2007) (medical providers with religious objections to contraception may not be required to make contraceptives available); *id.* at § 35-33-107(4) (2007) (religious practices involving "ritual slaughter, handling, or preparation of meat animals" are exempt from general provisions); *id.* § 12-54-108(2)(a) (2007) (mortuary code does not apply to

religious burial rites); *id.* § 25-4-903(2)(b) (2007) (students who adhere to "a religious belief whose teachings are opposed to immunizations" need not comply with school immunization requirements); *id.* § 12-22-317 (2007) (religious use of peyote is exempt from controlled substance laws). Under *Smith*, as discussed above, the Free Exercise Clause generally does not require such accommodations. Nevertheless, Colorado has chosen, in its discretion, to "provide[] greater protection of religious liberties than the Free Exercise Clause," *Locke*, 540 U.S. at 724 n.8 (making same point about State of Washington). Here, as in *Locke*, Colorado's "overall approach," *id.*, is entirely inconsistent with any suggestion of animus, or even insensitivity, to any or all faiths.

CONCLUSION

For the foregoing reasons, the Constitution does not compel Colorado to fund education at pervasively-sectarian institutions. *Amici* urge this Court to affirm the district court's decision.

Respectfully submitted,

December 7, 2007

/s Pamela Harris

WALTER DELLINGER*
(Counsel of Record)
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE CLINIC

PAMELA HARRIS
ALLISON ORR LARSEN**
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 2006
Telephone: (202) 383 5300
WDellinger@omm.com;
PHarris@omm.com;
ALarsen@omm.com

Student Participants†*:*
MICHAEL BERN
FRANCISKA COLEMAN
JESSICA LINDEMANN

**May be contacted at O'Melveny & Myers LLP*
***Admitted only in Virginia; supervised by principals of the firm. Application to 10th Circuit Bar pending.*
† *Appearing pursuant to 10th Cir Rule 46.7. Consent of Parties and Agreement of Supervising Attorney on File with Clerk's Office.*

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I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). This brief was prepared using Microsoft Word 2003 and contains 6,735 words of proportionally spaced text. The type face is Times New Roman, 14 point font.

December 7, 2007

/s Allison Orr Larsen

Allison Orr Larsen
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 2006
Telephone: (202) 383 5300
ALarsen@omm.com

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I hereby certify that the digital version of the foregoing is an exact copy of what has been submitted to the court in written form. I further certify that this digital submission has been scanned with the most recent version of Symantic Antivirus (last updated November 27, 2007) and is virus free.

December 7, 2007

/s Allison Orr Larsen
Allison Orr Larsen
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 2006
Telephone: (202) 383 5300
ALarsen@omm.com

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2007 I served a copy of the BRIEF OF AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION, PEOPLE FOR THE AMERICAN WAY FOUNDATION, THE ANTI-DEFAMATION LEAGUE, THE AMERICAN FEDERATION OF TEACHERS, AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* via electronic mail to:

Gregory S. Baylor
Timothy J. Tracey
Issac Fong
Center for Law & Religious Freedom
Attorneys for Plaintiff / Appellant
gbaylor@clsnet.org
tjtracey@clsnet.org
ifong@clsnet.org

L. Martin Nussbaum
Eric V. Hall
Rothgerber, Johnson & Lyons LLP
Attorneys for Plaintiff / Appellant
mnussbaum@rothgerber.com
ehall@rothgerber.com

Thomas N. Scheffel
Thomas N. Scheffel & Associates, P.C.
Attorney for Plaintiff / Appellant
tscheffel@tnslaw.com

Benjamin W. Bull

Gary S. McCaleb
Alliance Defense Fund
Attorneys for Plaintiff / Appellant
bbull@telladf.org
gmccaleb@telladf.org

Kevin Thomas Traskos
U.S. Attorney's Office - Denver
Attorney for the United States, Interested Party
kevin.traskos@usdoj.gov

Gregory M. Jones
Benjamin D. DuPre
Foundation for Moral Law
Attorneys for Foundation for Moral Law, Interested Party
greg.jones@morallaw.org
bdupre@morallaw.org

Stuart J. Lark
Holme Roberts & Owen LLP
Attorney for The Council for Christian Colleges and Universities and the American Association of Presidents of Independent Colleges and Universities, Interested Party.
Stuart.lark@hro.com

Eric C. Rassback
Roger T. Severino
The Becket Fund for Religious Liberty
Attorneys for The Becket Fund for Religious Liberty, Interested Party
erassbach@becketfund.org
rseverino@becketfund.org

Rena J. Comisac
Mark L. Gross
Dirk C. Phillips
United States Department of Justice
Attorneys for the United States, Interested Party
rena.comisac@usdoj.gov
mark.l.gross@usdoj.gov
dirk.phillips@usdoj.gov

Jay Alan Sekulow
Francis J. Manion
Geoffrey R. Surtees
American Center for Law & Justice
Attorneys for the American Center for Law & Justice, Interested Party
rarchuleta@aclj.org
fmanion@aol.com
gsurtees@aclj.org

Michael J. Norton, Esq.
Burns, Figa & Will, P.C.
Douglas Laycock
University of Michigan Law School
Carl H. Esbeck
Attorneys for the Center for Public Justice and National Association of Evangelicals.
mjnorton@bfw-law.com
laycock@umich.edu
esbeckc@missouri.edu

/s Allison Orr Larsen
Allison Orr Larsen
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 2006
Telephone: (202) 383 5300
ALarsen@omm.com