UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

INTERVENORS' MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Intervenors respectfully move this Court to dismiss Plaintiffs' claims for lack of jurisdiction and failure to state a claim upon which relief can be granted.

INTRODUCTION

This case is an improper attempt to use the federal-court system to circumvent ongoing Colorado state-court litigation. Defendants' attempt to create a school-voucher program has

embroiled all parties in a legal battle for over five years. Plaintiffs, having lost in state court, now attempt to invoke federal jurisdiction in the hope that this Court will give them what the state court could not—a school-voucher program that includes religious schools. This case, however, has multiple deficiencies, any one of which independently warrants dismissal.

First, this Court lacks jurisdiction, mandating dismissal under Fed. R. Civ. P. 12(b)(1). Both the *Younger* abstention doctrine—which is mandatory—and the *Colorado River* abstention doctrine apply. The *Younger* and *Colorado River* doctrines are intended to address situations exactly like the one here; notions of comity and avoidance of piecemeal litigation direct federal courts to allow protracted and ongoing state-court litigation to conclude.

Second, Plaintiffs lack constitutional standing. Given the Program's current lack of *any* private school partners and the pending motion for enforcement of the state-court injunction against the entire Program, Plaintiffs' alleged harm is too speculative for the Court to consider at this time and this Court cannot provide Plaintiffs the relief they seek. While the School District has attempted, in violation of a permanent injunction, to implement the Program, there are currently no approved partner schools. If the School District does not approve any schools, Plaintiffs have no injury. In addition, this Court cannot provide Plaintiffs the relief they seek—a Program including religious schools—because that option has been foreclosed by the Colorado Supreme Court's ruling in *Taxpayers*. As Plaintiffs cannot satisfy the requirements for constitutional or prudential standing, this case should be dismissed for lack of jurisdiction.

Third, there are severe jurisdictional concerns regarding the lack of adverseness between the parties that militate in favor of this Court declining to exercise jurisdiction. No party to this litigation—Plaintiffs, Defendants, or Intervenors—plans to defend a school-voucher program

that excludes religious schools. At the heart of this case is a common goal shared by both Plaintiffs and Defendants—a voucher program that includes religious schools. The School District has been fighting side by side with the Institute for Justice for over five years in defending the original Program in *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461 (Colo. 2015) (hereinafter "*Taxpayers*"). In *Taxpayers*, the School District and the Institute for Justice are both currently advocating to the U.S. Supreme Court that a school-voucher program that excludes religious schools is unconstitutional. The judicial admission by the School District on the central issue in this case makes it impossible for the School District to present an adequate defense. Tellingly, the School District's Response to Plaintiffs' Motion for Preliminary Injunction did not once assert that the Program is in fact constitutional. *See* ECF No. 37. At a minimum, therefore, the alignment and posture of the parties raises serious prudential standing concerns.

Finally, Plaintiffs fail to state a claim upon which relief may be granted, and this case should be dismissed under Fed. R. Civ. P. 12(b)(6). Plaintiffs have not identified any viable legal theory. The U.S. Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004), held that governmental bodies may constitutionally provide funding for private secular education without funding religious education. Following *Locke*, a plethora of federal courts of appeals and state courts have interpreted *Locke* in a way that directly contradicts Plaintiffs' position.

FACTUAL BACKGROUND

A. *The School-Voucher Program is Permanently Enjoined*

This case has a long and involved history in state court. In March 2011, Douglas County School District ("the School District") created and approved a school-voucher program, titled the Choice Scholarship Program ("the Program"). *Taxpayers*, 351 P.3d at 465. The Program was intended to divert millions of state taxpayer dollars designated by the Colorado Constitution and state statute for public elementary- and high-school education to private schools. *Id.* Under the Program, any private school—including religious schools—that satisfied the School District's requirements could receive voucher funding.

Intervenors filed suit as plaintiffs against the School District and School Board, the Colorado State Board of Education, and the Colorado Department of Education, seeking a declaratory judgment that the Program violated the Colorado Constitution and state law, as well as an injunction to prohibit the School District from implementing the Program. *Id.* at 466. Plaintiffs' counsel in the instant action represents a group of intervenor-defendants in that parallel litigation, defending the Program jointly with the School District.

After a three-day evidentiary hearing in August 2011, the trial court permanently enjoined the Program as violating several provisions of the Colorado Constitution and a state statute. *Id.* In June 2015, the Colorado Supreme Court affirmed the permanent injunction against the Program, with a plurality concluding that the inclusion of religious schools violated the Colorado Constitution. *Id.* at 475.

In October 2015, the School District and counsel for the Plaintiffs in this case filed separate petitions for certiorari in the U.S. Supreme Court, arguing that exclusion of religious

schools from a school-voucher program would violate the federal Constitution, and asking the Court to overturn the decision of the Colorado Supreme Court permanently enjoining the Program. Those petitions are currently pending.

