No. 07-1247

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO CHRISTIAN UNIVERSITY,
Plaintiff-Appellant,

v.

RAYMOND T. BAKER, in his official capacity as Chair of the Colorado Commission on Higher Education, *et al.*,
Defendants-Appellees,

On Appeal from the United States District Court for the District of Colorado
Case No. 04-CV-02512-MSK-BNB

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF PLAINTIFF-APPELLANT, IN SUPPORT OF REVERSAL

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Colorado Christian University v. Baker, et al., 07-1247

CORPORATE DISCLOSURE STATEMENT

07-1247

COLORADO CHRISTIAN UNIVERSITY, et al.,
Plaintiff-Appellant,

v.

RAYMOND T. BAKER, in his official capacity as Chair of the Colorado Commission on Higher Education, *et al.*,
Defendants-Appellees,

Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of *amicus* in this or any other case in which it has been involved.

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Gregory M. Jones

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law ("the Foundation") is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, legislative prayer, and other cases implicating religious freedom.

The Foundation has an interest in this case because it believes that the exclusion of Colorado Christian University ("Colorado Christian") from state financial assistance for its students solely on the basis of the school's affirmation of Christian faith constitutes blatantly unconstitutional religious discrimination. If left unchallenged, such government discrimination under the guise of preventing Establishment Clause violations could become widespread. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the state of Colorado's exclusion of Colorado Christian from state financial assistance programs violates the original understanding of the Equal Protection Clause of the Fourteenth Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a)-(b), and because all parties did not consent to the filing of this brief, *Amicus* has contemporaneously filed with this Honorable Court a motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment, at a minimum, prohibits states from discriminating against individuals or groups on the basis of possessing certain basic characteristics or being a member of a specially protected class. Religion is one of those classes protected under the original understanding of that Clause. The State of Colorado unconstitutionally discriminates against Colorado Christian by making higher education financial assistance available to all Colorado post-secondary education institutions except those that are "pervasively sectarian," a distinction based solely on religious affirmation.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules according to erroneous *case precedents* rather than the Constitution's *text*. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI, cl. 2.

The text of the Equal Protection Clause provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. When these words are applied to the situation under consideration, it becomes evident that the state of Colorado is unjustly discriminating against Colorado Christian. The "pervasively sectarian" distinction in Colorado law penalizes Colorado Christian for fervently implementing its religious beliefs into the university's daily life. Permitting such an odious distinction renders deeply-held faith a liability, a position plainly at odds with our nation's history and law. Thus, the decision of the court below should be reversed, and the portions of Colorado law that make government benefits contingent on a lack of religious commitment should be declared unconstitutional.

ARGUMENT

I. THE TEXT OF THE EQUAL PROTECTION CLAUSE, NOT THE CONFUSED JURISPRUDENCE OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT, SHOULD DETERMINE WHETHER THE STATE OF COLORADO IS SUBJECTING COLORADO CHRISTIAN UNIVERSITY TO UNJUSTFIED DISCRIMINATION.

In the course of attempting to steer through the United States Supreme Court's labyrinthine jurisprudence related to the Religion Clauses of the First Amendment, the district court's opinion winds along the paths of "strict scrutiny" and "rational basis" analysis, the "pervasively sectarian" doctrine, "hybrid rights" theory, and the *Lemon* test. *Colorado Christian University v. Weaver* (*CCU*), No. 04-02512, slip op. at 6, 8, 9, 12-13 (D. Colo. May 18, 2007). At the end of this dizzying journey, the court arrives at the conclusion that Colorado's financial aid statutory scheme does not offend the First Amendment. *Id*. at 12, 15. The district court then devotes all of one paragraph to dispatching any notion that the state's statutory scheme violates the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 15.

Given that Colorado's violation of the Equal Protection Clause is blatant in this case, the district court's priorities in analysis leave much to be desired. Adherence to the constitutional text would have had the virtues of arriving at the proper outcome in this case and of saving the court from delving into an area of jurisprudence that is, at best, confused and, at worst, hopeless.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. All judges take their oath of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison, the Chief Architect of the Constitution, insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

Thus, "[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). The Equal Protection Clause is not a redundancy where religion is concerned, and though its language seems broad and potentially unwieldy, its meaning becomes less daunting when framed by the original understanding of the phrase at the time of its enactment. Adherence to this

understanding avoids the fruitless task of delving into the confused jurisprudence of the Religion Clauses of the First Amendment.

