

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HEARING IN RE JAMES LARUE, et al. v. COLORADO BOARD OF
EDUCATION, et al.

DATE: August 4, 2011 - Volume III

DISCLAIMER: This uncertified rough draft transcript
is unedited and uncertified and may contain
untranslated words, a note made by the reporter, a
misspelled proper name, and/or word combinations that
do not make sense. All such entries will be corrected
on the final certified transcript which we will
deliver to you in accordance with your requested
delivery arrangements.

Due to the need to correct entries prior to
certification, this rough draft transcript can be used
only for the purpose of annotating counsel's notes and
cannot be used or cited in any court proceedings or to
distribute to other parties to the case who have not
purchased a transcript copy.

CONSENT: By opting for this rough draft transcript,
you have agreed: (1) To purchase the final transcript
at the agreed-upon rate; (2) Not to furnish this rough
draft transcript, either in whole or in part, on disk
or hard copy, via modem or computer, or by any other
means, to any party or counsel to the case.

1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 I am now calling 11CV4424. Counsel and
4 parties are present. Are there any preliminary
5 matters before we get started?

6 MR. DOUGLAS: Your Honor, I have one very
7 brief preliminary matter, if I may.

8 THE COURT: I notice everyone says very
9 brief now. Let's see how you do, Mr. Douglas, with
10 your very brief matter.

11 MR. DOUGLAS: Thank you, Your Honor.

12 It's come to my attention that
13 Plaintiffs' Exhibit 18, which is one of the stipulated
14 exhibits for the hearing, was inadvertently left off
15 the list of stipulated exhibits that was given to Your
16 Honor. So I just wanted to make sure that the record
17 correctly reflected that exhibit, which is one of the
18 private school applications, all of which were
19 stipulated to, was actually admitted and in the
20 record.

21 THE COURT: Okay. The record will
22 reflect that. I don't have it on my little sheet, but
23 I'll add it.

24 MR. DOUGLAS: Thank you.

25 THE COURT: Anything else?

1 MR. BINDAS: Yes, Your Honor. I wanted
2 to apprise you of the fact that Ms. Diana Oakley, who
3 will be a witness this afternoon, will be stepping
4 into the courtroom sometime this morning, but she,
5 being a party in the case, being our representative
6 today, I don't believe it will be a problem, but I
7 wanted to alert you to that fact.

8 THE COURT: If she's a party, she has a
9 right to be here, so it's not a problem. Thanks for
10 the notice.

11 Anything else? All right. We're going
12 to continue now with the defense case in chief. And,
13 Mr. Lyons, we'll start with you. Please call your
14 first witness.

15 MR. LYONS: Thank you, Your Honor. I
16 would like to introduce my partner and colleague,
17 March Nussbaum, who will be examining our next
18 witness.

19 THE COURT: Good morning, Mr. Nussbaum.

20 MR. NUSSBAUM: Good morning, Your Honor.

21 The Douglas County schools calls
22 Professor Charles Glenn as our next witness.

23 THE COURT: Give me just a moment.

24 Raise your right hand, please.

25 CHARLES L. GLENN,

1 having been first duly sworn to state the whole truth,
2 testified as follows:

3 THE COURT: Please be seated. I'm
4 going to take a moment to allow the plaintiffs to set
5 up a telephone connection so that their rebuttal
6 witness can hear the testimony of Professor Glenn. So
7 if you'll just stand down for a moment.

8 MR. NUSSBAUM: Your Honor, while we're
9 waiting for that, may I indicate a couple of
10 stipulations?

11 THE COURT: Absolutely.

12 MR. NUSSBAUM: The parties have
13 stipulated to the admissibility --

14 THE COURT: Hang on a second, so we can
15 get this goofiness out of the way.

16 (Pause in the proceedings.)

17 THE COURT: All right. Mr. Nussbaum, you
18 had a couple of matters you wanted to address.

19 MR. NUSSBAUM: Professor Glenn's
20 curriculum vitae, Exhibit HH, the parties *S *S have
21 stipulated to its admissibility.

22 THE COURT: Okay.

23 MR. NUSSBAUM: Exhibit LL and MM, *S *S
24 two articles from the Rocky Mountain News dated
25 respectively February 2, 1876, and March 17, 1876, the

1 parties have stipulated. This is actually -- each of
2 these are a two-page exhibit, Your Honor. The second
3 page of each is a difficult-to-read copy from
4 microfiche from that time, and the parties have
5 stipulated to the authenticity of the second page of
6 each of those exhibits.

7 THE COURT: Okay.

8 DIRECT EXAMINATION

9 BY MR. NUSSBAUM:

10 Q. Good morning, Professor Glenn. Would you
11 please state your name. *S?

12 A. Charles Glenn.

13 Q. And how are you employed?

14 A. I'm a professor at Boston University.

15 Q. And how long have you been in that
16 position?

17 A. In September, it will be 20 years.

18 Q. What is your educational background?

19 A. I earned a bachelor's degree at Harvard.
20 Studied in California and Germany. Then earned a
21 doctor of educational administration and educational
22 policy at Harvard, and a PhD in religion and modern
23 culture at Boston University.

24 Q. And have you taught on the subject of
25 history and education?

1 A. I have. I've taught courses in the
2 history department at Boston University, and for more
3 than a dozen years, I've taught a history of education
4 course.

5 Q. Are you the author of articles and books
6 on the subject of history?

7 A. Yes.

8 Q. And what generally are the subject
9 matters that you've addressed in those books and
10 articles?

11 A. The two questions that have most
12 interested me have been the question of -- of the role
13 of the state in relation to schools, which I looked at
14 in a number of countries, and the issue of the
15 education of immigrants and members of minority
16 groups, and how the state has not protected their
17 rights.

18 Q. And have you also looked at certain
19 religious minority groups in that work?

20 A. I have, yes.

21 Q. Has your work also caused you to look at
22 the issue of the -- what I'm going to call the Blaine
23 movement?

24 A. Yeah.

25 Q. Or more broadly known by some as the

1 no-pay movement?

2 A. Yes.

3 Q. And have you written on those subjects?

4 A. I have.

5 Q. Take just a moment and look at Exhibit HH
6 that's just been admitted into evidence. And what is
7 this document?

8 A. This is my curriculum vitae. I want to
9 correct one thing briefly. I am no longer chairman of
10 the department. I stepped down a few months ago in
11 order to devote myself to teaching and completing a
12 series of books on the history of education.

13 Q. And I see this goes 35 pages, your
14 curriculum vitae. We are not going to go through it
15 all. But does this fairly accurately represent your
16 professional work and your academic work?

17 A. Yes, it does.

18 Q. I see you also serve on a number of
19 national and international boards focused on the issue
20 of education.

21 A. Yes.

22 MR. NUSSBAUM: Your Honor, I would move
23 to certify Professor Charles Glenn as an expert on the
24 history of education in the United States, and more
25 particularly on the social, religious, and political

1 history of the Blaine movement in Colorado and
2 nationally, and the broader movement to bar public
3 funds flowing to so-called sectarian schools.

4 THE COURT: Any objection to the
5 tender?

6 MR. MACDONALD: Your Honor, can I reserve
7 for cross, so we don't waste the time now?

8 THE COURT: Well, if you have voir dire
9 that goes to his qualifications, now would be the
10 time. If you just want to start your
11 cross-examination, then, of course, I wouldn't permit
12 that.

13 MR. MACDONALD: Part of the issue is the
14 characterization of Colorado's Blaine amendment and
15 what is a Blaine amendment, and that goes a lot to the
16 cross-examination. We don't dispute anything on his
17 CV, Your Honor, his background.

18 THE COURT: So the issue is his
19 qualifications at this point. So I'm going to treat
20 that as a non-objection. Any other objections? No.
21 All right. Thank you. The professor may offer his
22 opinions in the designated fields, and you may
23 proceed.

24 Q. (BY MR. NUSSBAUM) Professor, let's begin
25 and focus on your testimony in the pre-Civil War half

1 of the 19th century. What was the religious character
2 of popular schooling in the United States before the
3 Civil War?

4 A. It depended very much on the religious
5 character of local communities. Since schooling is
6 almost entirely under the control local communities.

7 So that in instances when a local
8 community was very homogenous, for example, a group of
9 German Lutheran immigrants, the local public school
10 was German Lutheran. In the more common case where
11 there were a variety of different Protestant groups,
12 the school generally practiced a generic
13 Protestantism.

14 In almost every case it appears that, for
15 example, the Bible was read both for instruction and
16 devotionally, prayer was often an aspect of schooling.
17 And nobody much questioned that for many decades.

18 Q. How were these local schools funded?

19 A. They were funded in small part from state
20 land grants. For example, the northwest ordinance,
21 Congress set aside a portion of the land in the -- in
22 Ohio, Illinois, Indiana, and so forth, for the support
23 of schools and a portion of the land for the support
24 of churches.

25 And when the Louisiana Purchase was made,

1 that provision to the schools was extended. Beyond
2 that, though, it was local taxpayers and to some
3 extent what was called rates paid by parents.

4 Q. And that funding, the public element of
5 that funding, flowed to those schools, even though
6 there was heavy religious content in the curriculum;
7 is that correct?

8 A. Yes. No question.

9 Q. Now, were there also some denominational
10 schools during the first half of the 19th century?

11 A. Yes. In the middle Atlantic states, most
12 schooling was provided by the churches, which were
13 quite ethnic often in their background. And so the
14 schools were largely denominational.

15 In New England and in the midwest, they
16 generally were town schools with a religious
17 character.

18 Q. And as a general proposition -- I
19 recognize there's exceptions and there's a lot of
20 history we will not have time to get into today, but
21 as a general proposition, were the arrangements of
22 public support for local schools, both those that were
23 overtly religious and those that were public but had
24 religious content -- was there controversy regarding
25 that funding, as a general proposition, before the

1 Civil War?

2 A. Very seldom.

3 Q. Let's turn to the period of time after
4 the Civil War. Were there concerns about the
5 intentions and influence of Catholics and the Catholic
6 Church in society and American -- pardon me. Let's
7 take before the Civil War.

8 Were there concerns about the intentions
9 or influence of Catholics and the Catholic Church in
10 society and in American education before the Civil War
11 and before what I'm going to call the Blaine amendment
12 debates of the 1870s?

13 A. Yes.

14 Q. Okay. And what were they?

15 A. In the 1830s, in response in large part
16 to developments in Europe at which the Papacy asserted
17 more authority over education, a number of books were
18 published, one by Samuel Morse, the inventor of the
19 telegraph, called, I think, Foreign Conspiracies
20 Against the Liberties of the United States, which was
21 predicting that the Catholic Church was sending
22 Jesuits in disguise to attempt to take over American
23 life.

24 Lyman Beecher, the noted Protestant
25 minister, wrote a book called A Plea for the West, in

1 which he argued that the Ohio Valley was in danger of
2 falling into Catholic hands because of -- the
3 Catholics were being more vigorous about promoting
4 schooling than were Protestants. And many others.
5 This was a very popular genre in those days.

6 Q. Who was Horace Bushnell?

7 A. Horace Bushness was a congregationalist,
8 theologian, pastor in Hartford, Connecticut, who
9 became famous with a book on christianity in which he
10 argued that in contrast with the usual Protestant view
11 at the time, the necessity of conversion, that
12 children could be educated in such a way that they
13 would grow up always being christian without any need
14 for conversion.

15 Q. If you would take a look at Exhibit II,
16 which is in the book there before you. *S *S?

17 A. I'm finding JJ.

18 Q. II.

19 A. Oh, I'm sorry.

20 Q. It looks to me like a Roman II, but it's
21 II.

22 A. Yes. I have it.

23 Q. Okay.

24 MR. NUSSBAUM: Your Honor, I noticed, as
25 we were preparing for this, that the date of this

1 document was omitted from the front page of the
2 exhibit. And I don't know if I can, with your
3 permission, supplement that in the official exhibit
4 book.

5 THE COURT: Absolutely.

6 MR. NUSSBAUM: This will be the page 1 of
7 that exhibit.

8 Q. (BY MR. NUSSBAUM) So when was this book
9 published?

10 A. 1880.

11 Q. And if you'll open to the second page of
12 it, it refers to -- there at the bottom paragraph of
13 the page, does this refer -- what does this document
14 have in it, from pages -- the bottom of page 298
15 through page 303?

16 A. It is a -- it includes the text of a
17 public lecture which he gave in Hartford in 1853
18 addressing the question of the common school -- that
19 is, the public school -- and the threat to it imposed
20 by Catholic resistance.

21 MR. NUSSBAUM: Your Honor, I'd move for
22 the admission of Exhibit II.

23 THE COURT: Objection to II?

24 MR. MACDONALD: Your Honor, I guess I'm
25 going to object. I'm not sure if this is a learned

1 treatise, or what's the basis of --

2 MR. NUSSBAUM: 803.16, ancient document.

3 THE COURT: There's one we don't hear
4 very often. Does that satisfy you, Mr. Macdonald?
5 1853 --

6 MR. MACDONALD: That's pretty ancient,
7 Your Honor.

8 THE COURT: It's older than both of us.

9 MR. NUSSBAUM: In the rules of evidence,
10 20 years satisfies the ancient document requirement.

11 MR. MACDONALD: Other than the fact it's
12 an excerpt, Your Honor, we've never been provided the
13 full copy. It looks to me like it's many hundreds of
14 pages. We are on page 298. So with that reservation,
15 Your Honor.

16 THE COURT: Well, I don't know that the
17 rule of completeness applies. You're only offering
18 this excerpt; is that right, Mr. Nussbaum?

19 MR. NUSSBAUM: Yes, Your Honor.

20 THE COURT: II will be admitted on the
21 objection, sort of.

22 Q. (BY MR. NUSSBAUM) Professor Glenn, go to
23 page 301, and read aloud, if you would, the first full
24 paragraph of -- is it Pastor Bushnell? Is that how
25 they would address him at the time? Or Reverend

1 Bushnell?

2 A. Probably Dr. Bushnell.

3 Q. Okay. Dr. Bushnell's -- is this a speech
4 or sermon? What is this?

5 A. It was a public address. It was called a
6 fast day's sermon, which was not a church occasion.
7 It was a public -- when there was felt to be a need to
8 gather the people together to be addressed about some
9 pressing issue at the time.

10 Q. And before you read this, the date of
11 this speech or sermon was -- is 1853; is that correct?

12 A. 1853.

13 Q. If you'll read that paragraph, please.

14 A. "In this latter view, the withdrawing of
15 our Catholic children from the common schools, unless
16 for some breach upon their religion, and the
17 distribution of public moneys to them in schools apart
18 by themselves is a bitter cruelty to the children and
19 a very unjust affront to our institutions. We bid
20 them welcome as they come and" --

21 Q. Let me stop you there. Who's the "them"
22 in that sentence?

23 A. Catholics.

24 Q. Okay. Go ahead.

25 A. And obviously Catholic immigrants,

1 because "as they come."

2 "We bid them welcome as they come, and
3 open to their free possession all the rights of our
4 American citizenship. They, in return, forbid their
5 children to be Americans, penned them as foreigners to
6 keep them so, and trained them up in the speech of
7 Ashdod among us. And then to complete the affront,
8 they come to our legislatures demanding it as their
9 right to share in funds collected by a taxing of the
10 whole people, and to have these funds applied to the
11 purpose of keeping their children from becoming
12 Americans."

13 Q. As a historian, as you're looking at
14 this, what is going on in Dr. Bushnell speech, and
15 particularly this paragraph?

16 A. He is reflecting what was a common
17 concern that if Catholic children -- if immigrant
18 children were not persuaded somehow to be in the
19 common schools, which had a Protestant character,
20 which was assumed to be just a natural American
21 character, that they would not become real Americans.

22 Q. And when it refers to them as a bitter
23 cruelty upon the children, what does he mean by that?

24 A. Because they will not become real
25 Americans and be able to fit into American society.

1 Q. Thank you.

2 Let's turn, if we can, to the post Civil
3 War era of education in the United States. Did the
4 concern about Catholics and a Catholic Church in
5 relation to education in the United States change
6 after the Civil War?

7 A. Yes.

8 Q. How so?

9 A. There was a considerable revival of this
10 concern for three reasons, which were, if I may, just
11 in the interests of time, the first being that
12 increasingly immigrants, Irish and German immigrants
13 in particular, were becoming influential politically
14 in many northern cities. Often the mayors of northern
15 cities were being -- of immigrant background. And
16 this threatened the larger Protestant majority, who
17 saw this as a dangerous development.

18 Secondly -- and this is often ignored by
19 historians of American education -- there was a keen
20 awareness of the developments occurring in Europe at
21 the time. As I show in one of my books that was
22 published this spring, in a number of the countries in
23 western Europe, the 1860s and 1870s were a time of
24 bitter conflict between national governments seeking
25 to assert their control over the formation of citizens

1 and the Catholic Church seeking to maintain its role
2 educating children who were baptized.

3 Q. And was that the Catholic Church's
4 reaction to the government's movement in Europe?

5 A. Yes. And so, for example, in the famous
6 Syllabus of Errors in 1864 by Pope Pius IX --

7 Q. Okay. Go ahead.

8 A. -- spelled out a number of things which
9 the Catholic Church did not agree with in modern life.
10 And this included many of the features that -- that
11 liberals and most Americans indeed -- certainly most
12 American Protestants -- believed were central to the
13 qualities of American life.

14 Q. And did Pius IX in the 1864 Syllabus of
15 Errors speak about education to --

16 A. He did very specifically.

17 Q. And did he speak about government and
18 church with regard to education?

19 A. He rejected the idea that government had
20 a right to educate children and insisted that was the
21 responsibility of the church and the parents.