B. *The School District Revises the Program*

In March 2016, the School District modified the Program and renamed it the School Choice Grant Program. Because, as the School District admits, the School Choice Grant Program is not a new program, but merely a revised version of the earlier, enjoined program, we refer to both the original and the modified versions as "the Program." *See* Defs.' Answer at 2, ECF No. 12. The revised Program is virtually identical to the original Program in all material respects except that it excludes religious schools from participation. Without seeking guidance from the state trial court that permanently enjoined the Program, the School District took steps to implement the revised version of the Program. Intervenors here have filed a motion to enforce the permanent injunction in Denver District Court. That motion is currently pending.

Plaintiffs filed a facial and as-applied challenge in this Court to enjoin the revised Program, asserting that the exclusion of religious schools violates the federal Constitution. *See* Compl., ECF No. 1. Plaintiffs specifically asked for expedited consideration of a preliminary-injunction motion based on the School District's intent to award vouchers on June 17, 2016. *See* Mem. in Supp. of Pls.' Mot. for Prelim. Inj. at 1, ECF No. 14. Intervenors were granted leave to intervene on May 27, 2016, *see* Min. Order, ECF No. 30, and a hearing was set to decide the preliminary injunction on June 9, 2016, *see* Order, ECF No. 35.

This Court denied Plaintiffs' preliminary-injunction motion at the June 9, 2016 hearing. *See* Min. Entry, ECF No. 44. The Court further expressed several "serious concerns" regarding

whether this case should continue at all based on the lack of adverseness between Plaintiffs and Defendants as well as ongoing parallel state-court proceedings involving all parties. June 9 Oral Ruling Rep.'s Tr. 75, ECF No. 46. Further, Defendants indicated "on the eve of the deadline for awarding vouchers that only five to six students have applied under the new secular Program. And, as yet, the District has not approved any private school partners where students could use a voucher." *Id.* at 87.

STANDARD OF REVIEW

Rule 12(b)(1) motions to dismiss for lack of jurisdiction can present a facial or factual attack. *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). A facial attack "questions the sufficiency of the complaint" and, therefore, the district court "must accept the allegations in the complaint as true." *Id.* at 1002. A factual attack goes "beyond allegations contained in the complaint and challenge[s] the facts upon which subject matter jurisdiction depends." *Id.* at 1003. In that case, "a district court may not presume the truthfulness of the complaint's factual allegations" and "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion." *Id.* (internal citations and quotations omitted).

To survive a motion to dismiss premised upon Rule 12(b)(6), a complaint must "state[] a *plausible* claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added). When reviewing a 12(b)(6) motion, the court "must determine whether the complaint sufficiently . . . establish[es] an entitlement to relief under the legal theory proposed." *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1202 (10th Cir. 2011)

(quoting *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007)). "Dismissal is appropriate if the law simply affords no relief." *Id.* Moreover, "[a] claim may be dismissed either because it asserts a legal theory not cognizable as a matter of law or because the claim fails to allege sufficient facts to support a cognizable legal claim." *Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270, 1271 (D. Colo. 2004).

ARGUMENT

This case should be dismissed for numerous independent reasons. First, this Court lacks jurisdiction. Plaintiffs' challenge interferes with ongoing state-court litigation regarding the important state interest of public education. Therefore, *Younger* abstention is mandatory. Further, because this case would be duplicative of issues which originated in state court, dismissal under the *Colorado River* doctrine is appropriate. Finally, because there is substantial doubt as to whether there will be any Program, this Court cannot provide Plaintiffs with the relief they seek, and no party to this case intends to defend the Program, this Court lacks Article III jurisdiction.

Second, as Plaintiffs fail to state a claim upon which relief may be granted, this case should be dismissed under Fed. R. Civ. P. 12(b)(6). Plaintiffs have not identified any viable legal theory. The Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), is controlling and it would require a change in the current law by the U.S. Supreme Court for Plaintiffs to prevail. *Locke* rejected Plaintiffs' central legal theory and considered and rejected Plaintiffs' pre-*Locke* precedents in the context of funding religious education because "to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their

reasoning." *Id.* at 720. Plaintiffs' claims should be dismissed as requesting an unprecedented order that is without any valid legal basis.

I. Plaintiffs' Complaint Should Be Dismissed Because This Court Lacks Jurisdiction

A. *This Court Must Abstain from Hearing this Case Under Younger*

Plaintiffs' challenge is inextricably intertwined with an ongoing state proceeding involving a key state interest: public education. Abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is therefore mandatory. "Since the beginning of this country's history Congress has . . . manifested a desire to permit state courts to try state cases free from interference by federal courts." *Id.* at 43. Based on "longstanding public policy against federal court interference with state court proceedings" and "the notion of 'comity,' that is, a proper respect for state functions," the Supreme Court has recognized that, in certain situations, a federal court must refrain from exercising jurisdiction. *Id.* at 43-44. *Younger* abstention is required when "federal proceedings would (1) interfere with an ongoing state judicial proceeding (2) that implicates important state interests and (3) that affords an adequate opportunity to raise the federal claims." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999).