B. The Religion Clause tests culled from *Lemon*, *Locke*, and other cases are constitutional counterfeits that contradict the text of the "supreme Law of the Land."

The district court below focused its analysis on possible violations of the First Amendment's Free Exercise and Establishment Clauses. It admitted at the outset of its analysis under each clause that concrete principles of law were difficult to discern in the applicable Supreme Court jurisprudence. In its Free Exercise analysis, the district court observed that "[i]t is somewhat difficult to discern any clear governing principle from *Locke* [*v. Davey*, 540 U.S. 712 (2004)] . . . ." *CCU*, slip op. at 10. Regarding the applicability of Establishment Clause jurisprudence, the district court found "difficulty in applying the *Mitchell* [*v. Helms*, 530 U.S. 793 (2000)] framework to the facts of this case." *Id*. at 27.

These difficulties are hardly surprising given the current state of jurisprudence concerning the Religion Clauses. A majority of the Supreme Court acknowledged and even lauded this morass in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), opining that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is permissible or impermissible. *Lemon*, 403 U.S. at 612. The Court reiterated this

idea in *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984), intoning that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed."

This jurisprudential attitude confuses complexity with intelligence and sensitivity with difficulty. Just because an area of the law deals with a sensitive subject (such as a person's religion) does not mean that the answer to the conflict must be difficult to achieve, and interweaving various factors and levels of analysis into an area of the law does not automatically make the law more intelligent. Yet this is exactly what the Supreme Court has done with its proliferation of Religion Clause tests: the *Sherbert* test,[1] the *Smith* test,[2] the "pervasively sectarian" doctrine,[3] the "hybrid rights" theory,[4] the *Lemon* test, the *Marsh* test,[5] the *Mitchell* gloss on the *Lemon* test,[6] the endorsement test,[7] the coercion test,[8] the neutrality test,[9] etc. These tests have created more problems than they have solved,

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1 *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

2 *Employment Division v. Smith*, 494 U.S. 872 (1990).

3 *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976).

4 *Smith*, 494 U.S. at 881.

5 *Marsh v. Chambers*, 463 U.S. 783 (1983).

6 *Mitchell*, 530 U.S. at 808.

7 *Lynch*, 465 U.S. at 691 (O'Connor, J. concurring).

8 *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

9 *McCreary County, KY. v. ACLU*, 545 U.S. 844, 860 (2005).

producing a continuum of disparate results. As Justice Thomas has observed, "the very 'flexibility' of [the Supreme] Court's Establishment Clause precedent leaves it incapable of consistent application."[10] *Van Orden, v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).

Free Exercise jurisprudence has encountered its own confusion with a shift away from "strict scrutiny" analysis used in such cases as *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to the neutrality principle applied in *Smith*. But the jurisprudence at least remained intelligible—until the Court handed down *Locke*. Justice Scalia called the decision in *Locke* "irreconcilable" with the Court's previous Free Exercise jurisprudence. *Locke*, 540 U.S. at 726. The case's apparent central

[10] Frustration with Establishment Clause jurisprudence is widespread among the federal circuit courts of appeal. The Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence," *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), and "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Sixth Circuit has labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the "persistent criticism" that *Lemon* has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). This Court has opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

principle—the supposed "play in the joints" between the two Religion Clauses—"is not so much a legal principle as a refusal to apply any principle," according to Justice Scalia. *Id*. at 728.

It is no wonder, then, that the district court below groped for "some guiding rule" from *Locke* and concluded that it appeared to have reversed the presumption in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that statutes not neutral toward religion are unconstitutional. *CCU*, slip op. at 9, 10. This was just a guess, however, because the *Locke* Court seemed to imply that the statute at issue in that case did not contain any hostility toward religion. *See Locke*, 540 U.S. at 724 ("Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion into its benefits.").

Moreover, the Supreme Court seemed to limit its holding in *Locke* to the facts of that case by declining to "venture further into this difficult area" of Religion Clause jurisprudence "in order to uphold the Promise Scholarship Program." *Id*. at 725. Thus, at least in the area of government funding of education, the Supreme Court in *Locke* did for Free Exercise jurisprudence what it had long ago done with Establishment Clause jurisprudence: exchange the clarity of constitutional principles for the fog of case-by-case analysis.