22 Q. Were there further statements -- and how
23 did that -- was that known in America, that he had
24 issued the Syllabus of Errors?

25 A. It, of course, occurred during the Civil

1 War, so there was not immediately that intention. But
2 after the war, it became the source of extensive
3 discussion, particularly as the Catholic hierarchy
4 began to, in its own writing, support those ideas.

5 Then in 1970 -- 1870 -- sorry -- when the
6 Italian government finally seized control of Rome, the
7 Pope famously called the Vatican council, which issued
8 the statement of Papal accountability, which caused
9 even more objection among many American Protestants.

10 James Garfield, the future president,
11 said in an election campaign in Ohio that it was the
12 same battle on both sides of the Atlantic, that
13 Americans were facing the same threat from the claims
14 of the Catholic Church, which -- which Europeans were
15 experiencing.

16 Q. And you said there was a third thing. So
17 you've mentioned the growing political power of
18 Catholics in the U.S., and you've mentioned this
19 tension between European governments and Rome's
20 reaction.

21 A. Right.

22 Q. The third thing that you said changed
23 after the Civil War?

24 A. The third -- and this is discussed
25 eloquently by Professor Green -- is that the

1 republican party found itself in serious trouble in
2 the 1870s. The effort at reconstruction in the south
3 encountered very strong resistance and increasingly
4 lacked support in the north. There were financial
5 scandals in the Grant administration. Republicans
6 lost control of the House of Representatives in the
7 1874 election. And clearly they were looking for a
8 new issue. In both statements by republican leaders
9 and in republican friendly publications like Harper's
10 Weekly, it was mentioned at the time that that new
11 issue was going to be the Catholic threat to the
12 common public school.

13 Q. And who was -- who was articulating this
14 as being a new issue for republicans in Harper's
15 Weekly? What was the data for that?

16 A. I'm sorry. I quoted that from Professor
17 Green's 1992 article. He cites that.

18 Q. Okay. And so what did -- so the
19 republicans saw this issue. What did they do with it?

20 A. Well, in -- in the summer of 1875,
21 President Grant made a very widely reported speech to
22 a group of union veterans, threatening that there
23 might be a new Civil War, not over race but over --
24 over religion, and that it was necessary that
25 Americans come together and resist the efforts to

1 divide the country by having what he calls sectarian
2 schooling.

3 He then followed this up in his annual
4 message to Congress in December, calling for
5 constitution --

6 Q. 1875?

7 A. 1875.

8 Q. December 1875. Okay.

9 A. Calling for a constitutional amendment to
10 the same effect. And also, by the way, requiring that
11 church-owned property be taxed.

12 Q. And was there a reaction to President
13 Grant's September 1875 speech? Was that the speech in
14 Des Moines that he gave?

15 A. Yes, it was.

16 Q. The Des Moines speech and his December
17 1875 address to Congress; was there public reaction to
18 that?

19 A. These were very widely reported, very
20 favorably reported, in the republican-leaning press
21 across the north, attacked in the Catholic press as
22 being an attempt to use Catholics as an election
23 gambit to strengthen the position of the republican
24 party.

25 Q. And what was the effect of his proposal

1 to tax church property on the Protestant majority in
2 the United States?

3 A. It was not included in Blaine's
4 amendment, which I'm sure we'll discuss in a minute,
5 but it was included, interestingly enough, in the
6 Colorado convention, which began in December 1875, as
7 one of the potential elements of the Colorado
8 Constitution.

9 Q. So with this -- as I understand it, Grant
10 mentions two things: One is taxing church property,
11 and the other is not allowing any government funds to
12 go to sectarian schools. Is that the language that he
13 used?

14 A. Right.

15 Q. And so what was the reaction to the first
16 proposal on the Protestant majority nationally?

17 A. However, as one might imagine, although
18 it was best reflected perhaps in the position of the
19 Protestant churches in Denver, which, according to
20 John Evans, the former governor of the territory, who
21 was their spokesman, he privately said they wanted to
22 oppose the taxes upon their churches, but they would
23 like to see them imposed on Catholic churches and
24 institutions. However --

25 Q. To see taxes imposed on the Catholic

1 institutions?

2 A. Yes. But not on the Protestant churches.

3 However, in the course of the convention,
4 that provision was dropped from the constitution.

5 Q. But the education provision survived.

6 A. Right.

7 Q. Who was Blaine?

8 A. He was a congressman from the state of
9 Maine, who had been the speaker of the house
10 nationally until the defeat of the republicans in
11 1874. But he continued as a member of Congress, with
12 an eye to winning the nomination, republican
13 nomination, for the presidency in 1876.

14 Q. And in 1876, was he still a member of the
15 House?

16 A. He was until he was -- he was appointed
17 to the Senate after the defeat of his effort to win
18 the republican nomination.

19 Q. Okay. In terms of -- you mentioned the
20 Grant scandals, the 1874 election, and you've also
21 mentioned these speeches. What was going on with
22 reconstruction and the republicans at this time? And
23 the time I'm looking at is 1875, 1876, nationally.

24 A. One of the books I published this spring,
25 in fact, is on the history of the education of African

1 Americans. And I discuss in some detail, but I will
2 not do today, the ways in which republicans found that
3 although the bloody shirt as they called it of the
4 Civil War and of accusing democrats of being -- of
5 being rebels and being against equal rights of African
6 Americans, that had favored, as a useful political
7 issue by the 1870s, and gradually the national and
8 northern support for doing right by African Americans
9 in the south faded away, so that by 1876, republicans
10 were prepared to make a deal, as, in fact, they did
11 after the election, to end reconstruction in the south
12 in exchange for the presidency.

13 Q. And then their new political issue would
14 be -- after that deal was made, did they have a --
15 what was their focus to be if it's not reconstruction?

16 A. Well, in effect, after 1876, the south --
17 that is, the white south -- was left to regulate in
18 some affairs, which meant that very quickly the system
19 was put in place depriving African Americans of all
20 their rights and much of the property they had gained.

21 Q. Professor Glenn, would you please turn to
22 Exhibit KK. *S *S what is this document?

23 A. This is a number of pages photocopied
24 from the congressional record of the Senate August
25 14th, 1876.

1 Q. And what is reflected in these pages?
2 Let me make the record clear. 5580 through 5580 --
3 pardon me -- 5593. Pardon me. That's not right.
4 5595. 5580 to 5595. What's going on in these pages?

5 A. I'm going to have to turn this way to be
6 able to see the small print.

7 Q. It is small print.

8 A. This is the debate about whether the
9 Senate should adopt some form of the constitutional
10 amendment which James Blaine had filed in the House,
11 and which had been reported out by the House.

12 MR. NUSSBAUM: There earlier was
13 circulated a copy of this exhibit that omitted pages
14 5594 through 95, so I hope everyone, including the
15 court's copy, includes those pages.

16 Your Honor, I would move for the
17 admission of Exhibit KK.

18 THE COURT: Any objection to KK?

19 MR. MACDONALD: No, Your Honor.

20 THE COURT: KK will be admitted without
21 objection.

22 Q. (BY MR. NUSSBAUM) Professor Glenn, you've
23 read this document before, haven't you?

24 A. Yes.

25 Q. And is the word "sectarian" used in this

1 document?

2 A. It is.

3 Q. What was the meaning of the word
4 "sectarian" during this time frame? And the time
5 frame I'm talking about is quite specific: 1875, 1876
6 time frame. What was the common meaning of that term?

7 A. Throughout the 19th century, sectarian
8 was not applied by religious groups to themselves.
9 That is, they never referred to themselves as being a
10 sect or as being sectarian. They never referred to
11 their own schools as being sectarian.

12 Sectarian was a put-down. As Richard
13 Bayer, professor at Cornell, has written, it was
14 always intended to convey a religious group which was
15 narrow, cut off from wider concerns, turned against
16 the wider society. So it was always an insult, and,
17 as I say, never used in a positive sense.

18 Q. And in this text here, how do you see it
19 being used to refer to --

20 A. It's used in two different ways. It's
21 used by the public to refer obliquely to Catholic
22 schools as sectarian. And in at least one instance,
23 it's used by a democratic senator to reflect the
24 Catholic view that the public schools were sectarian.
25 That is, that they had a religious character.

1 Q. Let's look at some actual passages of
2 text. And we'll come to that passage itself in a
3 moment. Go to page 5585, column 2, if you will. This
4 will be a little bit tedious, but I think we can get
5 through this.

6 In the third full paragraph, this is the
7 paragraph that begins with, "It is" --

8 A. "This is not a new idea"?

9 Q. No. Come down to the bottom of that
10 paragraph that begins with, "This is not a new idea."
11 Towards the bottom of that paragraph, do you see,
12 about six or eight lines up, it says, "Let my friend
13 bear it in mind" -- and this is a statement from
14 Senator Morton.

15 A. Right.

16 Q. "Let my friend bear it in mind, this is
17 offered in a country where today the majority in every
18 state are Protestants. It is offered in what may be
19 called a Protestant country." Do you see that
20 passage?

21 A. Yes, I do.

22 Q. Now, I want to ask you a question about
23 this and another passage, but let's look at them both
24 at the same time. Keep your finger on that one, and
25 go to page 5590, if you would. Column 2. The second

1 full paragraph there, I'm going to read most of it,
2 and let me read it, if you don't mind, and tell me if
3 I read this accurately. "The Catholics of the United
4 States" -- this is Senator Bogey. "The Catholics of
5 the United States have been opposed to free schools,
6 as stated by my friend from Indiana, as organized some
7 years ago. And why? For the reason that they were
8 sectarian. Even the very Bible, which was used in the
9 schools, was sectarian -- was a sectarian book,
10 without going into discussion whether the Protestant
11 or Catholic Bible be the correct one. These schools
12 were more or less sectarian, and this being so, there
13 is nothing strange or astounding or very remarkable
14 that those who believed in their religion should not
15 willingly sanction their children going where their
16 religion was not only untaught but where they were
17 really taught to believe it was not correct. There
18 was nothing strange in that. Hence, the Catholics
19 have opposed throughout the United States the levying
20 of public taxes for the purpose of maintaining public
21 schools organized on sectarian principles."

22 Is that the passage you were referring to
23 earlier?

24 A. Yes, it is.

25 Q. And what's going on in that passage?

1 A. Well, he is defending the view that
2 Catholics, in fact, had a right to object to their
3 children being expected to attend schools that, in
4 fact, were contrary to their own convictions.

5 Q. Go to page 5585, column 2. The fourth
6 full paragraph that begins with, "This is not a new
7 idea." And toward the middle of that paragraph do you
8 see, "It has been on the minds of our people for 100
9 years, but circumstances have occurred in the last 15
10 or 20 years proving that there is a danger and that
11 the time has come when this idea has been somewhat
12 nebulous in character, should receive distinct form
13 and enunciation and go into the fundamental law."

14 This is from Senator Morton. What is the
15 danger that he says has recently occurred in America?

16 A. The danger, as his remarks earlier
17 indicate, is the increasing claims of the Catholic
18 Church, as expressed in Papal documents, the position
19 of the hierarchy of the United States, and the
20 attempts of Catholics to obtain public support for
21 their own schools in some cases.

22 Q. Do you recall a presentation -- I could
23 quote it if necessary -- where Senator Edmunds says,
24 "to convince you that I am right in precisely what
25 this issue is" -- and what he's talking about -- well,

1 let's look at it. Let me go to that. It's on page
2 5587. Second column, third paragraph.

3 "Mr. President, to convince you that I am right in
4 precisely what this issue is." Do you see that?

5 A. Yes.

6 Q. What does he do, then, to convince the
7 present Senate that he's right in his argument? What
8 does he do?

9 A. He has the secretary of the Senate read
10 extracts from the Syllabus of Errors, the document
11 issued by Pope Pius IX.

12 Q. How could a Papal syllabus possibly be
13 relevant in a debate of the United States Senate over
14 the issue of education in the United States?

15 A. Well, this senator is making the claim
16 that it represents the intentions of the Catholic
17 Church toward the American system and the American
18 public school.

19 Q. Go to page 5589. The top right column,
20 first full paragraph. Would you read that into the
21 record, please.

22 A. This is Senator Bogey of Missouri.
23 "Mr. President, seriously, I think this discussion is
24 much to be deplored. I think I know the motive and
25 the animus which have prompted all this thing. I do

1 not believe it is because of a great devotion to the
2 principles of religious liberty. That great idea,
3 which is now moving the modern world, is used merely
4 as a cloak for the most unworthy artisan motives. The
5 African race has played its part in this country. The
6 negro is, for party purposes, in a manner dead, and
7 these gentlemen, knowing that this thing is played out
8 and that the bloody shirt can no longer call out the
9 mad bull, another animal has to be brought forth by
10 these matadors to engage the attention of the people
11 in this great arena in which we assume all to be
12 combatants. The Pope, the old Pope of Rome, is to be
13 the great bull that we are all to attack."

14 Q. What does it mean when he says -- when he
15 refers to the negro and say that this thing has played
16 out? What's he referring to there?

17 A. The support -- the way the republican
18 party had been able to gain support in earlier
19 elections since the Civil War by their support for
20 reconstruction and doing right by black former slaves
21 in the south.

22 Q. And when he says -- he refers to the
23 bloody shirt and says that the old Pope of Rome is to
24 be the great bull that we all attack, what's he
25 referring to there? What's that about?

1 A. Well, when he mentions the great -- the
2 great -- sorry. I'm losing my place. The great arena
3 in which we are all soon to be combatants, he's
4 referring to the presidential election of 1876, and
5 with the Pope and fears about the intentions of
6 Catholics would be used by republicans -- he was a
7 democrat -- as the way to rally the voters behind the
8 republican party.

9 Q. And what was the legislative proposal
10 that was to --

11 A. The Blaine amendment.

12 Q. Okay. Thank you.

13 Let's start in Colorado. How did the
14 timing of the Colorado debates over the Blaine
15 provisions in the Colorado Constitution relate to the
16 events occurring in the national movement?

17 MR. MACDONALD: Your Honor, if I can just
18 object to the characterizations of these as Blaine
19 amendments.

20 THE COURT: The record reflects your
21 objection. It's overruled.

22 A. The Colorado convention began in December
23 1875, the same month when President Grant made his
24 statement to Congress, his annual report, calling for
25 a constitutional amendment with those elements of

1 taxing church property and of forbidding public
2 sectarian schools, which within -- incorporated into
3 the initial proposals of the constitutional convention
4 here in Colorado. The timing was extremely close.

5 Q. (BY MR. NUSSBAUM) And were the folks in
6 Colorado aware of what was taking place in Des Moines
7 and Washington?

8 A. Very much so. There were reports in the
9 Rocky Mountain News, the Boulder paper and others on
10 these events. This was after the telegraph, of
11 course. The national news was very quickly and very
12 elaborately reported.

13 Q. Do you have any idea what was the
14 religious complexion of the delegates of the Colorado
15 State convention? Constitutional convention?

16 A. Scholars are different. Machebeuf,
17 the -- the Catholic vicar general, said that there
18 were no Catholic voices in the convention. Others
19 have suggested there may be two or three Catholics who
20 were delegates. And I'm not sure how to resolve that.

21 Q. Who is Machebeuf? Is this Joseph
22 Machebeuf you're referring to?

23 A. Yes.

24 Q. And who is he?

25 A. He had been sent by Bishop Langley of

1 Santa Fe to start the Catholic mission in the Colorado
2 territory several decades earlier, and he's generally
3 regarded as the founder of the Catholic Church in
4 Colorado.

5 Q. And did he eventually become the first
6 bishop of Colorado?

7 A. He did.

8 Q. Thank you.

9 Were the provisions that eventually made
10 it into the Colorado Constitution regarding religion
11 and education and funding -- were those provisions a
12 controversial subject during the state convention?

13 A. Very much so.

14 Q. And how do you know that?

15 A. Really, two primary sources. One is the
16 great number of petitions that were filed on both
17 sides on this particular issue, both supporting
18 including Blaine language in the constitution and
19 opposing including it.

20 Also because of the reporting of the
21 press at the time, which indicated that this issue was
22 so hot that it would be better to stay off it in order
23 to ensure that the constitution was adopted and
24 Colorado could become a state.

25 Q. Let's take a look at Exhibit NN. *S *S

1 what is this?

2 A. This is a chapter from the book which I
3 am finishing this summer.

4 Q. And what's the book titled?

5 A. Actually, what is written on this is
6 incorrect. The book is going to be titled American
7 Models of State and School. The title that appears
8 here in this exhibit is the title of another book from
9 the same publisher, which came out several months ago.

10 Q. You know, that exhibit I understood had
11 been replaced. Maybe that's not been replaced in
12 everybody's book, but that should be the correct --
13 that's my error. That's my error that's on there.
14 But it should be American Models of State and School.

15 And what do you do in this chapter, just
16 generally? What's the chapter about?

17 A. After an earlier -- let me explain the
18 book a little bit.

19 Q. Okay.

20 A. There's 10 chapters. It's about the
21 historical roots of the shape that the characteristic
22 American model of the relationship of government and
23 schools has taken.

24 My previous book that came out in April
25 looks at four European countries and shows how their

1 models are quite different from the American models.
2 So this is my attempt at the American model. Two of
3 the 10 chapters are about religion. Chapter 3, I
4 believe it is, discusses the way in which the early
5 republic religion was often the basis of cooperation
6 in organizing education and other activities.

7 And then chapter 7 looks at the way in
8 the late 19th century it became a source of major
9 political conflict.

10 Q. Okay. And do you, in the first part of
11 the chapter, discuss the Blaine movement nationally?

12 A. I do.

13 Q. And in the second part of the chapter, do
14 you give a couple of different examples of how that
15 worked out at state levels?