"*Younger* abstention is jurisdictional." *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1228 (10th Cir. 2004). Courts address abstention "at the outset because a determination that the district court lacked jurisdiction over a claim moots any other challenge to the claim, including a different jurisdictional challenge." *Vail Dev. 09 LLC v. Ground Eng'g Consultants, Inc.*, No. 10-cv-00568-MEH-BNB, 2010 WL 2867861, at *4 (D. Colo. July 20, 2010). *Younger* abstention is "non-discretionary;" if all three conditions are met, a federal court must abstain from exercising jurisdiction. *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999).

Moreover, *Younger* applies "in full force" when the merits have not yet been litigated in federal court. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436 (1982).

All three conditions for *Younger* abstention are met here. Therefore, this Court must abstain.

First, the School District's school-voucher program has been the subject of extensive, protracted, and ongoing litigation over the past five years in *Taxpayers*. A Colorado trial court permanently enjoined the Program on August 12, 2011, which was affirmed by the Colorado Supreme Court on July 15, 2015. *Taxpayers*, 351 P.3d at 475. In contravention of that injunction, Defendants have attempted to forge ahead with the Program. On May 24, 2016, Intervenors filed, in Denver District Court, a motion to enforce the injunction obtained in *Taxpayers*. *See* Pls.' Mot. for Enforcement of Aug. 12, 2011 Permanent Inj., Douglas Decl. Ex. A. That motion is still pending. Moreover, Plaintiffs' counsel[1] and Defendants have both filed petitions for a writ of certiorari with the United States Supreme Court in *Taxpayers*. These petitions remain pending. The merits of this case are inherently and inextricably intertwined with those of *Taxpayers*. Therefore, the first *Younger* factor is established.

Second, "vital state interests are involved." *Middlesex Cty.*, 457 U.S. at 432. There is no doubt that education is an important state interest: "[t]he provision of primary and secondary education, of course, is one of the most important functions of local governments." *Martinez v.*

[1] The Tenth Circuit has held that *Younger* abstention is appropriate even when the "parties are not identical in the state and federal lawsuits . . . when in essence only one claim is at stake and the legally distinct party to the federal proceeding is merely an alter ego of a party in state court." *D.L.*, 392 F.3d at 1230. That is the case here: though the parents who intervened in *Taxpayers* to defend the Program when it included religious schools are not the same parents who are suing here to force the School District to include religious schools, the parents are represented by the same counsel (the Institute for Justice) and have the same goal—obtaining vouchers from the School District to pay tuition at religious schools.

Bynum, 461 U.S. 321, 329 (1983). That interest is particularly important here, as Plaintiffs threaten to siphon off the state's limited resources away from public schools and toward private and religious schools.

Third, the Colorado state courts provide an adequate forum to hear Plaintiffs' claims. Indeed, the Colorado state courts *have heard* Plaintiffs' federal constitutional claims. *See* Aug. 12, 2011 Order, Douglas Decl. Ex. B, at 34-35 (considering and rejecting the argument that "the First Amendment, through the Free Exercise Clause, requires states to aid religious schools"); *Taxpayers*, 351 P.3d at 473-75 (concluding that enjoining the Program "does not encroach upon the First Amendment"). The U.S. Supreme Court has repeatedly affirmed that state courts provide adequate forums to hear both state and federal constitutional claims. *See, e.g.*, *Middlesex*, 457 U.S. at 431 ("Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights."); *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986) ("We also have no reason to doubt that [Appellees] will receive an adequate opportunity to raise its constitutional claims" in a state administrative proceeding.); *Amanatullah*, 187 F.3d at 1164 ("It is sufficient for purposes of *Younger* abstention that federal challenges . . . may be raised in state court.").

The Supreme Court's decision in *Dayton Christian Schools* is particularly informative here. In that case, a religious school mandated that women teachers stay home with their preschool age children. 477 U.S. at 623. Based on this policy, the school told a pregnant teacher that her employment contract would not be renewed. *Id.* The teacher filed a complaint with the Ohio Civil Rights Commission, an administrative body, alleging that the school had impermissibly discriminated against her on the basis of her gender. *Id.* at 623-24. While the

administrative proceedings were pending, the school filed an action in federal district court, seeking to enjoin the administrative proceedings on First Amendment grounds. *Id.* at 624-25. The school challenged the ability of the administrative body to hear its constitutional claims, but the Supreme Court held that "it is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Id.* at 629 (internal citations omitted).