The federal courts' abandonment of fixed, *per se* rules results in the application of judges' complicated substitutes for the law. James Madison's observation in *Federalist No. 62* is apt here:

> It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be . . . so incoherent that they cannot be understood . . . or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001).

The "law" in Religion Clauses cases changes so often and is so incoherent that "no man . . . knows what the law is today, [or] can guess what it will be tomorrow," "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). Dutifully evaluating a set of facts under these case tests has become "required penance, an act of piety toward the law," but is in no in any sense predictable or principled law.[11] *Green v. Board of County Comm'rs*, 450 F. Supp. 2nd 1273, 1292 (E.D. Okla. 2006). By adhering to judicial tests rather than the legal text in

[11] At least one Supreme Court Justice has now concluded that, for him, there is "no test-related substitute for the exercise of legal judgment," which, he insists, is not the same thing as deciding according to mere predilection. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). *Amicus* respectfully submits that this is the inevitable conclusion of abandoning the constitutional text in favor of fabricated tests: eventually the veneer of legitimacy and logic accompanying these tests is washed away through repeated use until only the fabric of personal preferences remains. This thin thread is sustainable only through raw judicial power compelling the preferred outcome in a given case.

constitutional cases involving religion, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI, cl. 2.

As Justice Scalia has noted, "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County*, 545 U.S. at 890-91 (Scalia, J., dissenting). Reliance upon precedents such as *Lemon* and *Locke* is a poor and improper substitute for the concise language of the Constitution. This court can and should seize the opportunity presented in this case to decide it on the clear principle of equal protection of the laws.

II. THE STATE OF COLORADO'S DENIAL OF HIGHER EDUCATION FINANCIAL ASSISTANCE TO COLORADO CHRISTIAN UNIVERSITY SOLELY BECAUSE IT IS "PERVASIVELY SECTARIAN" VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourteenth Amendment's Equal Protection Clause provides, in relevant part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const.

amend I. The Religious Test Clause provides that "no religious Tests shall ever be required as a Qualification" for public office. U.S. Const. art. VI, cl. 3. Together these provisions address the government's relationship to the religion of its people, providing parameters for action that complement rather than contradict one another. In this case, Colorado's denial of financial assistance to Colorado Christian University on the basis of its religion clearly violates the protection afforded to religion under the Fourteenth Amendment.

A. Religion is among the classifications protected under the original understanding of the Equal Protection Clause.

While the undisputed primary focus of the Equal Protection Clause at the time of its adoption was eliminating discrimination in the law based on race,[12] the clause was not limited in its text or application to racial classifications.[13] As the Supreme Court noted early in its Equal Protection jurisprudence, "The Fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Equality before the law is one of the cardinal principles of our legal system, and religion has played a seminal role in the development of the country

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[12] *See, e.g., Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

[13] *See* Thomas M. Cooley, *General Principles of Constitutional Law*, 237 (Weisman pub. 1998) (1891).

from its founding up through the Civil War and beyond,[14] so it should come as no surprise that adoption of the Fourteenth Amendment included religion among the classifications within its protection.

1. The American concept of equality existed long before the adoption of the Fourteenth Amendment and had religious roots.

Though the phrase "equal protection of the laws" was not codified in the Constitution until the ratification of the Fourteenth Amendment in 1868, the concept of equal protection stretches back to the early colonial period, and religion was largely responsible for its emergence in the law. The deeply religious Pilgrims in the Mayflower Compact pledged "in the presence of God and one another" to "enact, constitute, and frame, such just and equal laws . . . as shall be thought most meet and convenient for the general good of the colony." *The Mayflower Compact*

[14] The New England Confederation of 1743, which was approved by the colonies of Massachusetts, Plymouth, Connecticut, and New Haven and constituted the first document uniting any of the colonies as a legal entity, captured the importance of religion and religious liberty in early America when it declared in its preamble: "[W]e all came into these parts of America with one and the same end and aim, namely, to advance the kingdom of our Lord Jesus Christ and to enjoy the liberties of the Gospel in purity and peace; . . . ." *The New England Confederation* (1743), *reprinted in Colonial Origins of the American Constitution* 365-66 (Donald S. Lutz, ed. 1998). It is also widely acknowledged that the First (1740-1750) and Second (1795-1810) Great Awakenings had a profound impact on America's social and political development. *See, e.g.*, 1 *Political Sermons of the Founding Era, 1730-1805* xv-xvi (Ellis Sandoz, ed., 2nd ed. (1998) ("The great political events of the American founding . . . have a backdrop of resurgent religion whose calls for repentance and faith plainly complement the calls to resist tyranny and constitutional corruption, so as to live virtuously as God-fearing Christians, and, eventually, as responsible republican citizens.").