16 A. Well, throughout the book, I use
17 different states. No historian tries to cover all the
18 states, so he's got to discuss Pennsylvania at length,
19 Connecticut, Virginia, Massachusetts, New York. In
20 this chapter, I used Colorado as an example, because
21 it was one of the four states that adopted Blaine
22 amendments the same year as the Blaine debate in
23 Congress.

24 Q. I see.

25 A. And so you can see the debate most

1 freshly in Colorado; I think, Texas. I forget the
2 other two.

3 Q. Come to about five pages from the end. I
4 see it's not paginated yet. But I see you write there
5 in the -- about five pages to account for the back,
6 the third -- fourth paragraph begins with the
7 statement, "Colorado is an interesting example." And
8 then you say, unlike Boston, New York, Philadelphia,
9 and so on. But Colorado is an interesting example.

10 Why did you find Colorado to be an
11 interesting example of this issue?

12 A. Interesting because, as I said in the
13 other paragraph, in a number of the eastern states
14 there were already very serious conflicts between
15 Catholics and Protestants; there were riots with many
16 people killed. That had not occurred in Colorado.

17 So the fact that -- although, there had
18 been a Trinidad war, as it's called, in southern
19 Colorado, which arguably was as Catholic as it was
20 religious, but -- so Colorado shows a particularly
21 clear case the way in which religion standing by
22 itself still was a decisive issue for both majority
23 and minority voters.

24 Q. And in the paragraph that follows, you
25 write, "The prejudice existed" -- "That prejudice

1 existed among the Protestant majority there can be no
2 doubt."

3 A. Are you referring to Colorado in that
4 sentence?

5 A. Yes.

6 Q. And why did you feel that there was
7 prejudice among the Protestant majority in Colorado?

8 A. Well, I begin by quoting from the Rocky
9 Mountain News, just as the convention started, an
10 article about the thieving reputation of Mexicans.
11 And I don't mention here, I think, that the Colorado
12 teachers association at its first meeting, also in
13 that time period, expressed deep concerns about the
14 character of the education Mexican, as they called
15 them, children were receiving.

16 I then go on to quote --

17 Q. Let me stop you there. We've been
18 talking about religion. Is there a time between -- do
19 you see a time between these comments about this in
20 Colorado and the whole Catholic thing?

21 A. The concern, I believe, was parallel to
22 the concern expressed about Irish immigrants, for
23 example, in Boston. That if they received an
24 education provided by Catholic teaching orders, let's
25 say, that education would not fit them to be real

1 participants in American life.

2 Q. Did the Boulder newspaper comment on
3 that?

4 A. It was trying very much to create
5 education for Mexicans in that time. And this was
6 clearly a concern. He was bringing in religious
7 orders to teach, and so forth.

8 Q. Let's turn, if we can, to Exhibit PP. *S
9 *S we'll come back to your chapter 7. What is PP?

10 A. This is the proceedings of the
11 constitutional convention here in Colorado.

12 MR. NUSSBAUM: Your Honor, I move for the
13 admission of Exhibit PP.

14 THE COURT: Any objection to PP?

15 MR. MACDONALD: No objection, Your Honor.

16 THE COURT: That will be admitted without
17 objection. You may proceed.

18 Q. (BY MR. NUSSBAUM) You had testified, I
19 think, that there was quite a bit of controversy in
20 Colorado regarding the Blaine provisions in the
21 Colorado convention. Is that evidenced in the
22 proceedings?

23 A. It is.

24 Q. And what evidence did you see in the
25 proceedings of that controversy?

1 A. Let me emphasize first, the proceedings
2 did not include a transcript of the debates, and so we
3 have to look mostly at the documents submitted as
4 evidence. And the proceedings do report the various
5 petitions submitted on both sides of the anti-aid or
6 Blaine language in the constitution, and that's a
7 frequent element, with hundreds of signatures
8 submitted on both sides.

9 Q. And turn to page 112, if you would, and
10 113 of the proceedings. Toward the bottom of the page
11 112 it says, "To the honorable, the constitutional
12 convention of Colorado." And then on the page that
13 follows, it has some signatures and names and so on.

14 What is this at the bottom of 112 and
15 continuing on to 113? What is that?

16 A. This is a petition submitted by delegates
17 from a number -- I believe 11. I counted them once --
18 of Protestant churches here in Denver that met to seek
19 to influence the deliberations of the convention.

20 Q. So these churches -- and do I see that
21 they're Presbyterian, Baptist, Methodist, Episcopal,
22 Christian, Congregational German Reformed, and so on?

23 A. Yes.

24 Q. They met and identified people to
25 represent them as delegates?

1 A. Yes. Particularly represent delegate
2 John Evans, who was the former territorial governor,
3 as their spokesman.

4 Q. And I believe earlier you had referred to
5 a George Evans. It's actually John; is that correct?

6 A. I'm sorry. John, yes.

7 Q. And what were they petitioning for, this
8 Protestant delegation, if you will?

9 A. Well, they made a number of claims. They
10 wanted the constitution to recognize the supreme ruler
11 of the universe in its preamble. They wanted it to
12 maintain the sabbath as a civil as well as a religious
13 holiday.

14 And then the third point was, "We believe
15 that the public schools should be provided by law and
16 kept free from sectarian influences." And also that
17 funds raised should not be diverted to other uses.

18 Q. Okay. And on page 113, in what's called
19 paragraph third, is that the section that talks about
20 funds not being diverted to --

21 A. Yes.

22 Q. -- other uses in the schools?

23 A. Right. And that the Bible should be
24 allowed to be used in the public schools.

25 Q. What's going on in that third paragraph?

1 Paragraph third, if you will.

2 A. It's addressing a cluster of the issues
3 that had been raised in the Blaine amendment. Three
4 distinct issues, really. One is that -- I'm asserting
5 that public schools were not, in fact, sectarian, even
6 though they were religious. But they were not
7 sectarian, because sectarian had a bad meaning.

8 Secondly, that the support raised, and
9 much of it from land sales from the state for public
10 schools, should not be diverted to funding Catholic
11 schools.

12 And thirdly, that the Bible should
13 neither be excluded nor required in the public
14 schools.

15 Q. So the petition from the Protestant group
16 was not anti-religious, was it?

17 A. No, of course not.

18 Q. But it was opposed to some aspect of
19 church and state.

20 A. Right.

21 Q. Specifically --

22 A. Yes.

23 Q. Specifically schooling or funding to
24 Catholic schools.

25 A. Yes.

1 Q. If you will, go to page 329 of the
2 proceedings.

3 A. Okay.

4 Q. And a third of the way down, it says,
5 "Address of the Right Reverend JP Machebeuf, Vicar
6 Apostolic of Colorado, to the Honorable Constitutional
7 Convention of Colorado." Do you see that?

8 A. Yes, I do.

9 Q. And this continues for several pages,
10 correct?

11 A. Yes.

12 Q. Now, you've read this document before?

13 A. I have.

14 Q. At the beginning -- after the second
15 paragraph it says, "I've had my home in this
16 territory. I came to Colorado very early in history.
17 I bore my share of its hardships."

18 And then in the next paragraph he says,
19 "I love Colorado."

20 What's going on in that, as you look at
21 this as a historian?

22 A. He's clearly concerned to answer the
23 charge that Catholics were disloyal citizens of the
24 United States and Colorado; that they did not want
25 their children, as Horace Bushnell said, to become

1 real Americans. He's saying, yes, we are real
2 Americans, we're as loyal as anybody, and our rights
3 are to be respected.

4 Q. On page 330, the following page, in the
5 first full paragraph -- let me read this. "We ask you
6 gentlemen of the constitutional convention to omit
7 from the constitution any clause which may forbid the
8 future legislative bodies of the state to deal with
9 the question of separate schools and denominational
10 education as to them may seem just. We don't ask the
11 insertion of any clause directing the solution of that
12 question by the legislature in our sense."

13 What is going on -- did I read that
14 accurately, first of all?

15 A. Yes.

16 Q. And what's going on in that request that
17 Bishop -- or Vicar Apostolic Machebeuf brings to the
18 convention?

19 A. He is, as I read it, asking that the
20 issue of support for schools that parents choose
21 reflecting their own religious convictions be
22 something that can be decided in the normal process of
23 democratic deliberation through the legislature and
24 not frozen for all time by being included in the
25 constitution.

1 Q. And why did the Blaine proponents want to
2 foreclose the issue by putting it into the
3 constitution?

4 A. Because they did not want it to be
5 subject to discussion and decision through the normal
6 process.

7 Q. And in the final paragraph on that page,
8 what's going on?

9 A. He, I think, makes a very eloquent
10 statement here. Would you like me to read it or --

11 Q. No. Just paraphrase it, in the interests
12 of time.

13 A. He is, in effect, saying, we have never
14 in this country, much less in Colorado, had an honest
15 debate about whether, in fact, it's appropriate to
16 fund schools on the basis of what parents want for
17 their children. And clearly we can't have that debate
18 right now, because matches are running so high. *S
19 but at some point in the future, he said, surely
20 Americans will be mature enough that we can, in fact,
21 have that discussion, and let's keep the door open so
22 discussion can occur then.

23 Q. Thank you.

24 I think you mentioned that the press was
25 reporting on this issue at the time.

1 the admission of -- well, one more foundational
2 question.

3 Q. (BY MR. NUSSBAUM) And does this
4 article or editorial from the Rocky Mountain News on
5 February 2, 1876, discuss the issue of the Blaine
6 amendments and the Colorado Constitution?

7 A. Yes.

8 MR. NUSSBAUM: I move for the admission
9 of Exhibit LL.

10 THE COURT: Any objection to LL?

11 MR. MACDONALD: Your Honor, no objection
12 to the second page. The first page, the
13 transcription, frankly, I find it -- we can't confirm
14 that it's exactly right. Professor Glenn testified
15 that he found a mistake just yesterday. So we would
16 stipulate to the admission of the second page.

17 MR. NUSSBAUM: We move for the admission
18 of both, Your Honor. As this goes through the record,
19 it will be helpful to --

20 THE COURT: Who did the transcription?

21 MR. NUSSBAUM: Your Honor, we began the
22 transcription. It's been reviewed by myself. The
23 young historian who did a lot of work for us, Craig
24 Levins, in court today, he has taken some look at
25 this. And then we had Professor Glenn look at it.

1 There's about three or four people in our office,
2 including myself, pored over the text to try to make
3 sure that it's accurate in all regards.

4 THE COURT: Objection goes to the
5 weight, not its admissibility. I will admit
6 Exhibit LL.

7 MR. NUSSBAUM: Thank you.

8 Q. (BY MR. NUSSBAUM) Does this article --
9 what does this article do, Professor Glenn?

10 A. In this article, the editorial writer
11 says on the one hand, we support the federal Blaine
12 amendment and we support the intention of the similar
13 effort in the Colorado constitutional convention.
14 However, our recommendation, for prudential reasons,
15 is that this issue not be forced in the convention
16 because of the likelihood of it arousing sufficient
17 opposition among Catholics to raise the possibility of
18 the defeat of the constitution and, therefore,
19 paralleling Colorado's admission as a state in 1876.

20 Q. Would you read the opening sentence,
21 please.

22 A. "With the passage of the constitution a
23 foregone conclusion, it is perhaps unnecessary to say
24 that this paper would hardly propose to, if only
25 ostensibly, gain say the Blaine amendment to the

1 federal constitution, or to even in appearance
2 controvert the doctrines enunciated in the Des Moines
3 speech of the president."

4 Q. And is this the same speech that you had
5 referred to --

6 A. Yes.

7 Q. -- earlier? And do you have any doubt
8 that the -- at least the Rocky Mountain News was
9 linking what was happening in Colorado precisely with
10 what was happening with President Grant and Blaine and
11 the Congress?

12 A. No doubt at all.

13 Q. And was there -- did you see any evidence
14 in the proceedings of the Colorado constitutional
15 convention that there was some extent that passage --
16 or acceptance of Colorado into the union would be
17 facilitated if it adopted Blaine-like provisions in
18 Colorado?

19 A. I think it's hard -- hard to find that,
20 because we have no transcript.

21 Q. Turn, if you will, to Exhibit MM. *S *S
22 this is another two-page document. Would you please
23 identify what this is.

24 A. It's an editorial from the Rocky Mountain
25 News on March 17th, 1876. A transcription and then a

1 photocopy of the original.

2 Q. And have you reviewed the transcription
3 as to whether it's an accurate transcription of the
4 original document?

5 A. Yes, I have.

6 Q. And do you find it to be accurate in all
7 regards?

8 A. I do.

9 MR. NUSSBAUM: Your Honor, I move for the
10 admission of Exhibit MM.

11 THE COURT: Mr. Macdonald, you maintain
12 the same objection?

13 MR. MACDONALD: Same objection.

14 THE COURT: Same ruling. MM will be
15 admitted.

16 MR. NUSSBAUM: Thank you.

17 Q. (BY MR. NUSSBAUM) What's the significance
18 of this date, March 17th, 1876? What's going on?

19 A. Oh, because the convention just finished
20 its work.

21 Q. That's the opening sentence. "It is
22 done." Right?

23 A. Right. It had not yet -- the
24 constitution had not yet been approved by the voters,
25 but the convention had finished its work and had

1 approved the text to be put before the voters.

2 Q. And what percentage of this article
3 commenting upon the constitution of Colorado is about
4 the Blaine issue? Just roughly.

5 A. I would judge almost all of it is
6 concerned with the Blaine language and its impact.

7 Q. And what do you see as the significance
8 of this document?

9 A. It's very interesting. The editorial is
10 saying, we opposed the inclusion of the Blaine
11 language in the Colorado Constitution, because we
12 thought it might imperil the approval of the
13 constitution. But it now appears that, in fact, we
14 were wrong; that the support which that language will
15 produce on the part of the majority of voters will far
16 more than offset any opposition.

17 And, in fact, he says, in taking the bull
18 by the horns and grappling with the school fund
19 question as it did, far more Protestants can begin to
20 vote for the constitution on account of this very
21 clause, that Catholics for the same reason would vote
22 against it. And many, no doubt, will vote for it for
23 the sake of the single clause alone. And at the very
24 end, "but it first seemed the weakest link in the
25 constitutional chain no doubt will prove as source of

1 strength to all the others."

2 In other words, this -- this provision is
3 going to carry the rest of the constitution with it,
4 because it will be so popular with the majority of
5 Protestant voters.

6 Q. Just like in Washington, it was a good
7 way to get votes. Is that fair?

8 A. That's what they are suggesting.

9 THE COURT: Mr. Nussbaum, is this a
10 good point for a break? I have a matter I have to
11 take up on the telephone.

12 MR. NUSSBAUM: Yes, it is, Your Honor.

13 THE COURT: All right. Let's take 15
14 minutes. Court's in recess.

15 (Recess taken, 10:15 a.m. to 10:47 a.m.)

16 THE COURT: Please be seated.

17 Professor Glenn, you can come back up,
18 grab a seat. And we'll pick up where we left off.

19 MR. NUSSBAUM: Thank you, Your Honor.

20 Q. (BY MR. NUSSBAUM) Professor Glenn, there
21 was a question I asked you shortly before closing as
22 to whether there was evidence in proceedings about an
23 understanding of some linkage between Colorado,
24 including the Blaine provisions, and having the
25 federal government accept Colorado.

1 We had a chance to speak about this over
2 the break, didn't we? Did you understand my question?

3 A. I misunderstood it. I thought you meant
4 on the part of delegates. Of course, we don't have
5 what they said or thought.

6 We do have a petition that's part of the
7 proceedings signed by a hundred citizens of Colorado
8 submitted by, by the way, a man with a German name,
9 which is interesting, because the Germans are very
10 strong republicans at that time, saying that they were
11 concerned that if the constitution did not include a
12 Blaine amendment type language, that that might
13 {\cxconf[]}{\cxc im\I am} pearl Colorado being admitted
14 as a state. In other words, watching what was going
15 on in Congress, being concerned with the -- Congress
16 might not agree to admit Colorado if it had not
17 adopted Blaine language.

18 Of course, only a few years later,
19 Congress did, in its enabling legislation for a number
20 of other states, require that they include Blaine type
21 language in their constitutions.

22 Q. Let's take another look at Exhibit NN,
23 which is chapter 7 of your book. And at the same
24 time, Professor, I'd like to look at Exhibit OO. *S
25 *S I don't think you need to pull them out. I'm not

1 going to ask you textual questions at this point.

2 A. All right.

3 Q. What is Exhibit OO?

4 A. Exhibit OO is the bibliography of my
5 entire new book.

6 Q. And at the end of Exhibit NN, or
7 chapter 7, you have 54 footnotes, don't you?

8 A. No. I have 54 end notes.

9 Q. Thank you.

10 And are those 54 end notes there in the
11 shorthand form?

12 A. Yes. They are in usual style for
13 scholarly writing.

14 Q. So Exhibit OO would allow someone to pull
15 the citation --

16 A. Anyone can look up any of those. For
17 example, I have a number of references to Green's 1992
18 article. And if you have looked at the bibliography,
19 you would see the full details of that article listed.

20 Q. Now, the book's being published by?

21 A. Continuum.

22 Q. Who is Continuum?

23 A. It's an international publisher based in
24 London and New York, which brings out about a hundred
25 titles a year, I think.

1 Q. Is it well recognized in academic
2 circles?

3 A. Very well recognized, yes.

4 Q. And does it have any standards as to what
5 it will publish?

6 A. They have an editorial board which
7 determines which projects they will accept.

8 Q. And how did it happen that they accepted
9 your book for publication?

10 A. Well, they had accepted my previous book,
11 which came out this spring, on the basis of, you know,
12 a detailed review and consideration. Having seen the
13 results of that, they're very pleased with it. And so
14 the review process went much quicker this time. They
15 still -- I had to give them an outline and
16 introduction. I gave about 10,000 words for them to
17 get an idea of what the book was going to be doing.
18 But I did not have to go through as detailed a
19 process.