Here, Plaintiffs' federal constitutional claims have been raised, litigated, and decided by a state court, and are the subject of pending petitions in the U.S. Supreme Court. The same federal constitutional issues at issue here were briefed extensively by the parties in *Taxpayers*. Further, the only evidence Plaintiffs intend to present in the instant case is testimony from *Taxpayers* given by the School District's expert that attempted, unsuccessfully, to establish that anti-Catholicism motivated the constitutional clauses that prohibit the inclusion of religious schools. Scheduling Order 8, ECF No. 19. These same constitutional and factual issues are also the subject of Plaintiffs' and the School District's pending petitions in the U.S. Supreme Court. Therefore, the state court is an adequate forum for Plaintiffs' claims, establishing the third *Younger* factor.

As all three *Younger* factors are present here, this Court must abstain.

B. *This Case Should be Dismissed Pursuant to Colorado River*

Plaintiffs' entire case is based on the exclusion of religious schools from the Program and they ask this Court to enjoin only the portions of the Program relating to religious schools. *See* Compl. ¶¶ 1, B, ECF No. 1. Therefore, what Plaintiffs request is "an injunction that attempts to rebuild their idealized version of the Program . . . and to subsume or circumvent the ruling of the Colorado Supreme Court." June 9 Oral Ruling, Rep.'s Tr. 89, ECF No. 46. But the Colorado

Supreme Court permanently enjoined that version of the Program, and that decision is the subject of pending certiorari petitions in the U.S. Supreme Court. Furthermore, Intervenors have filed a motion to enforce the permanent injunction against the *entire* Program in state court. If Intervenors prevail on that motion, there will be no Program. Any litigation in this Court would therefore be duplicative.

This situation is exactly the kind where abstention is called for by *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976): "reasons of wise judicial administration" permit "the dismissal of a federal suit due to the presence of a concurrent state proceeding." *Id.* at 818.

The threshold condition for *Colorado River* abstention is that the federal and state proceedings must be parallel. Two suits are "parallel if substantially the same parties litigate substantially the same issues in different forums." *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994) (quoting *New Beckley Mining Corp. v. Int'l Union, UMWA*, 946 F.2d 1072, 1073 (4th Cir. 1991)). Even if the "parties are not identical," when the "interests of parties in both suits are congruent," *Colorado River* is still applicable. *Health Care & Ret. Corp. of Am. v. Heartland Home Care, Inc.*, 324 F. Supp. 2d 1202, 1205 (D. Kan. 2004) (citing *Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691, 695 (7th Cir. 1985)). The named plaintiffs in *Taxpayers* and here, while different, share an identical interest: a Program that allows religious schools to participate. *Compare* Compl. ¶ 7 (Plaintiffs seek "an injunction enjoining the" Program's "exclusion of religious options" because it is "unconstitutional"), *with* Pet. for Writ of Cert., *Doyle v. Taxpayers for Pub. Educ.*, Douglas Decl. Ex. C, at 6 ("Whether the United States Constitution tolerates barring the choice of religious schools in student aid programs is a

question that this Court should resolve."). Moreover, the legal issues are the same as those that continue to be litigated in *Taxpayers*. *See id.* "The substantial overlap of parties and issues in both the state and federal case indicates that the two actions are parallel and the threshold test has been met." *Foxfield Villa Assocs., LLC v. Regnier*, 918 F. Supp. 2d 1192, 1198 (D. Kan. 2013).

Once a court determines that the federal and state proceedings are parallel, it should use a "nonexclusive list of factors" set forth by the Supreme Court in *Colorado River* to decide whether "deference to parallel state proceedings" is warranted. *Fox*, 16 F.3d at 1082. The *Colorado River* factors include: "(1) whether either court has assumed jurisdiction over property; (2) the inconvenience of the federal forum;[2] (3) the desirability of avoiding piecemeal litigation; and (4) the order in which the courts obtained jurisdiction." *Id.* (citing *Colorado River*, 424 U.S. at 818). "No one factor is necessarily determinative." *Colorado River*, 424 U.S. at 818.

This case is similar to *D.A. Osguthorpe Family Partnership v. ASC Utah, Inc.*, 705 F.3d 1223 (10th Cir. 2013), which the Tenth Circuit held should be dismissed under *Colorado River*. There, a failed development plan was the basis of a suit in Utah state court for breach of contract. *Id.* at 1227. In response to an adverse ruling in the state trial court, one plaintiff, Osguthorpe, filed an interlocutory appeal to the Utah Supreme Court. *Id.* at 1228-29. Osguthorpe also petitioned the Utah Supreme Court for "emergency relief and for an immediate stay of all trial-court proceedings pending the resolution of its appeal." *Id.* at 1229. The Utah Supreme Court denied the motion. *Id.* "Facing the prospect of imminent trial in [Utah] district court, Osguthorpe turned to the federal courts for relief." *Id.*

[2] The first two factors are not applicable in this case; there is no property at issue and the state and federal courthouses are geographically close.