(Nov. 11, 1620), *reprinted in Colonial Origins*, at 32. In the Massachusetts Body of Liberties, considered to be the first modern bill of rights, the people "religiously and unanimously decree[d]," among other things, that, "Every person within jurisdiction, whether inhabitant or foreigner shall enjoy the same justice and law, that is general for the plantation, which we constitute and execute toward one another, without partiality or delay." *The Massachusetts Body of Liberties* (Dec. 1641), *reprinted in Colonial Origins*, at 71.

The most immediate and important precursor to the Constitution, the Declaration of Independence, proclaimed to the world that Americans believed that "all men are Created equal" and that they are "endowed by their Creator with certain unalienable Rights." *The Declaration of Independence*, para. 2 (U.S. 1776). The Declaration inextricably connected the idea of equality with God: Because people are equal in the eyes of God, government must provide equal treatment to the governed. Writing to George Washington after the Revolutionary War but prior to the adoption of the Constitution, Thomas Jefferson confirmed the American legal tradition regarding equality, saying, "The foundation on which all [of the state constitutions and the Confederation] are built is the natural equality of man . . . ." Thomas Jefferson, Letter to George Washington (April 16, 1784), *reprinted in* 3 *The Founders' Constitution* 382 (Phillip Kurland & Ralph Lerner, eds. 1987).

The Constitution codified this belief in equality before the law in several respects, the most conspicuous being the prohibition on titles of nobility. *See* U.S. Const., art. I, § 9, cl. 8. Justice Joseph Story stated in his *Commentaries on the Constitution* that this prohibition "seems proper, if not indispensable, to keep perpetually alive a just sense of th[e] important truth" that "a perfect equality is the basis of all our institutions." Joseph Story, 3 *Commentaries on the Constitution*, § 1345 (1833). Even formal titles of address for the President and Vice-President were rejected by definitive votes in both Houses of the first Congress, a result that James Madison hoped would show "that our new Government was not meant to substitute either Monarchy or Aristocracy" for a republic. James Madison, Letter to Thomas Jefferson (May 9, 1789), *reprinted in* 3 *Founders' Constitution*, at 384. The absence of an American royalty class in fact and in name sharply contrasted with Europe and starkly illustrated the commitment to equality.

2. The Religious Test Clause embodied the Founders' fundamental understanding concerning basic religious discrimination.

The emphasis the founding generation placed on instituting a republican form of government made who could be chosen for public office a vital part of the system. The Founders took pains to spell out in detail in the Constitution the several qualifications for the President, congressmen, senators, judges, and other federal officials. This makes the Constitution's ban on "religious Tests" from

"ever be[ing] required as a Qualification" for holding a federal office the most telling pre-amendment constitutional text in the context of this case. U.S. Const. art. VI, cl. 3. In one clause the Founders combined their devotion to religious liberty with their vision for equality on a subject of immense importance for the new government—its leaders. The Religious Test Clause outlawed religious discrimination for service in federal office.

There can be no doubt that this was an issue of tremendous significance to the founding generation. "[I]t was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way."[15] *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). Yet, to the Founders, the Religious Test Clause also spoke to a broader principle. In the North Carolina Ratifying Convention of 1788, James Iredell, later one of the first justices of the Supreme Court, said that he considered the Religious Test Clause to be "one of the strongest proofs that could be adduced, that it was the

[15] The history of religious persecution from which many colonists fled and the intense fight for religious freedom in the early history of several states are singular reasons why religion is considered by the Supreme Court to be a "suspect class": It is a class "subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). In fact, at the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." The last state establishment was not abolished until 1833 when Massachusetts removed church support language from its Constitution. Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992).

intention of those who formed this system to establish a general religious liberty in America." J. Iredell, The North Carolina Ratifying Convention (July 30, 1788), *reprinted in* 4 *Founders' Constitution*, at 89. Oliver Ellsworth, the first Chief Justice of the Supreme Court, stated that "[T]he sole purpose and effect of [the Religious Test Clause] is to exclude persecution, and to secure to you the important right of religious liberty. We are almost the only people in the world, who have a full enjoyment of this important right of human nature." O. Ellsworth, "Landholder, No. 7" (December 17, 1787), *reprinted in* 4 *Founders' Constitution*, at 639.