20 Q. And your 10,000-word proposal, was it
21 reviewed by one person or --

22 A. No. By the editorial board.

23 Q. And they approved it?

24 A. They did. I have to say, they gave me a
25 contract, which I signed, which requires me to have

1 the total book in either by the end of August or by
2 the end of September. I forget which.

3 Q. And does it require them to publish it
4 when you do that?

5 A. Yes, I think so.

6 Q. And do you anticipate any material
7 changes in chapter 7 before publication?

8 A. The process which they follow is to send
9 it for text editing. Actually, most publishers have
10 it done in India now. And somebody goes through and
11 checks for commas and other kinds of errors like that.
12 But there's no editorial review on an established
13 scholar like me. They accept whatever I write.

14 Q. Have your previous books, including the
15 one published by Continuum, been treated as reliable
16 authorities?

17 A. Well, the one out in April is something
18 new that it's only beginning to be reviewed.

19 The Myth of the Common School, my first
20 book, has been cited very frequently. And Google
21 Scholar finds at least 130 citations in scholarly
22 publications. I was pleased to see that Professor
23 Green has been cited, as well.

24 Q. And in Exhibit -- when you cite to
25 authorities as footnotes, do you try to exercise

1 scholarly care in doing that?

2 A. Of course.

3 Q. Why is that important to you?

4 A. Well, a scholar's main asset is his
5 reputation. And that's very important to me, as it is
6 to any scholar. I don't expect to make much money on
7 writing a book, but it is a very important element of
8 my currency of academic life.

9 Q. And are you aware of any other
10 publications by established scholars that discuss the
11 relationship between the Blaine movement nationally
12 and what happened in Colorado?

13 A. I am not.

14 Q. And do the statements in chapter 7
15 represent your reporting on, and interpretation of,
16 data related to both the Colorado and the national
17 Blaine movements?

18 A. Yes.

19 MR. NUSSBAUM: Your Honor, I move for the
20 admission of Exhibits NN and OO, the bibliography for
21 chapter 7.

22 THE COURT: Any objection to NN?

23 MR. MACDONALD: Yes, Your Honor. We
24 object to the admission of both of these. They're, as
25 I understand them, an unpublished manuscript. I

1 believe the witness testified they're still in the
2 process of review and could change between now and
3 their publication. We also object on relevance, but I
4 understand the court's prior ruling on that.

5 MR. NUSSBAUM: Your Honor, we think these
6 are admissible both under 803.18, the learned treatise
7 exception to the hearsay rule, and under 807. I'll
8 address those separately.

9 Under 803.18, we recognize that the
10 normative document that would be admitted under that
11 is one that has been published, as counsel points out
12 in their objection. But the publication requirement
13 is simply a requirement to -- partially to establish
14 the circumstantial guaranties of trustworthiness that
15 underherd that exception.

16 We believe, given this scholar's
17 reputation, his history of publications, which are
18 numerous and numerous learned journals, his sitting on
19 boards both nationally and internationally, working in
20 this area, the fact that this document has been
21 approved by the editorial board in the lengthy
22 proposal that he made, the fact that they have
23 published his book before, the fact that there is no
24 pattern of substantial changes in his writings, also
25 the fact, Your Honor, that this witness, unlike most

1 situations when you're receiving a learned treatise,
2 is available for cross-examination, which gives a
3 great advantage to the plaintiffs that they would not
4 typically have when a learned treatise is put into
5 evidence.

6 Finally, Your Honor, we're trying to move
7 this along. There's a lot of history here. And I
8 think it would be a great aid to the court, especially
9 in the context of preliminary injunction proceeding,
10 to have this available to them.

11 THE COURT: Objection is overruled. NN
12 and OO will be admitted.

13 MR. NUSSBAUM: Thank you.

14 Q. (BY MR. NUSSBAUM) Just a few more
15 questions, professor.

16 What institution was, in your opinion,
17 the primary target of those who supported the Blaine
18 provisions in Colorado and nationally?

19 A. The Catholic Church.

20 Q. And were the public schools in Colorado
21 and nationally secular or religious in 1876?

22 A. There's abundant evidence that they were
23 religious in a sense that, under present
24 interpretations of the Blaine amendment, they might
25 well have been found to violate it. That is, they

1 incorporated the Bible, they incorporated prayer.
2 And, in fact, the fact that the Supreme Court was
3 finding the latest as of the 1950s that many American
4 public schools were doing both of those things
5 indicates that it was not just in the 1870s.

6 Q. And you're talking about the public
7 schools.

8 A. Right. Public schools.

9 Q. And were the Blaine provisions included
10 in the 1876 Colorado Constitution discriminatory?

11 A. Yes.

12 Q. How so?

13 A. Two ways. They knowingly discriminated
14 against Roman Catholics in their concern to educate
15 their children according to their own convictions.

16 And in a second way they discriminated
17 between schooling with a Protestant character and
18 schooling with a Catholic character.

19 MR. NUSSBAUM: Thank you. I have no
20 other questions, Your Honor.

21 THE COURT: Any further inquiry on the
22 plaintiffs now -- or defendants. Excuse me.
23 Cross-examination.

24 MR. MACDONALD: Thank you, Your Honor.

25

1 Your Honor, for purposes of preserving
2 the record, we did not want to make objections
3 throughout the testimony. We would move to strike the
4 testimony as irrelevant and lack of foundation, as we
5 set forth to incorporate the arguments in our motion
6 in limine. I understand the court's ruling on that.

7 THE COURT: You haven't lost your
8 record. You've made the record in the motion in
9 limine, Mr. Macdonald. Move along.

10 MR. MACDONALD: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. MACDONALD:

13 Q. Good morning, Professor Glenn. My name
14 is Tim Macdonald. I represent the LaRue plaintiffs in
15 this case.

16 Let me first ask, you're being
17 compensated for your participation in this case; is
18 that right?

19 A. Yes.

20 Q. And, in fact, for your testimony today,
21 you're receiving \$2,000?

22 A. That's correct.

23 Q. Your work yesterday, you received \$1500?

24 A. For flying out to Colorado, yes. Leaving
25 my vacation in New Hampshire.

1 Q. You and Mr. Green.

2 And you're also being compensated at \$200
3 an hour for the prior work you did in getting ready;
4 is that right?

5 A. Yes.

6 Q. And about how much -- how many hours did
7 you spend prior to today getting ready for this
8 proceeding, sir?

9 A. I've been keeping a log, but I haven't
10 tried to add it up yet. So I would guess it's in the
11 range of 30 hours or so, but I'm not sure.

12 Q. And that's at \$200 an hour?

13 A. Yes.

14 Q. And when did you first talk to anyone
15 about school choice issues in Douglas County, sir?

16 A. Perhaps three weeks ago. I'm not sure
17 exactly.

18 Q. And who did you speak to?

19 A. With Martin Nussbaum.

20 Q. Anyone else?

21 A. We had one conference call with two of
22 his colleagues, but it primarily was with him.

23 Q. And did you consult with anyone in 2010
24 about what Douglas County was trying to do to create a
25 Choice Scholarship or an Option Certificate Program?

1 A. In the year 2010?

2 Q. That's right.

3 A. No.

4 Q. And until three weeks ago, did you know
5 anything about the Douglas County program?

6 A. Only what I had read online.

7 Q. Have you had any contact with anyone for
8 the Institute for Justice?

9 A. Not about this issue.

10 Q. About other issues?

11 A. In years past I have, but not for the
12 last five years or so, I suppose.

13 Q. Sir, how many newspapers were in
14 existence in Colorado in 1876? Do you know?

15 A. I have no idea. I have seen citations
16 from three of them: The Denver Times, Rocky Mountain
17 News, and the Boulder Times.

18 Q. And that's it?

19 A. That's it.

20 Q. And if I ask you whether there were more
21 than 10, would you know that?

22 A. I have no idea.

23 Q. You haven't looked for publications in
24 Colorado in 1876; is that right?

25 A. That's right.

1 Q. And have you, yourself, gone and reviewed
2 the three publications that you just mentioned?

3 A. No. I have reviewed photocopies of the
4 Rocky Mountain News. I've -- the other two, the
5 quotations I used are drawn from writing -- published
6 writing by others. Hensel's article about the
7 Colorado Constitution and so forth.

8 Q. And when you refer to Hensel, that's
9 Mr. Donald Wayne Hensel; is that right?

10 A. I think so.

11 Q. And that's an article in 1961, I think
12 you cited in --

13 A. Yes.

14 Q. And Mr. Hensel wrote a thesis that was
15 published in 1957, correct?

16 A. Right.

17 Q. And that's called A History of the
18 Colorado Constitution of the 19th Century?

19 A. Right.

20 Q. Have you reviewed that, sir?

21 A. Yes, I have.

22 Q. Do you think that's an authoritative
23 text?

24 A. Well, it has in it a lot of information
25 which I take to be accurate and significant to this

1 issue.

2 Q. Do you recall how many newspapers
3 Mr. Hensel refers to or cites in his scholarly work on
4 the Colorado Constitution in the 19th century?

5 A. I don't.

6 Q. But you, yourself, have only reviewed a
7 selection of articles from the Rocky Mountain News
8 from the time frame around 1876; is that right?

9 A. That's correct.

10 Q. And how many articles, sir, have you
11 reviewed from the Rocky Mountain News from the 1876
12 time period?

13 A. Well, I would estimate for you, 50 pages
14 of photocopy.

15 Q. And those were provided to you from
16 counsel?

17 A. Yes.

18 Q. Do you remember how many articles, sir?

19 A. Well, the articles are that many pages.
20 A number of them had various articles. Some of them
21 relevant, others not.

22 Q. And as part of your chapter that's now
23 been admitted as Exhibit NN, in which you discuss the
24 Colorado Constitution and its evolution, you didn't
25 deem it necessary to go and look for other articles

1 from the time of the passage and the debate over the
2 Colorado Constitution, sir?

3 A. No. My book is not about Colorado. I
4 used Colorado as an illustration on certain elements
5 in American education in the 19th century. And
6 typically it's someone like me, who covers a broad
7 scope of history, I rely heavily on reliable secondary
8 sources, as my bibliography will indicate.

9 Q. In your testimony -- in your direct
10 testimony, you referred to a number of times the
11 Blaine or Blaine-like provisions of the Colorado
12 Constitution. Do you recall that?

13 A. Yes.

14 Q. I just want to get a little more specific
15 about which provisions you were actually talking
16 about.

17 A. Okay.

18 Q. If we could do that. You're familiar
19 with Colorado Constitution article 9, section 7?

20 A. Yes.

21 Q. And is that commonly referred to as a
22 no-aid provision?

23 A. Yes.

24 Q. And in your view, that's one of the
25 Blaine type amendments?

1 A. Yes.

2 Q. And are you familiar with Colorado
3 Constitution article 9, section 8?

4 A. Yes.

5 Q. In your view, is that a Blaine amendment?

6 A. Yes. That's the one that forbids
7 sectarian content in -- in schools.

8 Q. It also provides, sir, does it not, no
9 religious test or qualification shall ever be required
10 of any person as a condition of admission in any
11 public educational institution of the state, either as
12 a teacher or student?

13 A. Yes.

14 Q. Is that anything like that in the Blaine
15 amendment, sir?

16 A. No.

17 Q. But yet you consider this a Blaine type
18 amendment.

19 A. Because of the forbidding of sectarian
20 content in schools.

21 Q. But the provision I just read, do you
22 consider that a Blaine type provision?

23 A. No.

24 Q. So part of article 9, section 8, in your
25 view, is a Blaine type provision, and part of it is

1 not. Is that right?

2 A. Yes.

3 Q. And how about article 5, section 34? Are
4 you familiar with that?

5 A. Yes.

6 Q. And that's no appropriation shall be made
7 that's not under the absolute control of the state,
8 roughly paraphrasing.

9 A. Right.

10 Q. And you consider that a Blaine type
11 provision; is that right?

12 A. It has the same intention, yes.

13 Q. But different language?

14 A. Different language. It's parallel to
15 Massachusetts constitutional anti-aid amendment which,
16 of course, I've been very close to, because that
17 specifically speaks to any -- any institution which is
18 not under the control of government, even though
19 Massachusetts, like Colorado, has frequently funded
20 such institutions.

21 Q. If you would just answer my questions.
22 Your counsel will have an opportunity to ask you
23 further questions, sir.

24 Just to make sure the record is clear,
25 would you consider the article 5, section 34 Blaine

1 type amendment, even though it has no language that's
2 similar to the Blaine amendment -- the federal Blaine
3 amendment?

4 A. It has the same intention.

5 Q. Different language?

6 A. Yes.

7 Q. And how about article 2, section 4 of the
8 Colorado Constitution? Are you familiar with that?

9 A. I am. That's less directly related, it
10 seems to me, than the federal Blaine debates.

11 Q. Okay. So you wouldn't consider -- you
12 wouldn't call that a Blaine-like amendment?

13 A. Not in the same sense.

14 Q. And how about article 9, section 3? Are
15 you familiar with that provision of the Colorado
16 Constitution?

17 A. No. You'd have to show it to me.

18 Q. Let me paraphrase it for you. Maybe it
19 will refresh your recollection. Public School Fund of
20 the state shall forever remain inviolate. Do you
21 recall seeing that?

22 A. I have read that, yes.

23 Q. It's a Public School Fund provision,
24 correct?

25 A. Right.

1 Q. And you wouldn't consider that a
2 Blaine-like amendment, would you?

3 A. Well, the intention is the intention of
4 the Blaine amendment. That is, that the Public School
5 Fund not be diverted to schools that are not a part of
6 the public school apparatus. Just like article 5,
7 section 34, they both have the same intention,
8 although the language -- they go at the issue in a
9 different way, but with the same intention.

10 Q. So if I understand your testimony, is it
11 your testimony that the intention of article 9,
12 section 3, and article 9, section 8 is to prevent the
13 public funds from going to private schools, including
14 religious schools? Is that what your testimony is?

15 A. I was talking about article 5, section
16 34.

17 Q. Okay. Excuse me. Let me rephrase the
18 question, then.

19 It's your testimony that article 5,
20 section 34 and article 9, section 3 of the Colorado
21 Constitution, the intention is to prevent public
22 funding going to private schools, including religious
23 schools.

24 A. Yes.

25 Q. And so -- and I'm not sure I heard the

1 answer, so I apologize if you did answer it. Do you
2 consider article 9, section 3, that the Public School
3 Fund shall forever remain inviolate, a Blaine
4 amendment, as you use the term?

5 A. I don't think you want me to explain, but
6 I can explain if you'd like me to.

7 Q. Well, first just -- if you could answer
8 the question. Do you consider it a Blaine amendment,
9 as you use the term -- as you used the term repeatedly
10 with Mr. Nussbaum in your direct?

11 A. I can't answer that accurately yes or no.
12 I have to answer it with a qualification.

13 Q. Please.

14 A. There are two different ways of
15 accomplishing the intentions of the Blaine movement,
16 if I can call it that. One way is to forbid funding
17 to sectarian education. The other is to -- for the
18 funding to education that's not under control of
19 government. They both achieve the same goal, but they
20 use different means of achieving that goal.

21 Q. The provision -- the public school
22 provision that it shall remain inviolate in article 9,
23 section 3, doesn't refer to religion at all, does it,
24 sir?

25 A. No.

1 Q. In fact, you would say the intention was
2 to prevent any money going to any private school; is
3 that right?

4 A. That's why I made the distinction I did.

5 Q. And you agree with that. You agree
6 that --

7 A. In 1876, almost all private schools in
8 Colorado were Catholic.

9 Q. You said almost. Not all of them,
10 correct?

11 A. I don't know whether there were some that
12 were not, but the majority were Catholic. And, in
13 fact, nationwide at that point, so that -- there are
14 two different ways of achieving the same goal. One
15 way is to forbid sectarian institutions from receiving
16 funds. The other is to forbid institutions not under
17 the control of government from receiving funds. They
18 both achieve the same Blaine goal, which is to
19 disqualify Catholic schools chosen by parents from
20 sharing in the public education fund.

21 Q. And if I understand your testimony,
22 you're saying these are essentially redundant
23 provisions because they do the same thing?

24 A. They do it in different ways.

25 Q. But you think they do the same thing.

1 You think they're redundant.

2 A. No. Because you could -- one of them is
3 more sweeping than the other. For example, the second
4 set would also forbid a totally non-religious private
5 school from receiving funds. So it is broader in that
6 respect than the first two.

7 Q. Let me ask a little bit about school
8 choice and vouchers, if we can. You have a long
9 history in supporting vouchers and that movement; is
10 that right?

11 A. No.

12 Q. Is it your view, sir, that the
13 bureaucratic constraints imposed by
14 government-operated schools systems are inconsistent
15 with good education?

16 A. You are quoting from a website. Do you
17 have the total text of that website? If so, I'd be
18 happy to read it.

19 Q. I'm simply asking you a question as to
20 whether --

21 A. No.

22 Q. If you can let me ask the question,
23 Professor Glenn.

24 -- whether you believe that the
25 bureaucratic constraints imposed by

1 government-operated school systems are inconsistent
2 with good education.

3 A. And I'm saying that you're taking half of
4 the sentence out of context.

5 THE COURT: Then if you disagree, tell
6 him that. It's either yes or no, sir.

7 THE WITNESS: I'm afraid, Your Honor,
8 it's not a question I could answer yes or no. I
9 believe that, in fact --

10 THE COURT: I didn't ask you to state
11 what you believe, sir. With all due respect, and the
12 time constraints we have, the way this works is, he
13 gets to ask you questions and you have to answer his
14 questions. If you agree with him, you can tell him
15 you agree with him. If you disagree with him, you can
16 tell him that. If your answer is yes, you can tell
17 him yes. If your answer is no, your answer is no.
18 Beyond that, please don't expand on your answer.
19 Okay?