In affirming the federal district court's dismissal of the case on abstention grounds, the Tenth Circuit noted the "tension that results when one lawsuit suddenly becomes two." *Id.* at 1233. The court held that "the *Colorado River* doctrine wisely counsels our abstention from duplicative interference with the exceptionally protracted state proceedings present here." *Id.* at 1226. First, the court concluded that the state-court proceedings were ongoing because Osguthorpe's interlocutory appeal remained unresolved. *Id.* at 1232. Then, after finding that the first two *Colorado River* factors—jurisdiction over property and inconvenience of the federal forum—were inapplicable, the court determined that "the latter two factors weigh heavily on our analysis." *Id.* at 1234.

The same two factors that were determinative for the *Osguthorpe* court are controlling here. Particularly, the third factor—avoiding piecemeal litigation—is "paramount." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983)); *accord Nat'l Ass'n of Inv'rs Corp. v. Bivio, Inc.*, No. 11-cv-02435-WJM, 2013 WL 316021, at *10 (D. Colo. Jan. 28, 2013)). The court noted that the parties had "aggressively litigated this sprawling case in state court" a full five years before any action was filed in federal court. *Id.* The "litigation had become profoundly intertwined with the machinery of the Utah judicial system" before any parallel proceedings had begun. *Id.* at 1235. As in *Osguthorpe*, the Colorado state court system "ha[s] already overseen years of intensive litigation" before Plaintiffs invoked this Court's jurisdiction. *See id.* Intervenors filed a complaint challenging the Program in June 2011. The Denver district court held a three-day hearing in August 2011 and permanently enjoined the program on August 11, 2011. *Taxpayers*, 351 P.3d at 466. The case has since woven its way through the Colorado state-court system with the Colorado Supreme Court upholding the

injunction in June 2015. *Id.* at 475. Plaintiffs' counsel and Defendants have both appealed that ruling to the U.S. Supreme Court, where their petitions for certiorari remain unresolved. Further, Intervenors have filed a motion for enforcement of the injunction in Denver district court that has yet to be decided. Like in *Osguthorpe*, this case is "interwoven with a state-court system—on both trial and appellate levels." *Id.*

For the *Osguthorpe* court, the substantial amount of state-court litigation "tie[d] into the fourth *Colorado River* factor"—the order in which the state and federal courts obtained jurisdiction. *Id.* "In applying this factor," the court noted, "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Id.* (quoting *Moses H. Cone*, 460 U.S. at 21). Because the "Utah state court had already overseen years of intensive litigation before the federal court's jurisdiction was invoked," the Tenth Circuit concluded that "[a]ll progress in this case . . . has been made in the state court" and "the clearest of justifications" to dismiss based on *Colorado River* was present. *Id.* Similarly, the Colorado state court presided over the claims at issue here for years before the federal suit was filed. Plaintiffs ask this Court to decide a question which the Colorado Supreme Court has already decided and which both Plaintiffs' counsel and Defendants have asked the U.S. Supreme Court to review. Any litigation in this Court would be duplicative of the state-court proceedings.

Therefore, the Court should dismiss under *Colorado River*.

C. *This Court Does Not Have Article III Jurisdiction Over Plaintiffs' Claims*

Article III of the Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). A court may therefore only exercise jurisdiction over a claim if a plaintiff has standing and there is an actual case or controversy. As the party seeking federal jurisdiction, "plaintiffs bear the burden of establishing standing." *Colo. Outfitters Ass'n v. Hickenlooper*, Nos. 14-1290, 14-1292, 2016 WL 1105363, at *2 (10th Cir. Mar. 22, 2016). "At bottom, the gist of the question of standing is whether [plaintiffs] have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)). Whether a plaintiff "faces an imminent injury . . . bears close affinity to questions of ripeness." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1157 (10th Cir. 2013) (internal citations and quotations omitted). Ripeness protects federal courts from "entangling themselves in abstract disagreements" by avoiding "premature adjudication." *Awad*, 670 F.3d at 1124 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). "Both standing and ripeness present the threshold jurisdictional question of whether a court may consider the merits of a dispute." *S. Utah Wilderness All.*, 707 F.3d at 1152.