It is noteworthy that these eminent founders made these comments before the First Amendment was ever drafted, let alone ratified. On its face, the Religious Test Clause prohibited the federal government from making religious affirmation a litmus test for holding public office. But the legal principle to be culled from the clause is that the Founders roundly disapproved of basic government discrimination on the basis of religion. As Iredell put it, "This article [Religious Text Clause] is calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution." J. Iredell, Ratifying Convention, 4 *Founders' Constitution*, at 90. It is this fundamental idea of prohibiting a government-sponsored religious caste system that the Equal Protection Clause

constitutionalized for all state government actions, not just for service in public office.

B. The Religion Clauses of the First Amendment do not cover all aspects of religious discrimination prohibited by the Constitution.

The notion that the Free Exercise and Establishment Clauses are in tension with one another, as the Supreme Court suggested in *Locke* and other cases,[16] disregards that the clauses are not grammatically separated in the text and the single unifying idea behind these clauses for the founding generation was religious freedom. The clauses represent one embodiment of "our constitutionally protected tradition of religious liberty." *McDaniel v. Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring). It has been repeatedly noted by the Court that Thomas Jefferson's Bill for Establishing Religious Freedom and the Virginia struggle for disestablishment was a primary precursor to the First Amendment's Religion Clauses. *See, e.g*, *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947); *McGowan v. Maryland*, 366 U.S. 420, 437-438 (1961). Prohibiting religious establishments and protecting the "free exercise" of religion are ways of protecting "the first freedom"—religious liberty.

These methods of protecting religious liberty do not, however, cover every aspect of that freedom in theory or in practice under the Constitution. The

[16] *See Locke*, 540 U.S. at 718; *Norwood v. Harrison*, 413 U.S. 455, 469 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

Supreme Court itself admitted in *Locke* that there is "play in the joints" between the Establishment Clause and the Free Exercise Clause, but it erroneously assumed that these clauses cover the entire constitutional ground regarding the subject of religion. *Locke*, 540 U.S. at 719. That this is not so is most readily seen—as section II, part A of this brief has shown—in the Religious Text Clause. But the Equal Protection Clause of the Fourteenth Amendment also implicitly speaks about government infringements upon religious liberty.

Far from capturing the field of religious liberty protection under the Constitution, the Religion Clauses "forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel v. Vitale*, 370 U.S. 421, 430 (1962). The Establishment Clause, as originally understood, prohibited laws relating to "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Cooley, *General Principles*, at 213. It concerned government control of religion through a religion's primary corporate institution.

The Free Exercise Clause sought to prevent government interference with the religious activities of its citizens so long as those activities did not interfere with public peace and safety. *See* Michael W. McConnell, *Free Exercise As The Framers Understood It,*" in *The Bill of Rights: Original Meaning and Current Understanding* 67 (Eugene Hickok, Jr., ed. 1991). It concerned the use of

government power to conform or curtail individual religious worship. This is why the classic violation of the "free exercise of religion" takes place when someone is faced with the stark choice between fidelity to his or her faith and receiving a generally applicable government benefit. *See, e.g.*, *Sherbert*, 374 U.S. 398; *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

There is a broad field of government action between these two prohibitions that may relate to religion. This is why many government actions involving religion do not constitute a religious establishment and why many government laws that may incidentally infringe upon religious practices are permissible. The Equal Protection Clause provides a baseline of protection for religion not immediately covered by the Religion Clauses. Far from being "the last resort of constitutional arguments," as Justice Oliver Wendell Holmes, Jr., famously described the Equal Protection Clause, *Buck v. Bell*, 274 U.S. 200, 208 (1927), in situations such as the case at hand, it is the first line of constitutional defense for religious freedom.

C. The Equal Protection Clause levels the state financial aid playing field for Colorado Christian and other so-called "pervasively sectarian" educational institutions.

Though the Founders recognized the idea of equality before the law and implemented it in various provisions of the Constitution, the idea was not fully

realized in the adoption of that document or the subsequent Bill of Rights. The Reconstruction Congress sought to remedy this defect in part through the Fourteenth Amendment's Equal Protection Clause.[17] In so doing, the Amendment not only outlawed racial discrimination in the states, it also expanded constitutional protection for groups identified by other basic characteristics such as alienage and religion. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (stating that the Constitution strongly disfavors classifications "drawn upon inherently suspect distinctions such as race, religion, or alienage."); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (listing religion as a "suspect" classification). Equal protection demands that Colorado Christian receive eligibility for state financial aid in this case.