20 A. I don't agree with the way you phrased
21 the question, so I can't answer it.

22 Q. (BY MR. MACDONALD) Sir, does that -- if I
23 refreshed your recollection that that's language from
24 your own book, *The Ambiguous Embrace* --

25 A. Have you the text there? I'd be happy to

1 see it.

2 Q. I do have it. I'll come back to it, in
3 the interests of saving time, sir.

4 Professor Glenn, do you believe the case
5 for charter school vouchers and other forms of
6 marketized education rest not only on educational
7 performance but also on the claims of freedom of
8 conscience?

9 A. Yes.

10 Q. And you are not for vouchers as a way for
11 some lucky children to escape from a bankrupt public
12 education system but as a way to transform that system
13 to abolish its choking monopolies and reshape it in
14 ways consistent with a free society?

15 A. Are you quoting me?

16 Q. Sir, it's a question as to whether or not
17 you are not for vouchers as a way for some lucky
18 children to escape from a bankrupt public education
19 system.

20 A. Yes.

21 Q. Instead, vouchers are a way to transform
22 that system and to abolish its choking monopolies and
23 reshape it in ways consistent with a free society. Is
24 that also your view?

25 A. Yes.

1 Q. You're a board member of the Council for
2 American Private Education; is that right?

3 A. Yes.

4 Q. And that council has joined in legal
5 briefs supporting school vouchers, including in
6 Arizona, correct?

7 A. To be honest, I don't know.

8 Q. You're an associate at the American
9 Center for School Choice; is that right?

10 A. Yes.

11 Q. The Council for American Private
12 Education on which you're -- of which you're a board
13 member is a -- has the objective of providing parents
14 with financial assistance to allow them to exercise
15 fully their right to choose their child's school,
16 religious, private or public. Correct?

17 A. Yes.

18 Q. You believe that school voucher opponents
19 use scare tactics based on unfounded stereotypes about
20 faith-based schooling?

21 A. Yes.

22 Q. You believe that graduates of Catholic
23 and Evangelical schools are, if anything, more
24 tolerant and academically ahead of graduates of
25 comparable schools, correct?

1 A. That's what the research suggests.

2 Q. And you believe that?

3 A. Yes.

4 Q. Your undergraduate degree is not in
5 history; is that right?

6 A. That's correct.

7 Q. Neither of your doctorate degrees are in
8 history?

9 A. No.

10 Q. Your other academic training is in
11 theology?

12 A. Some. My PhD is not, if that's what
13 you're referring to. Neither is my other doctorate.

14 Q. You spent years working in the
15 Massachusetts Department of Education; is that right?

16 A. Yes.

17 Q. 20 years, roughly?

18 A. Almost 21.

19 Q. I'd like to ask you a little bit about
20 your article, which is Exhibit NN. Do you have that
21 in front of you?

22 A. I do. It's not an article. It's a book
23 chapter.

24 Q. Thank you. Your unpublished book
25 chapter, correct?

1 A. Yes.

2 Q. It's not paginated, I don't think. My
3 copy is not. Is yours?

4 A. This one is paginated, yes.

5 Q. You have a different copy than I do.
6 Hopefully, the words are the same.

7 If you could turn to the second page of
8 the manuscript. In the second full paragraph you say,
9 "Four American Protestants, as for French
10 anti-clerical republicans, the Catholic Church, a
11 large and ramifying organization and also a source of
12 transcendent claims seemed a menacing limitation upon
13 national unity and progress." Do you see that?

14 A. Yes, I do.

15 Q. And is it your view, sir, that it was all
16 American Protestants held this view?

17 A. No.

18 Q. Some?

19 A. Some.

20 Q. How many?

21 A. Influential leading circles.

22 Q. Lots did not?

23 A. Not -- not as far as I'm aware of, but
24 influential leading circles.

25 Q. How about simply American Protestants

1 generally?

2 A. There were many, I'm sure, who had never
3 thought about it.

4 Q. If you'd turn to what is page 5, I
5 believe. The third full paragraph, you state, "What
6 agitated voters in the 1870s was the fear that the
7 Catholic Church was gaining political influence and
8 advancing demands upon an educational system." Do you
9 see that?

10 A. Yes, I do.

11 Q. And again, are you talking about all
12 voters, or some voters?

13 A. Many voters.

14 Q. On direct, you went through a series of
15 questions from Mr. Nussbaum about individuals from
16 history. Do you recall that? PreCivil War, post
17 Civil War?

18 A. Yes.

19 Q. The first was Samuel Morse; is that
20 right?

21 A. Right.

22 Q. Or you talked about Samuel Morse.

23 A. Correct.

24 Q. Do you know if Samuel Morse had any
25 direct influence in the historical scholarship of

1 literature on the Colorado Constitution, sir?

2 A. Whether Morse had influence on the
3 historical scholarship?

4 Q. It was a terrible question. Let me
5 restate it.

6 A. Please.

7 Q. In your review of the literature, does
8 Samuel Morse appear to have influenced the
9 constitutional debate in Colorado? Is he referenced?

10 A. No. His influence was in the 1830s.

11 Q. And the same question. Who was -- what's
12 Beecher's first name, who wrote Plea for the West?

13 A. Now you're making me forget. I don't
14 remember.

15 Q. Okay. Well, let me just ask.

16 A. Okay.

17 Q. Have you seen evidence that Beecher was
18 referenced in the constitutional ratification process
19 and discussions in Colorado in 1876?

20 A. No. His influence again was in the
21 1830s.

22 Q. You didn't see any references in Colorado
23 in 1876?

24 A. 40 years later, no.

25 Q. You talked about Horace Bushnell,

1 correct? On direct?

2 A. Right.

3 Q. Have you seen any evidence that Horace
4 Bushnell appears in the discussions, debates of the
5 Colorado Constitution in 1876?

6 A. No.

7 Q. You mentioned President Garfield, and
8 comments or speeches that he made, in your direct with
9 Mr. Nussbaum. Do you recall that?

10 A. Yes.

11 Q. In your review of the historical
12 literature, have you seen any references that relate
13 to James Garfield in the ratification or debates on
14 the Colorado Constitution?

15 A. No.

16 Q. You also looked at the congressional
17 record on the debates over the Blaine -- the
18 federal -- actual federal Blaine amendment, correct?

19 A. Yes.

20 Q. And that's Exhibit KK. And Mr. Nussbaum
21 directed you to comments by Senator Morton. Do you
22 recall that?

23 A. Yes.

24 Q. And, sir, do you have any evidence that
25 Colorado -- anyone in Colorado was aware specifically

1 of Senator Morton's statements on the federal Blaine
2 amendment?

3 A. No.

4 Q. You also referenced in your direct
5 testimony Senator Edmunds. Do you recall that? *S?

6 A. Yes.

7 Q. Were you aware of any -- you have -- or
8 are you aware of any evidence that anyone in Colorado
9 was aware of Mr. Edmunds' discussions and views on the
10 federal Blaine amendment? Anyone in Colorado was
11 aware of that?

12 A. No.

13 Q. Same question for Senator Bogey.

14 A. No.

15 Q. And if we could -- I think I had this
16 right. Senator Bogey was opposed to the federal
17 Blaine amendment; is that right?

18 A. Yes.

19 Q. And if we could just look at Exhibit KK,
20 at 5590, please. And I believe that Mr. Nussbaum had
21 you, or maybe he, himself, read in a section on --
22 where Mr. Bogey was speaking on the second column on
23 page 5590. Do you recall that?

24 A. Yes.

25 Q. And here Mr. Bogey, who opposed the

1 Blaine amendment -- do you know, sir, as a matter of
2 history, was Mr. Bogey himself Catholic? Do you know?

3 A. I don't know.

4 Q. He supported what your -- what you see as
5 the Catholic position again opposing the Blaine
6 amendment; is that right?

7 A. No. He supported the democratic
8 position.

9 Q. Democratic party?

10 A. Yes. I believe he was not Catholic. The
11 senator of New York was Catholic. Bogey, I believe,
12 stated somewhere in the transcript that he was a
13 Protestant, all four squared.

14 Q. So Mr. Bogey, a Protestant, was opposed
15 to the Blaine amendment.

16 A. Right. Because he saw it as oppressive
17 to Catholics.

18 Q. In his statements on the Blaine amendment
19 that are set out here in the congressional record,
20 he's using the term "sectarian" to refer to
21 Protestants; is that right?

22 A. He's to refer to the Protestant character
23 of public schools.

24 Q. So he -- let's make sure I understand it.
25 He's using the term "sectarian" to refer to the

1 Protestant character of public schools?

2 A. Public schools.

3 Q. He's not using sectarian here to mean
4 Catholic; is that right?

5 A. Correct.

6 Q. As part of the discussions in Colorado,
7 sir, are you aware that members of the constitutional
8 convention introduced resolutions calling for a rigid
9 separation of church and state, including a ban on
10 reading the Bible in school?

11 A. Yes.

12 Q. And those were -- as I understood
13 earlier, one of the issues that you identified in your
14 direct with Mr. Nussbaum was that at least some
15 Protestants wanted to prevent money to go to Catholic
16 schools, but also wanted to have the Bible read in
17 public schools.

18 A. Yes.

19 Q. Yet, in Colorado, there were those who
20 were supporting the provisions -- the religious and
21 education provisions of the Colorado Constitution, who
22 supported banning the reading of the Bible in the
23 public schools, correct?

24 A. Yes. So-called liberals.

25 Q. And you're aware, sir, that the Colorado

1 Constitution was -- excuse me. The no-aid provision,
2 article 9, section 7, is almost word for word
3 identical to the Illinois Constitution? You're aware
4 of that?

5 A. Yes.

6 Q. And the Illinois Constitution was
7 enacted -- and that provision, the no-aid provision in
8 Illinois, was enacted in 1870?

9 A. Yes.

10 Q. Sir, are you aware that several petitions
11 identified as being from Catholics called for
12 prohibiting a division of the Public School Fund? Are
13 you aware of that?

14 A. I find the report of that ambiguous. I
15 have difficulty interpreting it.

16 Q. And have you actually looked at the
17 report?

18 A. I have looked at the -- at the report of
19 the convention, yes.

20 Q. Well, let me see if I can help.

21 MR. MACDONALD: Your Honor, may I
22 approach?

23 THE COURT: Yes. Thank you.

24 Q. (BY MR. MACDONALD) Professor Glenn, I've
25 handed you an excerpt from Donald Hensel's 1957

1 thesis, a history of the Colorado Constitution in the
2 19th century that we discussed early KWREUR. Do you
3 see that?

4 A. Right.

5 Q. You've reviewed this before, correct?

6 A. I have, yes.

7 Q. You think it's a scholarly work?

8 A. Well, it's -- it's a -- yes, it is a
9 doctoral dissertation.

10 Q. And you, sir, rely on Hensel in your own
11 forthcoming, to-be-published manuscript; is that
12 right?

13 A. I do. I quote him.

14 Q. Okay. And you think he's a reliable
15 source of the history, correct?

16 A. Yes.

17 Q. If you could turn to page 195. And down
18 at the bottom there is a footnote 43. Do you see
19 that?

20 A. I do.

21 Q. And it's a reference to the Los Animas,
22 Colorado Leader, November 5th, 1875, and a reference
23 to the Denver Daily Tribune, February 10th and 21st,
24 1876. Do you see that?

25 A. Yes, I do.

1 Q. And Mr. Hensel states there were several
2 petitions identified as being Catholic, which called
3 for prohibiting a division of the school fund. Do you
4 see that?

5 A. Yes, I do.

6 Q. If you'd look up on that same page, 195,
7 Mr. Hensel -- and I think in your testimony -- in your
8 direct testimony with Mr. Nussbaum, you talked about
9 the divide in Colorado at that time between southern
10 Colorado and the Front Range and northern part of
11 Colorado?

12 A. Right.

13 Q. And here Mr. Hensel says in the first
14 full paragraph, "Sentiment in southern Colorado was
15 perhaps not nearly as uniform as some of the delegates
16 assumed." Do you see that?

17 A. Yes.

18 Q. If you could turn to page 194, sir.
19 There's a discussion there about the section
20 prohibiting division of the Public School Fund, do you
21 see, in the reference to Boyles and to Henry Bromwell?

22 A. Are you talking about the first
23 paragraph?

24 Q. Yeah. The first paragraph, which starts
25 at the top of 194. Do you see that George Boyles

1 seeks to strike out the provision that would keep the
2 Public School Fund inviolate, because he contended
3 that public schools were still experimental and that
4 more than half the children in the east attended
5 private schools? Do you see that?

6 A. Yes, I do.

7 Q. And that several delegates vigorously
8 defended the ban?

9 A. Yes.

10 Q. And Henry Bromwell -- do you recall, in
11 reviewing the literature -- do you remember anything
12 about Henry Bromwell, sir?

13 A. No, I don't.

14 Q. Henry Bromwell here is quoted -- or
15 provided as saying that Henry Bromwell added that the
16 provision was basic to maintaining a system of popular
17 education. Right?

18 A. Yes. That's what he said.

19 Q. And there's no reference in here that
20 he's supporting that provision because he's
21 anti-Catholic, is there?

22 A. No.

23 Q. You don't have any evidence that he was
24 anti-Catholic; is that right?

25 A. No, I don't.

1 Q. If you could turn to page 196 of
2 Mr. Hensel's doctoral thesis. And down near the
3 bottom, they're discussing that they are barring --
4 that the provision that barred all sectarian tenets or
5 doctrines from the public schools. Do you see that
6 paragraph?

7 A. Yes, I do.

8 Q. And Mr. Hensel concludes, quote, the
9 convention rejected the assumption that Bible reading
10 was indispensable evidence that the schools were more
11 institutions. Do you see that?

12 A. Yes, I do.

13 Q. The carryover from 196 to 197 says,
14 "Another observer applauded the decision to let
15 religion be taught in the family circle, in the
16 church, and in the Sunday school." Do you see that?

17 A. Yes.

18 MR. NUSSBAUM: Your Honor, are there
19 questions in this, or just a reading of the document?

20 THE COURT: Little of both, it seems
21 like. Your objection is to form of the question? I'm
22 going to sustain the objection at this point.

23 MR. MACDONALD: Thank you. I'll move on,
24 Your Honor.

25 Before I move on, Your Honor, I'd like to

1 move the admission of Exhibit 149.

2 THE COURT: Objection to 149,
3 Mr. Nussbaum?

4 MR. NUSSBAUM: There is, Your Honor.
5 This is a master's thesis. It was not published. It
6 was not intended for publication. It's not by a
7 recognized scholar. There's no peer review or any of
8 that. A lot of us have written theses during our
9 master's exercises that are not being treated as
10 learned documents.

11 THE COURT: How does it meet the
12 criteria to be admitted, Mr. Macdonald?

13 MR. MACDONALD: Your Honor, I believe
14 that the witness has already testified he, himself,
15 relies on Mr. Hensel's work. He's testified it's a
16 scholarly work. And I believe he also testified it
17 was both, Your Honor.

18 THE COURT: He didn't say those things.
19 But does that give it enough to meet the standard
20 necessary to be qualified as a learned treatise or
21 otherwise be admissible as non-hearsay?

22 THE WITNESS: I relied on the published
23 article, not this --

24 THE COURT: I wasn't asking you, sir.

25 THE WITNESS: I'm sorry, sir.

1 MR. MACDONALD: Your Honor, I believe the
2 fact that Mr. Hensel -- excuse me -- Mr. Glenn himself
3 relies on the work of Mr. Hensel, said that he
4 believed it was a scholarly work, satisfies the
5 standard.

6 MR. NUSSBAUM: Your Honor, experts are
7 permitted to rely on documents that aren't otherwise
8 admissible into evidence. That doesn't make them
9 admissible.

10 THE COURT: Well, the rule provides
11 that it also applies to periodicals or pamphlets on a
12 subject of history. So the court will permit it and
13 find the objection goes to the weight, not its
14 admissibility. 149 is admitted.

15 Q. (BY MR. MACDONALD) If you could turn to
16 Exhibit LL. This was one of the Rocky Mountain News
17 articles that you referred to earlier. Do you have
18 that in front of you, sir?

19 A. Yes, I do.

20 Q. In this article -- I think you testified
21 about this on direct, but I just want to make sure the
22 record is clear. The Rocky Mountain News in this
23 editorial takes the position that Colorado should not
24 enact the no-aid provision or the provision to keep
25 the Public School Fund inviolate. Correct?

1 A. Yes.

2 Q. And in discussing that, in the middle of
3 the page, they say, "In the first place, the
4 legislature is fully competent to deal with the
5 question." Do you see that?

6 A. Yes.

7 Q. And that was something that you talked to
8 Mr. Nussbaum on direct exam, right? This question of
9 whether the debates about putting these education
10 clauses in the constitution was -- should be better
11 left to later democratic process.

12 A. Yes.

13 Q. And as I recall, I think you said left to
14 the normal process -- normal democratic process. Is
15 that right?

16 A. I don't know what my exact words were.

17 Q. Is that a fair characterization?

18 A. Yes.

19 Q. And you're not saying there's anything
20 inherently wrong about the democratic process putting
21 things in the constitution that the people want in the
22 constitution, are you?

23 A. No.

24 Q. And here the Rocky Mountain News is
25 talking about, in the rest of that sentence, "The

1 danger's far from conceivable for the majority in that
2 body being in favor of any measure that would detract
3 from the stability of the public school system as at
4 present constitute." Do you see that?