Plaintiffs lack standing (or, alternatively, their claims are not ripe) because their alleged injury is not imminent and cannot be redressed by this Court. This Court cannot provide Plaintiffs the relief they seek—a Program including religious schools—because that option has been foreclosed by the Colorado Supreme Court's ruling in *Taxpayers*. Moreover, the parties here are not adverse. No party to this litigation—Plaintiffs, Defendants, or Intervenors—plans to

defend a school-voucher program that excludes religious schools. At a minimum, therefore, this "friendly suit[]" raises serious jurisdictional concerns. *Flast v. Cohen*, 392 U.S. 83, 100 (1968). As Plaintiffs cannot satisfy the requirements for constitutional or prudential standing, this case should be dismissed for lack of jurisdiction.

i. Plaintiffs' Alleged Future Injury is Speculative

For Plaintiffs to establish standing they must show (1) an injury that is (2) traceable to the challenged action of Defendants and is (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). These three elements are the "irreducible constitutional minimum of standing." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Lujan*, 504 U.S. at 560). The injury must be "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Future injury "may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)).

Plaintiffs cannot show that their alleged injury is "certainly impending." *Id.* First, Intervenors have filed a motion to enforce the permanent injunction of the Program writ large. Should that motion be granted, there will be no injury because there will be no Program. Second, at the June 9 hearing, the School District "indicated on the eve of the deadline for awarding vouchers that only five to six students have applied" for the Program and as of that time it had "not approved any private school partners where students could use a voucher." June 9 Oral Ruling, Rep.'s Tr. 87, ECF No. 46. As of July 11, 2016 the School District still has not

identified any potential partner schools. Douglas County School District, Choice Grant Program Webpage, Douglas Decl. Ex. E, at 4-5. Without partner schools, the School District cannot award vouchers. Given that there may be no partner schools (and, hence, no vouchers), Plaintiffs' claimed injury is too speculative at this time for this Court to exercise jurisdiction. *See* June 9 Oral Ruling, Rep.'s Tr. 87, ECF No. 46 ("It is not entirely clear to the Court that any vouchers will be awarded; and if they are not awarded, there is no discrimination.").

For the same reasons, Plaintiffs' claims are not ripe. "In evaluating ripeness the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed *may not occur at all*." *S. Utah Wilderness All.*, 707 F.3d at 1158 (emphasis added) (internal citations omitted). Without participating partner schools there will be no Program. If Intervenors prevail on their motion for enforcement in state court, the entire Program will be enjoined. In either case, whether the Program—in any form—will begin is simply too uncertain. If there is no Program Plaintiffs have no injury and, therefore, no standing.

ii. *Plaintiffs' Claims Cannot be Redressed by this Court*

The third requirement for constitutional standing asks whether the plaintiff has demonstrated that there is "a likelihood that a favorable decision will redress the injury." *Jordan v. Sosa*, 654 F.3d 1012, 1019 (10th Cir. 2011). In other words, Plaintiffs "must show that a favorable court judgment is likely to relieve the party's injury . . . [and] would have a binding legal effect." *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1182 (10th Cir. 2012) (quoting *City of Hugo v. Nichols*, 656 F.3d 1251, 1264 (10th Cir. 2011)).

Critically, Plaintiffs do not ask this Court to enjoin the entire Program; rather, they only ask the Court to enjoin the parts of the program that exclude religious schools from participating.

See Compl. ¶ B, ECF No. 1 (requesting an injunction for the parts of the Policy "insofar as they exclude religious options from the School Choice Grant Program"). This Court cannot provide that relief. As both Plaintiffs and Defendants admit, the School District cannot implement a Program that includes religious schools because the Colorado Supreme Court enjoined that version of the Program. *Taxpayers*, 351 P.3d at 475. A plurality specifically held that the Program violates the Colorado Constitution. One Justice concurred in the judgment and did not reach the constitutional claims, concluding that the Program, which would "funnel[] public funds . . . to finance private education," violated a state statutory provision. *Id.* (Márquez, J., concurring).

Thus, the program that Plaintiffs ask this Court to create—one where the School District is permitted to channel public money to private religious schools—is unlawful under Colorado law. As a state's highest court is the final interpreter of its statutes and constitution, *see Johnson v. Fankell*, 520 U.S. 911, 916 (1997), no ruling from this Court can provide Plaintiffs with the relief they request. The only court that can review a state supreme court decision is the U.S. Supreme Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (""[N]o court of the United States other than [the Supreme Court] c[an] entertain a proceeding to reverse or modify" a state supreme court judgment.). Without a redressable injury, Plaintiffs cannot establish the third requirement of standing. This Court must therefore dismiss for lack of jurisdiction.

iii. *The Parties Are Not Adverse*

At the June 9 hearing on Plaintiffs' motion for a preliminary injunction, this Court expressed serious concerns regarding the lack of adverseness between Plaintiffs and Defendants. Particularly because Plaintiffs have brought a facial constitutional challenge, this Court stressed

the need for "parties to present good, sound arguments from differing perspectives" so that the Court is not "lured into making rulings or granting relief that would not have been granted in proper circumstances." June 9 Oral Ruling, Rep.'s Tr. 73, ECF No. 46. Plaintiffs and Defendants are nominally on opposite sides of this case, but as this Court noted, *id.* at 72, they both seek the same goal: a school-voucher program that includes religious schools. Neither Plaintiffs, Defendants, nor Intervenors is mounting a vigorous defense of the Program. The Court simply "do[es] not have the level of adversariness" needed to decide the merits of a facial constitutional challenge. *Id.* at 74.