1. The district court's failed analysis

The district court below gave short shrift to the applicability of the Equal Protection Clause to this case, dedicating to this argument all of one paragraph and one footnote of conclusory analysis near the end of its opinion. The court concluded that its "Establishment Clause analysis applies with equal force to CCU's Equal Protection claim," and rejected the claim. *CCU*, slip op. at 32. The court failed to cite a single authority for this melding of constitutional provisions.

[17] *See e.g.*, *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896) ("[T]he constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race.").

The district court might have taken a cue from the U.S. Supreme Court's cursory treatment of the Equal Protection Clause in *Locke*, which devoted a single footnote to dispatching the argument. However, the High Court equated the Free Exercise Clause, rather than the Establishment Clause, with the Equal Protection Clause. *See Locke*, 540 U.S. at 721 n.3 (indicating that there could be no violation of Equal Protection if "the program is not a violation of the Free Exercise Clause"). The two cases the *Locke* Court cited for this proposition—*Johnson v. Robinson*, 415 U.S. 361 (1974), and *McDaniel v. Paty*, 435 U.S. 618 (1978)—do not provide support for this novel view.

In *Johnson*, the Court concluded that the appellant's contention was not about religion at all, so protection due to religious affiliation or affirmation under the Equal Protection Clause was not a possibility. *See Johnson*, 415 U.S. at 375 n.14 (stating that the Court found "the traditional indicia of suspectedness lacking in this case"). In *McDaniel*, the Court made it clear that the case turned on McDaniel's "status as a 'minister' or 'priest'" and the acts he performed in that role. 435 U.S. at 627. Therefore, *McDaniel* was not a religious discrimination case *per se*, which would implicate the Equal Protection Clause; it was a case based on a vocational disqualification.

That the Supreme Court and a federal district court could equate the Equal Protection Clause with both Religion Clauses of the First Amendment

demonstrates either the absurd malleability of Religious Clause jurisprudence or a profound misunderstanding of the equal protection guarantee regarding religion—or both. Even if either Court had cited previous applicable authorities for this fusion of the Equal Protection Clause with the Religion Clauses, they would still be in error because such analysis (or lack thereof) fails to distinguish, based on original meaning, the difference between the protection to religious liberty afforded by the Equal Protection Clause from the protections provided by the Religion Clauses of the First Amendment. *See infra*, section II, part B.

2. Application of the Equal Protection Clause to this case

If it is indeed true that "no word was unnecessarily used, or needlessly added" in the text of the Constitution, then the Equal Protection Clause provides a blanket of constitutional security to religion not covered by the Religion Clauses. *Holmes*, 39 U.S. (14 Peters) at 570-71. Justice Harlan stated in his powerful *Plessy v. Ferguson* dissent that, "In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The Equal Protection Clause simply requires that state governments be "religion-blind" in their actions. The State of Colorado has failed to live up to this standard of equality with regard to Colorado Christian University.

Colorado awards financial assistance through a variety of need- and merit-based programs administered by the Colorado Commission of Higher Education (CCHE). Students may use CCHE financial assistance to attend any public or private postsecondary institution in Colorado that meets the statutory criteria for eligibility. Colorado carves out only *one* exception to this general eligibility: if the institution is determined to be "pervasively sectarian" under the criteria listed in C.R.S. § 23-3.5-105. It is undisputed that Colorado Christian students would be eligible for CCHE financial assistance if Colorado Christian had not been declared a "pervasively sectarian" educational institution.

The determination of whether an institution of higher learning is "pervasively sectarian" is based entirely on the degree to which the institution integrates religion into the life of the school. To identify "pervasively sectarian" educational institutions, § 23-3.5-105 looks at the exclusivity of the religious persuasions of the governing board, faculty and students, whether attendance at religious convocations and services is required, whether required courses in religion or theology tend to indoctrinate or proselytize, and whether school funding is dominated by sources that favor one particular religion. C.R.S. § 23-3.5-105 (1) (a)-(f). In other words, the more a school affirms a particular religion, the more likely it is to be deemed "pervasively sectarian."