5 A. Yes.

6 Q. And based on your review of the
7 scholarship, you understand, sir, that there were many
8 delegates in Colorado who were concerned about the
9 stability of the public school system; is that right?

10 A. Concerned that the fund's not being used
11 for other than public schools, yes.

12 Q. And one of the reasons, based on your
13 review of the literature, is because they were
14 concerned about the stability of the public school
15 system if funds were taken out of it. Is that right?

16 A. That's what the editorial is saying.

17 Q. And you've seen that in your review of
18 the scholarship and Mr. Hensel's work?

19 A. That's not the way I interpret it.

20 Q. In the Colorado convention, I think you
21 talked on direct that there was originally a provision
22 to tax private schools and religious schools.

23 Correct?

24 A. To tax churches as well as schools.

25 Q. To tax churches and to tax religious

1 schools.

2 A. Yes.

3 Q. And the Colorado delegates decided not to
4 include that provision. They voted that down; is that
5 right?

6 A. Yes.

7 Q. They rejected that.

8 A. Yes.

9 Q. Sir, are you aware that not a single
10 newspaper south of the divide, as they say, in
11 southern Colorado, urged the defeat of the Colorado
12 Constitution?

13 A. I have no information.

14 Q. Don't know one way or another?

15 A. I don't know.

16 Q. And, sir, are you aware that there
17 were -- just one moment, please.

18 MR. MACDONALD: I'm trying to cut this
19 down, Your Honor.

20 Q. (BY MR. MACDONALD) Sir, you're aware that
21 no-aid provisions were enacted in states without
22 submitting to the Catholic populations, correct?

23 A. Yes.

24 Q. And Michigan in 1835?

25 A. Wisconsin, 1848.

1 Q. Sorry. Can you answer my question first?

2 A. Michigan in 1850, I think.

3 Q. If the record shows it in 1835, would you
4 disagree with that?

5 A. That's not my information, but --

6 Q. All right. You think Michigan in 1850?

7 A. I think Michigan, 1850.

8 Q. Wisconsin?

9 A. 1848.

10 Q. Okay. Indiana has a no-aid provision?

11 A. Right.

12 Q. When was that put in?

13 A. There were 13 states who did it before
14 1870. So -- I have notes on it, if you want me to
15 read them off.

16 Q. I don't. Do you know if Indiana's no-aid
17 provision was put in in 1851?

18 A. That sounds reasonable. That's just
19 1853.

20 Q. Do you know --

21 A. Sorry.

22 Q. Do you know if there was significant
23 anti-Catholic presence in Indiana or Wisconsin in 1848
24 or 1851? Do you know if that motivated their
25 inclusion of the no-aid provisions in their

1 constitutions?

2 A. I believe that it did.

3 Q. How about Michigan in whatever year they
4 put in the --

5 A. Yes.

6 Q. Your view is, anytime a state includes a
7 no-aid provision, it's motivated by anti-Catholic
8 animus? Is that your view?

9 A. Yes.

10 Q. Have you looked at the historical record
11 for each of those states?

12 A. No.

13 MR. MACDONALD: No further questions,
14 Your Honor.

15 THE COURT: Any other inquiry,
16 Mr. Deihl?

17 MR. DEIHL: No, Your Honor.

18 THE COURT: All right. Redirect,
19 limited in scope to cross-examination, please.

20 REDIRECT EXAMINATION

21 BY MR. NUSSBAUM:

22 Q. *S Professor Glenn, there were a number
23 of questions regarding kind of quantum of
24 anti-Catholic feeling that motivated the various
25 Blaine movements in the various states.

1 Did the Rocky Mountain News in Colorado
2 comment in its editorial on March 17th, 1886 -- 1876,
3 regarding what it believed would be the quantum of
4 sentiment about this?

5 A. Yes.

6 Q. And what was their view of that?

7 A. That the -- adopting the anti-aid
8 language would lead to far more support for
9 Protestants than it would to opposition from
10 Catholics.

11 Q. And did President Grant and Mr. Blaine
12 and the republican party make some assessment of the
13 quantum of sentiment regarding this issue?

14 MR. MACDONALD: Objection. Foundation.

15 A. Yes.

16 THE COURT: Well, overruled.

17 Q. (BY MR. NUSSBAUM) And what was their
18 views?

19 A. That this -- this was a winning issue for
20 the 1876 election.

21 Q. What was your doctoral thesis about?

22 A. It was what became the book The Myth of
23 the Common School, which Professor Green quotes
24 several times, which is a history of the relationship
25 of government, schools, and the religion issues in the

1 19th century.

2 Q. A history.

3 A. Yes.

4 Q. And there was questions to you about
5 Samuel Morse, and I believe it was Lyman Beecher,
6 Horace Bushnell, Senators Morton, Edmunds, and Bogey,
7 and whether there was actual record of their
8 statements in the proceedings in Colorado. Do you
9 remember that line of questions?

10 A. Yes, I do.

11 Q. And when you discussed what their views
12 were, were you simply trying to give evidence of the
13 national mood regarding these issues?

14 A. Of the national mood. And if I may add,
15 the national mood in the period when the earlier
16 anti-aid amendments were adopted, as well.

17 Q. And did you see that Colorado, as you
18 looked at the evidence in Colorado, that it was also
19 affected by the national mood in that era?

20 A. Absolutely.

21 Q. Okay. There were some questions on
22 cross-examination regarding a resolution in the
23 Colorado proceedings to ban the use of the Bible from
24 public schools.

25 A. Right.

1 Q. Do you recall the result of that
2 resolution?

3 A. I don't know. You'd have to remind me.

4 MR. NUSSBAUM: May I approach, Your
5 Honor?

6 THE COURT: Yes.

7 Q. (BY MR. NUSSBAUM) I'll draw your
8 attention --

9 MR. DEIHL: Your Honor, what -- we don't
10 know what he's showing the witness.

11 MR. NUSSBAUM: Be happy to show you.

12 THE COURT: The record should reflect
13 that he's attempting to refresh his memory with
14 something.

15 MR. NUSSBAUM: I'll lay the foundation.
16 I'm happy to show it to counsel.

17 THE COURT: Yes. You need to show it
18 to counsel.

19 You need to not break the phone.

20 MR. NUSSBAUM: Are you still there,
21 Professor Green? We dropped you. Hello.

22 THE COURT: Literally and figuratively.

23 MR. NUSSBAUM: Oh, he's here.

24 Q. (BY MR. NUSSBAUM) I'm going to show you
25 page 360 from the -- do you recognize this as the

1 proceedings from the --

2 THE COURT: Before you do that, you
3 need to show opposing counsel, Mr. Nussbaum.

4 MR. NUSSBAUM: Okay.

5 (Pause in the proceedings.)

6 MR. NUSSBAUM: Perhaps, Your Honor, we
7 may have counsel stipulate that on page 360 of the
8 proceedings, it shows a resolution was introduced that
9 reads as follows. "The Bible shall not be introduced
10 in any public school in this state for the purpose of
11 religious instruction."

12 And then it says, after a failed attempt
13 to amend, the question then recurring on motion of
14 Mr. Whyte to adopt the additional section and being
15 put, "It was not agreed to."

16 And so can we maybe stipulate that that
17 motion is put before the convention, and it was
18 rejected by the convention? Or do you want me to lay
19 the foundation?

20 MR. MACDONALD: I'd ask you to lay the
21 foundation.

22 THE COURT: You want him to ask the
23 witness about it?

24 MR. MACDONALD: Yes, Your Honor. The
25 reason I'm not sure I can stipulate to it is because I

1 don't know what else happened. This was just an
2 excerpt shown in --

3 THE COURT: You weren't there?

4 MR. MACDONALD: No.

5 THE COURT: Fair enough. You may
6 proceed, Mr. Nussbaum.

7 Q. (BY MR. NUSSBAUM) I'll draw your
8 attention, then, to page 360 of the proceedings of the
9 Colorado Constitution. And let me let you read the
10 text that's highlighted, if you will. Don't read it
11 aloud.

12 A. Yes.

13 Q. So was there a motion to the convention
14 from Mr. Whyte?

15 A. Yes.

16 Q. Regarding the use of the Bible?

17 A. Yes.

18 Q. And what did he move?

19 A. He moved that it not be used in public
20 schools for the purposes of instruction.

21 Q. And did the motion -- did the convention
22 adopt or reject the motion?

23 A. It rejected it.

24 Q. Thank you.

25 Finally, Professor Glenn, counsel asked

1 you questions regarding the Rocky Mountain News in its
2 February editorial opposing inclusion of the Blaine
3 language in the Colorado convention. Do you recall
4 those questions?

5 A. Yes.

6 Q. Did they also, in that editorial, oppose
7 or support the Blaine principle?

8 A. They supported the Blaine principle very
9 strongly.

10 Q. How could they support the Blaine
11 principle, yet oppose its inclusion in the Colorado
12 convention?

13 A. Because they said tactically or
14 strategically, it would be unwise to include anything
15 that might result in the constitution being voted down
16 and, thereby, imperiling the statehood.

17 Q. And by the time of its March 17th, 1786
18 editorial, did the Rocky Mountain News' analysis of
19 the political calculus change?

20 A. It had changed significantly.

21 Q. And what did it believe the political
22 calculus was before it went to a vote of the people?

23 A. That, in fact, the response had been so
24 positive to the adoption of the anti-aid amendment,
25 that it would materially contribute to the adoption of

1 the constitution.

2 MR. NUSSBAUM: Thank you very much.

3 Thank you for coming out here to testify.

4 THE COURT: Any recross? Limited in
5 scope, please. Which you already knew, but I say that
6 all the time.

7 RECCROSS-EXAMINATION

8 BY MR. MACDONALD:

9 Q. Professor Glenn, *S are you aware that
10 there was a Catholic rally in support of eradication
11 of the Colorado Constitution?

12 MR. NUSSBAUM: Beyond the scope.

13 THE COURT: No. Overruled.

14 Q. (BY MR. MACDONALD) Shortly after the --
15 after the constitution was drafted and before
16 ratification, are you aware of that?

17 A. Yes.

18 MR. MACDONALD: Thank you. No further
19 questions.

20 THE COURT: Anyone else? No? All
21 right. That will conclude the testimony of this
22 witness. If there's no objection, he may step down
23 and be excused.

24 We still have Dr. Green on the line?

25 MR. BINDAS: It appears to be on, Your

1 Honor.

2 THE COURT: Well, the phone is on. Is
3 he there?

4 MR. BINDAS: Professor Green, can you
5 hear us?

6 MR. GREEN: Yes.

7 THE COURT: Did you want to take this
8 testimony out of order?

9 MR. MACDONALD: We would like to, Your
10 Honor, if that's permissible.

11 THE COURT: Okay. Any idea how long
12 you think it's going to take? I know it's not going
13 to be 10 minutes, but -- are we looking at three
14 hours?

15 MR. MACDONALD: No. I would hope it's
16 less than 45 minutes.

17 THE COURT: Okay. Well, let's see if
18 we can make some headway on it, then.

19 Professor Green, can you hear me?

20 MR. GREEN: Barely, Your Honor.

21 THE COURT: I'm kind of soft spoken,
22 so --

23 MR. GREEN: The battery on this phone is
24 dying on me, so -- it's been on for a couple of hours,
25 so I may have to try to call back on a cell phone that

1 has between one and two bars where I am at this point.
2 So I apologize if I --

3 THE COURT: Do you want me to take a
4 break now so you can recharge your phone and come back
5 after lunch?

6 MR. GREEN: That would actually help
7 quite a bit, because I think this phone would be more
8 alive than the cell phone.

9 THE COURT: Why don't we just do that.

10 MR. MACDONALD: That's fine, Your Honor.

11 THE COURT: We're going to do that,
12 Mr. Green.

13 MR. GREEN: Okay. Why don't you call me
14 back, then.

15 THE COURT: It's about five till noon.
16 Why don't we come back at 1:00 o'clock, and we'll
17 proceed then with the testimony of Professor Green by
18 telephone.

19 MR. MACDONALD: Thank you, Your Honor.

20 THE COURT: Court's in recess.

21 (Recess taken, 11:53 a.m. to 1:26 p.m.)

22 THE COURT: Please be seated. Good
23 afternoon. Back on the record in 11CV4424.

24 My understanding is, the plaintiffs have
25 opted not to call Dr. Green in rebuttal to the

1 testimony from Professor Glenn. Is that correct,
2 Mr. Macdonald?

3 MR. MACDONALD: That's correct, Your
4 Honor.

5 THE COURT: So we're going to continue,
6 then, with the defendants' case in chief. Mr. Blue is
7 standing.

8 MR. BLUE: Yes, Your Honor. The defense
9 calls Senator Keith King, please.

10 THE COURT: All right. Senator, please
11 come forward and be sworn.

12 SENATOR KEITH KING,
13 having been first duly sworn to state the whole truth,
14 testified as follows:

15 THE COURT: Please be seated, sir.

16 Now, Senator, as you get yourself
17 comfortable, there's a couple rules. Obviously,
18 you're out of your element down here. But some of the
19 similar rules will apply, and I'm sure you will
20 appreciate them.

21 Please do your best to speak up into the
22 microphone, and make sure you use it in response to
23 the questions that you are asked.

24 Also keep in mind that our proceedings
25 are being recorded by the court reporter. She only

1 has 10 fingers, so she needs you to wait until the
2 question is completed before you start to answer it,
3 and that way, we have a clear record of the
4 proceedings.

5 And the other thing I'm going to ask you
6 to do is please listen carefully to what you're being
7 asked on the question and answer just that question.
8 If there's something that needs to be clarified, then
9 Mr. Blue at a later point will be able to clarify that
10 for you or with you. Okay?

11 THE WITNESS: Very good.

12 THE COURT: Thank you. Mr. Blue.

13 MR. BLUE: Thank you, Your Honor.

14 DIRECT EXAMINATION

15 BY MR. BLUE:

16 Q. Would you state your name for the record.

17 A. My name is Keith King. () *S.

18 Q. And you serve as state senator for what
19 district?

20 A. I serve as state senator for District 12.
21 It's the west side of Colorado Springs, Colorado.

22 Q. And how long have you been -- how long
23 have you served in the Colorado legislature?

24 A. I served eight years in the House, and
25 then I was out for two years. And now I'm back in the

1 Senate. So I've been in a total of 11 years.

2 Q. And have you been involved in education
3 legislation?

4 A. A lot. I have worked on a lot of bills.
5 I probably carried 40 to 60, maybe as many as 70
6 bills. They call me the amendment king. So I have
7 done literally dozens and dozens of amendments on
8 education bills.

9 Q. And you have served on or chaired the
10 education committee?

11 A. I've served on the education committee.
12 I was vice chair. I was majority leader. And as
13 majority leader, I couldn't chair a committee, so I
14 have not chaired the education committees.

15 Q. And for how many years have you served on
16 education committees?

17 A. Probably all the years in the House
18 except for one, the first year I was majority leader.
19 And then all the years in the Senate.

20 Q. Thank you.

21 Now, do you have another job outside of
22 your legislative work?

23 A. I do. I'm also the administrator of
24 Colorado Springs Early Colleges. It's a charter
25 school I founded when I got out of the House and

1 didn't think I'd go back into the Senate. And so it's
2 going into its fifth year this fall.

3 Q. And what is Colorado Springs Early
4 Colleges?

5 A. Colorado Springs Early Colleges is a
6 charter school that's authorized by the Charter School
7 Institute, and it's a school that specializes in
8 helping high school students get a college degree
9 while they're still in high school. So we've based
10 our curriculum on the junior college or community
11 college model, try to move the kids as quickly as
12 possible into concurrent enrollment and give them an
13 associate's degree.

14 The most remarkable -- and maybe I
15 shouldn't talk too much -- was, we had one girl this
16 year graduate from Colorado Technical University with
17 a four-year college degree from high school.

18 Q. You mentioned concurrent enrollment. Can
19 you describe what that is, please?

20 A. Concurrent enrollment is the opportunity
21 for public schools across the state of Colorado to
22 allow kids to take college courses while they're still
23 in high school.

24 At Colorado Springs Early Colleges, we
25 have like 170 kids taking courses full-time at Pike's

1 Peak Community College on a regular semester basis.
2 We have probably 200 students taking college courses
3 at Colorado Technical University. We co-share their
4 campus.

5 And so the concept behind concurrent
6 enrollment is, if it's the exact same curriculum, and
7 you have an opportunity to give both high school
8 credit and college credit, you can take the exact same
9 course -- like Algebra 2, for example, is typically in
10 three level college level courses. And so you can
11 take that and get college credit, be able to get a
12 transcript from a college or university, wherever
13 you're going, and also fulfill the school credit.

14 Q. Is Colorado Technical University a
15 private entity?

16 A. It is. It's a private entity. It's a
17 publicly -- it's part of the Career Corporation, and
18 they're publicly traded on the New York Stock
19 Exchange.

20 Q. And does COS -- I'm sorry. Does the
21 Colorado Springs Early Colleges -- COS is the acronym
22 for that?

23 A. No. CSAP? Colorado Springs Early
24 Colleges?

25 Q. What is COS the acronym for? I

1 apologize.

2 A. COS?

3 Q. Yeah.

4 A. CTU would be Colorado Technical
5 University, Colorado Springs Early Colleges is -- we
6 call it CSEC.

7 Q. CSEC. That will work. Does CSEC have a
8 contract with CTU?

9 A. It does. We co-share the location. So
10 what we do is, Colorado Springs Early Colleges teaches
11 the curriculum of Colorado Technical University. We
12 hire the professors, the adjunct professors. They
13 teach the curriculum of CTU. And so they're our
14 employees and they're also qualified by CTU to be able
15 to teach their courses. So we work collaboratively
16 together.