Because "Article III of the Constitution ensures that federal courts are not roving commissions assigned to pass judgment on the validity of the nation's laws, but instead address only specific cases and controversies," the lack of "necessary adversarial zeal," *id.* at 73, between the parties is fatal to Plaintiffs' case. *See Ward v. Utah*, 398 F.3d 1239, 1246 (10th Cir. 2005) (internal quotation marks and citations omitted). Plaintiffs' counsel and Defendants continue to argue before the U.S. Supreme Court that the federal Constitution prohibits the exclusion of religious schools from a publicly funded school-voucher program, and therefore that the original Program, which includes religious schools, should be reinstated. *See* Pet. for Writ of Cert., *Douglas Cty. Sch. Dist., et al. v. Taxpayers for Pub. Educ.*, Douglas Decl. Ex. D, at 3 (School District petition arguing that "[f]orcing school districts to deviate from . . . neutrality is nothing less than unconstitutional discrimination against religion"); *id.* at 30 ("the restriction of available schools to those without religious affiliations is not just artificial and counterproductive, but unconstitutional"); Pet. for Writ of Cert., *Doyle, et al. v. Taxpayers for*

Pub. Educ., Douglas Decl. Ex. C, at 3 (Institute for Justice petition arguing that a government may not bar religious schools from a voucher program).

An "actual controversy exists only when the parties 'ha[ve] taken adverse positions.'" *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1385 (10th Cir. 2011) (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242 (1937)). It is well settled that when "there is no real dispute between the plaintiff and defendant"—when "their interest in the question brought [to the Court] for decision is one and the same, and not adverse"—federal courts lack jurisdiction. *Lord v. Veazie*, 49 U.S. 251, 254 (1850); *see also Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (dismissing case because "both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution."). Particularly "when [a court] assumes the grave responsibility of passing upon the constitutional validity of legislative action," if the parties to a case are not genuine adversaries "[i]t is the court's duty to . . . dismiss the cause without entering judgment on the merits." *United States v. Johnson*, 319 U.S. 302, 304-05 (1943).

Also instructive is the U.S. Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, the Court considered whether the case should be dismissed as the U.S. Attorney General declined to defend the constitutionality of the challenged statute. The Court stated that "prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Id.* at 2687 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Court ultimately allowed the case to proceed, however, based upon

the intervention in the case of the House of Representatives, through its Bipartisan Legal Advisory Group (BLAG), specifically to defend the constitutionality of the statute it had passed. *Id.* at 2687-88 ("BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."). In contrast, there is no party in this case who will vigorously defend the constitutionality of the School District's program, and the enactor of the Program, the School District, is simultaneously pursuing a claim in the U.S. Supreme Court that a school-voucher program that excludes religious schools is *unconstitutional*.

Here, Plaintiffs and Defendants simply are not "genuine adversaries." Rather, both have taken and continue to take the same position on the key issue in this case—including before the U.S. Supreme Court—arguing that it is unconstitutional for a governmental body like the School District to implement a voucher program that excludes religious schools. Under these circumstances, this Court lacks jurisdiction, or alternatively should dismiss the case based on prudential considerations.

II. Plaintiffs Fail to State A Claim Upon which Relief can be Granted

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

In *Locke*, the Supreme Court held that a state law barring university students from using state scholarship funds to pursue a degree in theology did not violate the U.S. Constitution, even

though allowing such use of scholarship funds would be permitted under the Establishment Clause. *Id.* at 715, 719, 720 n.3, 725 n.10. Addressing an argument that the law violated the Free Exercise Clause, the Court first noted that "there is room for play in the joints" between that Clause and the Establishment Clause; "[i]n other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19 (internal quotations and citations omitted).

The Court then explained that the law did not significantly burden students' religious-exercise rights. The law did not impose "criminal [or] civil sanctions on any type of religious service or rite," "deny to ministers the right to participate in the political affairs of the community," or "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21. "The State ha[d] merely chosen not to fund a distinct category of instruction," and the students were not prohibited from undertaking theological study. *Id.* at 721.