Because Colorado Christian strongly affirms its Christianity, the state of Colorado denies its eligibility for state assistance programs. This is precisely the kind of religious discrimination the Equal Protection Clause forbids. The Equal Protection Clause "requires that all persons subjected to . . . legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 293 (1898). The state has made the public benefit of financial aid generally available; the Equal Protection Clause forbids the state from denying that benefit solely on the basis of religious adherence.

The fact that the CCHE permits other schools with a religious background like Regis University to be eligible for financial aid is not a valid defense to the state's action.[18] This simply means that CCHE is basing its decision on the *degree*

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[18] In a throwaway footnote at the end of its decision, the district court absurdly claims that the Equal Protection Clause does not apply in this case because Colorado Christian is not "similarly situated" to other universities with religious characteristics like Regis University and the University of Denver. It says this simply is not so because the CCHE determined Colorado Christian to be "pervasively sectarian," whereas, it has not so labeled Regis or the University of Denver. "Thus, they are not 'similarly situated' at all." *CCU*, slip op. at 32 n. 28.

This bewildering and circular reasoning is equivalent to saying that a law which denies driver's licenses to people because they are black does not violate equal protection because blacks are not similarly situated to whites due to their color. *The whole issue in this case is whether Colorado Christian can be singled out for differential treatment because the state has labeled it "pervasively sectarian.*" The court attempts to assume away the issue by stating it. Colorado Christian is similarly situated to Regis because it is a Colorado college that meets all the criteria for receiving financial aid. Colorado Christian's only distinction is

of a school's religious affirmation and integration rather than just the fact of it. The Supreme Court rejected such reasoning in *Mitchell v. Helms*, saying the "pervasively sectarian" concept "collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell*, 530 U.S. at 828. The statutory distinction between "pervasively sectarian" and generally sectarian institutions actually *increases* the degree of religious discrimination perpetrated by the state. Colorado is punishing Colorado Christian for, as the district court so aptly put it, "inextricably intertwin[ing]" education and religion, when this is the very reason students choose to attend there. *CCU*, slip op. at 30.

This is a prototypical example of the kind of religious discrimination the Founders would have abhorred[19] and that the original understanding of the Equal Protection Clause categorically forbids. Colorado's antiestablishment interests do not outweigh the requirement of equal treatment under the law, especially given that there can be no legitimate fear that CCHE financial aid to Colorado Christian

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that it integrates its religious beliefs more thoroughly into its curriculum and school life than Regis does. It is only this degree of religious affirmation and integration that distinguishes these two similarly situated schools.

[19] "[A]lmost universally[,] Americans from 1789 to 1825 accepted and practiced governmental aid to religion and religiously oriented educational institutions." C. Antieau, A. Downey, & E. Roberts, *Freedom From Federal Establishment, Formation and Early History of the First Amendment Religion Clauses* 174 (1964).

would result in establishing Christianity as the official religion of the state. Colorado Christian does not ask for special treatment; it asks for equal treatment, and the Constitution commands that Colorado provide it.

CONCLUSION

In the debate over the Religious Text Clause, James Iredell astutely asked:

> [H]ow is it possible to exclude any set of men, without taking away that *principle of religious freedom* which we ourselves so warmly contend for? This is the *foundation on which persecution* has been raised in every part of the world. The people in power were always right, and everybody else wrong. If you admit the least difference, the door to persecution is opened."

Ratifying Convention, 4 *Founders' Constitution*, at 90 (emphasis added). His question resounds in this case as well: How can Colorado Christian be excluded from eligibility for generally available financial assistance solely based on its strong affirmation of Christianity without taking away the principle of religious liberty our Constitution so steadfastly protects? This Court's ruling will either rest on the principle of religious freedom or build on the foundation for persecution Colorado has laid.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision below should be reversed, and this Court should declare that the state of Colorado's "pervasively sectarian" distinction in the law violates the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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Dated this 19th day of September, 2007.

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Dated this 19th day of September, 2007.

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The undersigned hereby certifies that two true and correct copies of this *Brief of* Amicus Curiae have been served on counsel for each party via first-class U.S. mail, as well as one electronic copy of the *Brief of* Amicus Curiae by electronic mail. Also, an original and seven (7) copies of this *Brief of* Amicus Curiae have been dispatched to the Clerk of the United States Court of Appeals for the 10th Circuit, by first-class U.S. Mail, on this 19th day of September, 2007.

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