17 Q. And what is the tuition rate that you --

18 A. CTU matches the curriculum cost or the
19 tuition cost of the community college system in
20 Colorado. So last year it was 96 dollars, I think,
21 and 35 cents. This next year, it's going to be
22 \$105.85 per credit hour.

23 The students can also take courses at
24 UCCS. And UCCS this next year is going to be around
25 \$350 per credit hour.

1 Q. And do your students have dual enrollment
2 in those universities?

3 A. Correct. They are enrolled both at CTU,
4 UCCS, and Pike's Peak Community College. And they
5 also are enrolled with our school. We use the per
6 pupil revenue, the PPR, of the money that we get from
7 the state *S to pay their tuition and books when they
8 go to the college or university.

9 Q. And does CSEC receive -- so it does
10 receive the per pupil funding, then?

11 A. It does.

12 Q. And it uses that funding to pay CTU for
13 its services?

14 A. Correct. It's \$6100 this next year. It
15 was about \$6500 last year.

16 Q. I'd like to shift over. Do you know what
17 education management organizations are?

18 A. Yes, I do.

19 Q. And do you know what educational service
20 providers are?

21 A. Yes, I do.

22 Q. Okay. What are education management
23 organizations or EMOs?

24 A. There's typically several things that
25 people use to contract services for in schools. And

1 these are traditionally found mainly in charter
2 schools. You have for-profit organizations. Those
3 would be organizations like Mosaic, Imagine, K-12
4 Education. They are for-profit companies that
5 typically contract for services.

6 Then you have nonprofit companies that
7 also contract for services and provide services inside
8 the school districts across the state of Colorado and
9 specifically charter schools. And they are contracted
10 to maybe provide the entire range of services from the
11 perspective of education, or they might just be
12 special education. But they have specific missions,
13 and they typically always have contracts between who
14 they work with.

15 Q. And so you mentioned during that that
16 they sometimes will provide the entire package. So
17 when you say the entire package, do you mean that they
18 run the school completely from soup to nuts?

19 A. Well, in a charter school, you have to
20 have a governing board, so they would not be the
21 governing board. But underneath the governing board,
22 there would be a contract -- GO is another company
23 that contracts with schools in Colorado Springs, for
24 example. And so the governing board has a contract
25 that manages the educational process and the

1 educational philosophy of the school.

2 Edison is another one that was contracted
3 totally to do the entire operations.

4 Q. So do these organizations hire the
5 teachers?

6 A. Yes. In many cases, they do. Sometimes
7 it's a collaborative arrangement. But in a lot of
8 cases, they are not hired by the -- they contract the
9 hiring to the EMO.

10 Q. And do EMOs often -- do they control the
11 curriculum and write the curriculum?

12 A. Yes. They have a particular philosophy
13 that they typically do -- K-12 Education, for example,
14 delivers online instruction, and that's the philosophy
15 that they have. Other ones, the Mosaic, will be more
16 of a traditional type of delivery system. Edison will
17 have a different delivery system.

18 But they fundamentally contract the
19 services to the school board or the charter school to
20 fulfill those services while they are educating at the
21 school.

22 Q. And you had mentioned that the teachers
23 are often hired directly by the EMOs. Are all the
24 employees in the school hired by the EMOs at times?

25 A. At times that can be done. Other times,

1 you might contract services out for janitorial to a
2 different contractor as opposed to the EMO. But many
3 times they hire out the entire operation of the
4 school.

5 Q. So to reverse it a little bit, there are
6 times with EMOs where none of the employees of the
7 schools are school district employees.

8 A. Correct.

9 Q. And does the PPR funding help pay for
10 this?

11 A. PPR funding, in the case of Colorado
12 Springs, the college virtually pays for the entire
13 portion of it. There's also categorical funding that
14 is available to schools like for special education,
15 transportation, career, technical education, those
16 times of things.

17 There's federal funding that comes in.
18 But PPR is the main source of funding for all this.

19 Q. So total program funding goes to pay the
20 EMOs for the work they're providing?

21 A. Correct.

22 Q. Are you aware of the College Opportunity
23 Fund?

24 A. I am. I carried the bill on the
25 legislature.

1 Q. Can you tell us what the Colorado
2 Opportunity Fund does?

3 A. The Colorado Opportunity Fund, in
4 essence, takes state dollars and gives it to the
5 recipients of the students who are going to be going
6 to the higher ed institutions, the 28 higher ed
7 institutions in the state of Colorado.

8 So it was done to, in essence, create an
9 enterprise opportunity for higher ed across the state
10 of Colorado. And by doing so, we had to fund -- when
11 we carried the bill, we had to fund students. We
12 could no longer fund institutions.

13 Q. Are you familiar with the Choice
14 Scholarship Program that's been implemented by Douglas
15 County?

16 A. Yes, I am.

17 Q. And could you compare the College
18 Opportunity Fund and the Choice Scholarship Program?

19 MR. DEIHL: Your Honor, I object. Calls
20 for an opinion. As this witness has indicated, he's
21 not qualified as an expert to talk about that.

22 THE COURT: Well, I took it as a
23 factual inquiry. But I'll sustain it as to the form
24 of the question and ask you to rephrase it.

25 Q. (BY MR. BLUE) Senator King, do you think

1 there are similarities between the College Opportunity
2 Fund and the Choice Scholarship Program?

3 A. Yes.

4 MR. DEIHL: Same objection.

5 THE COURT: Overruled.

6 Q. (BY MR. BLUE) Could you describe some of
7 those similarities for us here?

8 A. Yes. When we started the College
9 Opportunity Fund, we made public institutions eligible
10 for the funding; the 28 higher ed public institutions
11 in the state of Colorado.

12 Also, we had originally created
13 opportunities for students to use the College
14 Opportunity Fund at three private institutions in the
15 state of Colorado. And that was Colorado College,
16 Regis, and DU. And subsequent to that, Colorado
17 Christian University, I also carried legislation to
18 help allow them also to participate. There was a
19 lawsuit that was on that particular issue, and now COF
20 also be used at Colorado Christian University.

21 Q. And just to clarify, so under COF, state
22 funding goes to these schools?

23 A. Correct. And the way we define -- well,
24 correct.

25 Q. Okay.

1 A. I was going to define in-state tuition
2 for you.

3 Q. I don't think we need to go into in-state
4 tuition.

5 So are you aware of any other
6 public-private partnerships in Colorado education
7 specific to school districts?

8 A. Yeah. One of the first amendments I ever
9 did to the School Finance Act when I went into the
10 House was what I called at the time education orphans.
11 And education orphans is a -- it continues to be
12 funded, actually, today. It's been a successful
13 program. It is worth about a half a million dollars.

14 In my particular House district at the
15 time, Myron Stratton Homes was a residential treatment
16 facility, and the court would adjudicate what the --
17 would call abandoned kids, kids that had been abused,
18 *S parental rights denied or taken away from kids that
19 were in education. And many times, they were being
20 sent to Myron Stratton Homes, *S and they had an
21 excess cost to educate these kids.

22 So I worked with the superintendent of
23 schools, Cliff Brookhart, to try and solve an issue of
24 helping Myron Stratton take care of the excess costs,
25 because the per pupil revenue wasn't covering that.

1 And so we set aside half a million dollars for
2 residential treatment facilities. And virtually all
3 of those are private. I think there's about 60 of
4 them in the state of Colorado, and 56, 57 of them are
5 private schools. And it's been a very successful
6 program to serve the most needy students that we have
7 really in the state of Colorado.

8 Q. And are some of the private institutions
9 religious?

10 A. As far as I know, there is one that is
11 religious in the Denver area. I think it's St. --
12 St. Martin's. It's affiliated with the Catholic
13 religious order.

14 Q. Are you aware of -- are contract schools
15 another public-private partnership?

16 A. They are.

17 Q. And could you give some examples of some
18 contract schools?

19 A. Well, typically contract schools are
20 inside the district where it might be a special
21 district as far as a contract school to accomplish a
22 certain type of activity. They're typically not
23 charter schools, but they might be a particular
24 service, like a preschool service that they might want
25 to fulfill.

1 So the district contracts with the
2 schools. DPS also has some contract schools for
3 specific needs. Maybe it's --

4 Q. What is DPS?

5 A. Denver Public Schools.

6 Q. And do you know some of the contract
7 schools that DPS has?

8 A. As far as I know, DPS has three of them.
9 One has about --

10 Q. Do you have the names, by chance?

11 A. One is a Spanish name. I --

12 Q. Is it Esquilla -- I can't even say it
13 myself. I apologize. I'm not even going to begin to
14 try, because I don't speak Spanish, so -- do you know
15 the other two?

16 A. I'm familiar with Esquela, but the other
17 two -- I think, at one time, there was more than one.
18 And I think there might be just two left. There are
19 possibly the three.

20 Q. May private schools through this contract
21 school program provide complete education packages to
22 schools?

23 A. They do.

24 Q. Is that what DPS has done?

25 A. They have, yes.

1 Q. And does DPS or other school districts
2 who have contract schools receive per pupil funding
3 under the Public School Finance Act for students
4 attending those contract schools?

5 A. They do.

6 MR. BLUE: No further questions, Your
7 Honor.

8 THE COURT: Any further inquiry from
9 the defendants? Cross-examination?

10 MR. DEIHL: Yes, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. DEIHL:

13 Q. *S good afternoon, Senator King.

14 A. Good afternoon.

15 Q. My name is Colin Deihl. I represent
16 Taxpayers for Public Education. Nice to meet you.

17 A. Nice to meet you.

18 Q. Now, the students in your school in
19 Colorado Springs -- and I apologize. What's the name
20 of that school?

21 A. Colorado Springs Early Colleges. It's
22 one of five early colleges in the state of Colorado.

23 Q. Okay. The students in Colorado Springs
24 Early Colleges are authorized to get this concurrent
25 enrollment under the Concurrent Enrollment Program

1 Act, correct?

2 A. That's correct.

3 Q. And that's a state statute, right?

4 A. That's correct.

5 Q. Is that also known as the Ascent Program?

6 A. Ascent is one of the many concurrent
7 enrollment programs. So it was a specific program
8 inside the concurrent enrollment. They're in the
9 process of blending these after the passage of House
10 Bill 1319.

11 Q. And that statute defines the terms under
12 which a student can participate in that program,
13 right?

14 A. That's correct.

15 Q. And you follow that statute in your
16 school in Colorado Springs?

17 A. I do follow the statute. But I will tell
18 you --

19 Q. If you could just answer my question. I
20 don't need any explanation. Thank you.

21 A. I do not have to follow the statute in
22 Colorado Springs Early Colleges.

23 Q. That was going to be my next question.
24 So you also have a college, correct?

25 A. No. We're a high school.

1 Q. You have a high school, and then there's
2 a technical college associated with that, correct?

3 A. Colorado Technical University is where we
4 are located at. But it's one of several institutions
5 where we send the kids.

6 Q. And a school -- the charter school
7 receives money under the Charter School Act, right?

8 A. Correct.

9 Q. And there is also moneys that are
10 legislated by the legislature for this concurrent
11 enrollment program, correct?

12 A. Well, the money that we use to expend for
13 the kids going to Pike's Peak, UCCS or CTU is the per
14 pupil revenue, PPR, that we get from the state of
15 Colorado.

16 Q. And you get that money because you're a
17 charter school under the state of Colorado, right?

18 A. Correct. We are authorized by the
19 Charter School Institute.

20 Q. If we could look at Exhibit R, please.
21 I'm sorry. I did this yesterday. Exhibit 119. It
22 was Exhibit R to the motion for preliminary
23 injunction. I'm not going to do it again today. *S

24 *S

25 THE COURT: Feel free to confuse us at

1 any time. Exhibit 119, right?

2 MR. DEIHL: 119, Your Honor.

3 Q. (BY MR. DEIHL) And if we can take a look
4 at page 6, please. If we can scroll down. I'm sorry.
5 Wrong page. Grant, distribution, and other
6 assistance. Do you see that? Senator King, do you
7 see this document?

8 A. Yes, I do.

9 Q. You're familiar with the Long bill, are
10 you not?

11 A. I am.

12 Q. And this is a section entitled "Grant
13 Programs Distributions and Other Assistance"? Do you
14 see that?

15 A. Yes, I do.

16 Q. And then a couple pages into this
17 document -- two pages later is listed facility
18 schools. Do you see there's a separate line item for
19 facility schools?

20 A. Correct.

21 Q. And facility schools receive funding
22 under the assistance to public schools grant programs
23 distributions and other assistance. Facility schools
24 funding line item; isn't that correct?

25 A. I don't see the end of that line, but

1 that could be where education orphans, for example,
2 receive their funding. It's part of the School
3 Finance Act philosophy, but they probably have several
4 line items.

5 Q. But it's a separate line item, correct?

6 A. Correct.

7 Q. Okay. And all of these programs that you
8 talked about on direct examination are authorized by
9 specific state statute, right?

10 A. Correct.

11 Q. Your school in Colorado Springs has a
12 building that you use, right?

13 A. We lease a building.

14 Q. Okay. The students attend that building,
15 and then they have their concurrent classes at the
16 university, right?

17 A. Correct.

18 Q. What is your salary, as administrator of
19 the Colorado Springs Early Colleges?

20 A. I make \$65,000 a year. And I do not take
21 the salary while I'm in legislative session. So my
22 salary for the year is \$43,333.

23 Q. Thank you.

24 The College Opportunity Fund that you
25 spoke about --

1 A. Correct.

2 Q. -- the money from that fund goes to
3 higher education, correct?

4 A. It goes to higher education. But while
5 students are taking concurrent enrollment while they
6 are still in high school, could have also is used *S
7 for that particular funding of those courses. It's a
8 total part -- in-state tuition includes the stipend
9 and the portion from the general assembly. So it is
10 used both for kids in high school while they're still
11 attending high school and when they're out of high
12 school.

13 Q. And again, that's authorized by a
14 specific statutory provision in the Colorado statutes,
15 right?

16 A. That's correct.

17 MR. DEIHL: I don't have anything
18 further, Senator King. Thank you for your time.

19 THE COURT: Mr. Langendorf, do you have
20 questions?

21 MR. LANGENDORF: I do, Your Honor.

22 THE COURT: Please don't repeat
23 Mr. Deihl.

24

25

1 MR. LANGENDORF: Your Honor, as a
2 preliminary matter, I'd like to move to strike Senator
3 King's testimony, because it goes to programs not at
4 issue in this litigation.

5 THE COURT: Motion is noted. Motion is
6 denied. You may proceed.

7 CROSS-EXAMINATION

8 BY MR. LANGENDORF:

9 Q. Good afternoon, Senator King.

10 A. Good afternoon.

11 THE COURT: Pretty efficient, huh?

12 THE WITNESS: I thought I was giving
13 pretty good testimony. Sorry you don't like it.

14 THE COURT: It's not personal.

15 Q. (BY MR. LANGENDORF) Don't take it
16 personally.

17 Senator King, I represent the LaRue
18 plaintiffs in this matter. It's nice to meet you,
19 sir.

20 A. Nice to meet you.

21 Q. Now, you testified that high school
22 students that attend CSEC -- I can call it CSEC?

23 A. Correct.

24 Q. -- can attend college course -- can
25 attend college, right?

1 A. Correct.

2 Q. And you offer both on-campus and
3 off-campus versions of the college attendance program,
4 right?

5 A. Correct.

6 Q. And for the on-campus version, those
7 classes are held on the grounds of CSEC; is that
8 right?

9 A. They're held on the grounds of CSEC at
10 the Springs Business Park. Springs Business Park has
11 two tenants. It has Colorado Springs Early Colleges
12 and it has Colorado Technical University.

13 So when the kids -- we have -- a portion
14 of our facility is for college prep programs, getting
15 the kids ready for college courses. Then they walk
16 across the parking lot and take the college courses at
17 the Colorado Technical University.

18 Q. So it's in the same office park?

19 A. Yes. It's in the same office park.

20 Q. Okay. And for the on-campus college
21 courses, all of the professors are hired by CSEC,
22 right?

23 A. All the -- let me clarify. We do some
24 master courses during the school day. And all those
25 professors are hired by us and also qualified by CTU.

1 A lot of our students, to complete an associate's
2 degree or a four-year degree like Jenna Rock, started
3 attending quarter courses on a quarter system. Those
4 courses typically start at 5:00 o'clock at night and
5 go till 11:00 o'clock at night. And we do not hire
6 those professors.

7 Q. So for the -- for the on-campus courses
8 you hire -- with the exception of those professors,
9 you hire the professors to come.

10 A. Correct.

11 Q. Okay. And so the off-campus college
12 credit courses. The only students that are eligible
13 for those courses are juniors and seniors without
14 special permission. Is that right?

15 A. No. They are eligible if they qualify --
16 they take the Accuplacement test. And if they qualify
17 and we cannot offer them the course work at CTU, they
18 can go as 9th graders or 10th graders or 11th or 12th
19 graders to Pike's Peak Community College or UCCS.

20 Q. Even the off-campus courses?

21 A. Correct. I am right now trying to get a
22 9th grader admitted to UCCS for specifically a French
23 class.

24 Q. So it takes a special situation for a 9th
25 or 10th grader to be able to attend the off-campus

1 courses, right?

2 A. They have to pass the Accuplacement test.
3 We want mostly 9th and 10th graders to take courses at
4 CTU. But if the course work is not offered at CTU --
5 it's a technical school -- then we allow the kids to
6 go to Pike's Peak and UCCS.

7 Q. But generally speaking, the idea is that
8 the 9th and 10th will take the on-campus courses.

9 A. Correct.

10 Q. Thank you.

11 And all of the off-campus students must
12 sign an off-campus college contract that spells out
13 the agreement between the students and their parents
14 and CSEC, right?