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

The Court also rejected in a footnote the argument that the law violated the Equal Protection Clause and explained it was subject only to rational basis scrutiny under the Equal Protection Clause. *Id.* at 720 n.3; *accord Johnson v. Robison,* 415 U.S. 361, 375 n.14 (1974) (holding that a religion-related Equal Protection claim merited only rational basis scrutiny

because the Free Exercise claim failed). In the same footnote, the Court dismissed the plaintiff's Free Speech claim, explaining that scholarships are "not a forum for speech." 540 U.S. at 720 n.3. The Court similarly rejected in a footnote the plaintiff's Establishment Clause claim, explaining that the state's decision not to subsidize religious instruction did not reflect "animus toward religion." *Id.* at 725, 725 n.10.

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

Numerous federal courts have accordingly rejected arguments that providing funding to secular institutions requires extension of funding to religious institutions. For example, in *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 354 (1st Cir. 2004), the court

held that a state did not violate the U.S. Constitution by paying tuition for students in secular but not religious private schools, noting, "[*Locke*] confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity." In *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007), the court, relying on *Locke*, ruled that a state did not violate the U.S. Constitution by denying a religious facility for troubled youths public funding available to non-religious entities. *See also Bowman v. United States*, 564 F.3d 765, 776 (6th Cir. 2008) (upholding a federal regulation that provided former military service-members credit toward retirement for secular but not religious public-service work); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 21 (1st Cir. 2004) (holding that a school district was not obligated to provide disabled children at private schools with special-education benefits equal to those given to such children at public schools, for "the mere non-funding of private secular and religious school programs does not burden a person's religion or the free exercise thereof") (quotations and citations omitted); *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 781 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 891 (Jan. 15, 2016) (holding that a state did not violate the U.S. Constitution by denying a religious preschool funding for playground renovations that was available to secular schools); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 750 F.3d 184, 198 (2d Cir. 2014), *cert denied*, 135 S. Ct. 1730 (2015) (holding that city board of education's rule barring the use of school facilities for religious worship after hours did not violate the U.S. Constitution); *Wirzburger v. Galvin*, 412 F.3d 271, 279-82 (1st Cir. 2005) (upholding against federal constitutional challenge prohibition in Massachusetts Constitution on

use of initiative process to repeal constitutional provision restricting public aid to religious organizations).[3]

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

The primary basis for Plaintiffs' argument is the U.S. Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Lukumi*, however, involved a law that was enacted specifically to criminalize the practice of a particular

[3] State courts have reached similar conclusions. In *Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006), the Maine Supreme Court rejected a federal constitutional challenge to the program that was also at issue in *Eulitt*, 386 F.3d 344, stating, "[t]he statute merely prohibits the State from funding [religious parents'] school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner." In *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 680 (Ky. 2010), the Kentucky Supreme Court spurned a federal constitutional attack on a state constitutional provision that restricts state funding to religious educational institutions, concluding that any free-exercise interests had to yield to "the state's legitimate and fully constitutional antiestablishment concerns." *Accord Bush v. Holmes*, 886 So. 2d 340, 362-66 (Fla. Dist. Ct. App. 2004) (rejecting federal constitutional challenge to state constitutional provision barring state funding of religious schools), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006).

religion, animal sacrifice. Such criminalization was found to be a burden on the practice of religion, thereby requiring a compelling state interest to survive. 508 U.S. at 546. When the U.S. Supreme Court decided *Locke* it specifically distinguished *Lukumi* as inapplicable in the context of the state of Washington's choice to exclude religious education funding, as it did not unconstitutionally burden the practice of religion. *Locke*, 540 U.S. at 720-25.[4] It would take a change in the law overturning *Locke* and its progeny for Plaintiffs to prevail in this case. Plaintiffs are asking this Court to speculate as to whether the Supreme Court might make such a change, but as the Eighth Circuit succinctly stated in that case, "[u]ntil the [Supreme] Court rules otherwise," the Court's opinion in *Locke* is controlling. *Trinity Lutheran*, 788 F.3d at 785 n.3. *Locke* forecloses Plaintiffs' argument.

Plaintiffs thus have no legal theory upon which this Court may provide relief.

CONCLUSION

For the reasons set forth above, Intervenors respectfully request that this Court dismiss Plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) pursuant to mandatory *Younger* abstention, *Colorado River* abstention, or Plaintiffs' failure to establish constitutional or prudential standing. Furthermore, this case warrants dismissal under Fed. R. Civ. P. 12(b)(6) because Plaintiffs fail to state a claim upon which relief can be granted, for their claims are foreclosed by the decisions of the U.S. Supreme Court and related federal precedents.

[4] Notably, the dissent in *Locke* relied on *Lukumi* to advocate for precisely the rule that Plaintiffs argue supports their claim here—that excluding religious education from a school-funding program is a burden on religion that qualifies as unconstitutional discrimination. *Id.* at 726-27 (Scalia, J., dissenting).

Respectfully submitted this 11th day of July, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 11, 2016, a copy of the foregoing **INTERVENORS' MOTION TO DISMISS** was electronically filed with the clerk of the court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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