15 A. Correct. Concurrent enrollment.

16 Q. And one of the reasons for that is to
17 make sure that the student understands his obligation
18 to attend the course off campus and to do exactly
19 what's expected of him. Is that right?

20 A. Correct.

21 Q. And so, for example, if the student does
22 not attend the off-campus course and in some instances
23 the student would have to reimburse *S CSEC for that
24 cost, right?

25 A. If they do not pass the course. Now,

1 there's two requirements in the contract. One is,
2 they attend the classes. And the other is that they
3 pass the course.

4 Q. And you mean get a grade of C or higher?

5 A. Correct.

6 Q. And so when a student is attending an
7 off-campus course at a private institution, it's fair
8 to say that there is apparatus in place to monitor
9 that student and the education he's receiving and his
10 performance?

11 A. Correct. There is a contract that we
12 function under.

13 Q. Okay. And CSEC itself does not tolerate
14 any discrimination; is that right?

15 A. It does not.

16 Q. That includes religious discrimination.

17 A. That's true.

18 Q. And none of the colleges that we've
19 spoken about here, Pike's Peak or CTU, discriminate on
20 the basis of religion; is that right?

21 A. That's correct.

22 Q. And speaking of CTU, you testified, I
23 think, that several hundred students attend CTU
24 classes?

25 A. Correct.

1 Q. Now, the off-campus portion -- students
2 that attend off-campus classes at CTU, that number is
3 much smaller. It's more like in the range of 20
4 students; is that right?

5 A. We had eight students receive associate
6 degrees from CTU this last year. So all those kids,
7 through completion of their courses, had to attend the
8 courses.

9 Q. So it's actually a fairly small fraction
10 of your enrollment?

11 A. Probably 20 kids attending at any one
12 time. The evening courses --

13 Q. The off-campus courses.

14 A. Oh, the off-campus courses at CTU? I'm
15 sorry.

16 Q. Yes.

17 A. Yeah, about 20. But they're on campus.
18 They're on the same Springs Business Park. So the
19 off-campus schools are Pike's Peak and UCCS.

20 Q. Okay. And I think you testified that you
21 are aware of the basic parameters of the Douglas
22 County voucher or Choice Scholarship Program?

23 A. Correct.

24 Q. And you're also familiar with the charter
25 act -- the Colorado Charter School Act?

1 A. I am.

2 Q. And under that act, the district -- local
3 school district provides 100 percent of the per pupil
4 revenue to the -- to the charter school, minus 5
5 percent of administrative costs, right?

6 A. Up to 5 percent.

7 Q. Up to 5 percent.

8 A. Correct.

9 Q. And then the local school district has
10 the ability to contract -- excuse me. The charter
11 school can then contract with the local school
12 district for additional services, right?

13 A. Typically, special education -- that is
14 correct -- is what they contract back. They buy an
15 insurance policy and contract special ed back to the
16 school district.

17 Q. So the usual practice is that the charter
18 school, what they use the contracting for is for
19 special education? That's what you're saying?

20 MR. BLUE: Objection. Form of the
21 question.

22 THE COURT: Overruled.

23 A. That's typical.

24 Q. (BY MR. LANGENDORF) Okay. And in that
25 scenario, the local school district cannot charge more

1 than a reasonable rate for the services it's
2 providing, right?

3 A. Charge the students a service?

4 Q. I'm sorry. Charge the charter school.

5 A. Oh.

6 Q. It can't charge more than the value of
7 the services it's providing, right?

8 A. Correct.

9 Q. It's not like the local school district
10 can overcharge the charter school for the special
11 education services, for example.

12 A. Well, that's highly debatable, because
13 special education is underfunded at the federal level.
14 And many school districts want to charge a pretty
15 exorbitant amount of dollars for special education
16 services to be delivered under the insurance model, so
17 it can be as much as 6 to 8 hundred dollars per pupil.

18 But it's -- many times it's debated
19 whether that's reasonable.

20 Q. So as a general proposition, the contract
21 must be for a reasonable price, but there's some
22 controversy as to what a reasonable price is in the
23 special education realm. Is that right?

24 A. Correct. And typically the charter
25 school has very little power to negotiate the

1 fairness.

2 Q. And so a local school district could not
3 contract with a charter school and then use excess
4 money -- could not overcharge a charter school and use
5 the surplus to fund other public schools in the
6 district?

7 MR. BLUE: Objection. Lack of knowledge,
8 Your Honor.

9 THE COURT: Overruled.

10 A. No. I disagree. Because a charter
11 school is required to give special education services
12 to a student and maybe, maybe not have severe need
13 students at the charter school, and yet the insurance
14 model is based upon the entire funding of the entire
15 district on the needs of the students.

16 And because the students could be severe
17 needs students in other schools, they do overcharge
18 many times, and it's very unfair. And sometimes, in a
19 way, they do charge charter schools for the
20 appropriate full amount.

21 Q. (BY MR. LANGENDORF) So I think we may
22 have gotten off course. I really didn't mean to focus
23 on special education.

24 A. Okay. Fine.

25 Q. But I take your point to be that in that

1 scenario, it can be unfair when the charter school is
2 overcharged for the services?

3 A. Correct.

4 Q. And just so we're clear, not talking
5 about special education, if a school district
6 contracts with a charter school for services, the
7 school district cannot overcharge the charter school
8 and take the extra money and use it to pay for the
9 other public schools in the school district, right?

10 A. No. I disagree with that. They are
11 characteristically using that money across the entire
12 spread of the school district. So if they take more
13 money back from the charter school for specific
14 services that are allocated to them, then they do
15 spread that cost across the school district.

16 Q. It's not your understanding that there's
17 a provision in the Charter School Act saying that the
18 school district must charge the charter school the
19 actual cost of the services it provides?

20 A. I'm very familiar with it. I was the one
21 that tried to offer that provision in the act. But
22 the reality of it is, the services that are forced on
23 charter schools across the state of Colorado to be
24 bought back are not at the discretion of the charter
25 school. And the discretion of the charter school has

1 services that sometimes they don't need or are not
2 required to have at their school because of the
3 population of the kids that they are serving at their
4 school.

5 And because of that, many times the
6 buybacks are in excess of the cost at that individual
7 charter school. And so as a result, the charter
8 school does help in many cases the rest of the funding
9 of the district.

10 Q. And you think that's unfair; is that
11 right? To the charter school?

12 A. It should be at cost.

13 Q. It should be at cost. And while we're on
14 the topic of charter schools, the charter school
15 application must contain a description of the school's
16 educational program and curriculum; is that right?

17 A. Correct.

18 Q. And are you aware that the charter school
19 application for the charter school in this case does
20 not contain a description of the charter school's
21 education and curriculum?

22 A. Well, it would depend -- I'm not aware of
23 that, no.

24 Q. Okay. But if it didn't -- if the charter
25 school application in this case did not contain such a

1 description, that would be inconsistent with the
2 Charter School Act, right?

3 A. There should be some educational
4 methodology that's going to be used by the charter
5 school as it educates its kids.

6 Q. And that educational methodology should
7 be described in the charter school application, right?

8 A. It should. And it could vary from school
9 to school depending upon whether it's an elementary
10 school, middle school, or a high school. It could
11 have various different types of educational
12 philosophies that it would use throughout the program.

13 Q. That the charter school would use.

14 A. Correct.

15 Q. And the charter school application is
16 also supposed to contain a description of the content
17 standards for the school to use, which are specific
18 statements of what a student should know or be able to
19 do relative to a particular academic area?

20 A. Correct. I think, specifically, they
21 have to meet state standards.

22 Q. And are you aware that the charter school
23 application at issue in this case did not contain
24 that?

25 A. I did not read that portion of it.

1 Q. And if it did not, that would be
2 inconsistent with the Charter School Act?

3 A. Yes.

4 Q. And the charter school application must
5 also state that the instruction and assessment at a
6 charter school will be aligned with Colorado's
7 contents and standards. Is that true?

8 A. They would.

9 Q. And are you aware that the charter school
10 application in this case doesn't state that?

11 A. No. But I'm sure the kids would have to
12 take the CSAP. It is my understanding in all the
13 schools that are under this charter.

14 Q. But that's different than -- okay.

15 And is it your understanding that the
16 charter school application should describe all core
17 content areas plus supplemental or elected areas that
18 there will be in the charter school?

19 A. You're talking about the educational
20 program?

21 Q. I'm talking about the application
22 requirements, that the application describe the core
23 content areas that are going to be taught at the
24 charter school.

25 A. Yeah. It should talk about how they're

1 going to educate the kids. What processes are we
2 going to use to educate the kids, how they're going to
3 get their education, that type of stuff.

4 Q. And you're aware that the -- are you
5 aware that the charter school application in this case
6 doesn't do those things?

7 A. No, I'm not.

8 Q. And if it did not do those things, would
9 that be inconsistent with the Charter School Act?

10 A. It would be inconsistent, but it would
11 also give an opportunity for the charter applicant and
12 the district to make a decision on how to resolve
13 those particular issues.

14 Q. I think you managed -- you mentioned
15 educational management organizations or EMOs?

16 A. Correct.

17 Q. Is that right? And some of those that
18 you mentioned are Edison and Mosaic; is that right?

19 A. Correct. Management.

20 Q. And they deliver online instruction?

21 A. K-12 is the online instruction format
22 that delivers online education.

23 Q. And it's right, isn't it, that the online
24 education -- online education in Colorado cannot be
25 religious or faith-based? Is that your understanding?

1 A. That's correct.

2 Q. And as far as concurrent enrollment goes,
3 all of the programs under the concurrent enrollment
4 umbrella are designed to help high school students get
5 into college or study at the college level; is that
6 right?

7 A. Correct.

8 Q. So there's no -- the concurrent
9 enrollment umbrella is limited to those -- to the high
10 school students; is that right?

11 A. Correct.

12 Q. You discussed the -- what you call the
13 Education Orphan Acts?

14 A. Correct.

15 Q. And I apologize. I'm not sure -- is that
16 part of the Exceptional Children's Education Act?

17 A. Well, when I carried the amendment, I'm
18 not for sure where it went into statute, but I carried
19 it onto the School Finance Act. So I'm assuming it's
20 under the general area where the School Finance Act is
21 described in state statute. I can't quote the exact
22 state location, but it would be something within the
23 School Finance Act section.

24 Q. So you don't know whether it's part --
25 currently part -- under the rubric of the exceptional

1 children's act or --

2 A. Are you talking about special ed?

3 Q. I'm asking you what -- yeah -- whether
4 those are under the same umbrella?

5 A. Well, they would be under the same
6 umbrella, because a lot of kids that are education
7 orphans also need special education, and that service
8 is provided to them at residential treatment
9 facilities.

10 Q. And the education and residential
11 treatment facilities cannot be religious in nature.
12 Is that your understanding?

13 A. They cannot -- it's my understanding that
14 they cannot teach religious instruction. The one I
15 talked about in Denver -- there is one in Denver that
16 is by a Catholic order. That's the only one I know
17 of. But they do not do religious instruction.

18 Q. They don't do that, because they can't do
19 that, right?

20 A. They're prohibited by the -- I think the
21 Department of Human Services is the department that
22 works with them, and also the Department of Education.

23 MR. LANGENDORF: Thank you, Senator. No
24 further questions.

25 THE COURT: Redirect, limited in scope

1 to cross-examination?

2 MR. BLUE: No, sir.

3 THE COURT: Senator King, from one
4 Colorado Springs westsider to another, have a nice
5 day.

6 THE WITNESS: Thank you very much.
7 Appreciate it.

8 THE COURT: If there's no objection,
9 the senator will be excused. Call your next witness,
10 please.

11 MR. BINDAS: Your Honor, the defense
12 calls Mrs. Diana Oakley.

13 THE COURT: All right. Ma'am, would
14 you raise your right hand, please.

15 DIANA OAKLEY,
16 having been first duly sworn to state the whole truth,
17 testified as follows:

18 THE COURT: Please be seated.

19 DIRECT EXAMINATION

20 BY MR. BINDAS:

21 Q. Good afternoon, Mrs. Oakley. Would you
22 please state your name for the record. *S?

23 A. My name is Diana Oakley, O-a-k-l-e-y.

24 Q. And where do you live, Mrs. Oakley?

25 A. I live in Highlands Ranch, Colorado,

1 which is in Douglas County.

2 Q. Thank you. And can you tell us a little
3 bit about your family, please?

4 A. I have been married for 15 years to Mark
5 Oakley, and I have three -- we have three children.
6 Nathaniel is 13, Amber is 10, and Joshua is 8.

7 Q. And do you work outside the home,
8 Mrs. Oakley?

9 A. Yes.

10 Q. And where do you work?

11 A. I work -- I'm an oncology nurse. I work
12 at Cancer Care Center, Cypress Hematology and
13 Oncology.

14 Q. How about your husband? Does he work
15 outside of the home, as well?

16 A. Yes, he does.

17 Q. Where does he work?

18 A. Mark works at Westinghouse Electric
19 Company.

20 Q. Here in Colorado?

21 A. No. He is in South Carolina.

22 Q. And if you don't mind my asking, why
23 does -- why does Mark work in South Carolina?

24 A. Mark was unemployed for two years prior
25 to this employment in South Carolina. It was the only

1 job he could find.

2 Q. I'd like to get back to your children.

3 And we'll start with Amber. What grade is Amber in?

4 A. Amber is in fifth grade.

5 Q. And where did she go to school last year?

6 A. Eagle Ridge Elementary.

7 Q. Is that a Douglas County public school?

8 A. It is.

9 Q. And were you and Mark happy with Amber's
10 progress at Eagle Ridge?

11 A. Very happy with Amber's progress. *S.

12 Q. And will she be going to Eagle Ridge this
13 coming school year?

14 A. She will.

15 Q. And what grade is Joshua in?

16 A. Joshua is going into second grade.

17 Q. Okay. And where did he go for first
18 grade?

19 A. He went to Eagle Ridge Elementary.

20 Q. Again, public school?

21 A. A public school in Douglas County, yes.

22 Q. And were you and Mark happy with Joshua's
23 progress?

24 A. Very happy with Joshua's progress, yes.

25 Q. And will he be going back there for

1 second grade?

2 A. Yes, he is there.

3 Q. And how about Nate? What grade is Nate
4 in? Or -- I'm sorry -- Nathaniel. Would you prefer
5 that I call him Nathaniel or Nate?

6 A. I like Nathaniel.

7 Q. Okay. And what grade is Nathaniel in?

8 A. Nathaniel is going into second grade this
9 year.

10 Q. Okay. And where did Nathaniel go to
11 school last year?

12 A. In sixth grade, he was at Eagle Ridge
13 Elementary.

14 Q. And were you and Mark satisfied with
15 Nathaniel's progress at Eagle Ridge?

16 A. No, we were not.

17 Q. Why not?

18 A. Nathaniel has a diagnosis of Asperger's
19 syndrome, which is -- falls on the autism spectrum,
20 and requires a different kind of education. And we
21 were not happy with his progress. He was not
22 academically proficient. Socially, he was -- he was
23 bullied. We are not happy -- we were not happy with
24 Nathaniel's education.

25 Q. Can you tell me what Asperger's syndrome

1 is, and perhaps describe its symptoms?

2 A. Asperger's syndrome falls on the autism
3 spectrum. If you were to think of the spectrum as a
4 hot and warm and cold spectrum, Asperger's falls -- or
5 is on the cold side of autism. So it's a verbal
6 autistic child or adult. There are adults with
7 Asperger's.

8 And it is a -- when I've tried to
9 describe how Nate feels due to his Asperger's, I try
10 to ask an adult to imagine being in a Las Vegas casino
11 and having the flu and having a temperature of 103
12 degrees. And there's people -- there's bells and
13 whistles and lights. You're achy. There's people
14 smoking. You don't -- you don't know what time it is.
15 You can't -- you can't wrap your mind around somebody
16 asking you to deal with money. There is some drunk
17 people next to you that are acting like jerks.

18 It is all-encompassing for him. When he
19 is overstimulated, that is how he feels.

20 Q. So is it correct to say that these are
21 all kind of like a sensory overload that --

22 A. Well, he does have a sensory processing
23 disorder. That is, most Asperger's -- all autistic
24 have a sensory disorder.

25 Q. And how does Nathaniel's Asperger's

1 syndrome affect his performance in school?

2 A. Nathaniel doesn't learn the way other
3 children learn. When he is inside of those four
4 walls, he does not fit. He doesn't understand social
5 cues. He is not -- again, he's not academically
6 proficient, because he's required to study topics that
7 he is not interested in. And -- I'm sorry, Michael.
8 Say that again. How does it affect his --

9 Q. His performance. I think you've done a
10 good job answering that.

11 A. Well, then on CSAPs he is not proficient,
12 according to a state mandated test.

13 Q. CSAP is an acronym that stands for?

14 A. Colorado State aptitude.

15 Q. It's state testing to gauge --

16 A. I'm sorry.

17 Q. Okay. And one more question related to
18 Asperger's syndrome. How does it affect Nathaniel's
19 interactions with his classmates?

20 A. Nathaniel oftentimes will melt down in
21 class, again, because he's in that Las Vegas casino
22 and is so overstimulated and doesn't know how to --
23 how to bring himself back down or back into his skin,
24 and he'll melt down.

25 He'll fall on the floor. He's 13 years

1 old, and so, you know, he will fall on the floor
2 around his classmates. He is not -- he doesn't
3 understand social cues. He thinks that if a kid is
4 sitting across the lunch table from him and takes his
5 lunch from him, that the kid is his friend, which
6 happens a lot. I pay for other kids' food a lot.

7 And he is -- he doesn't learn the way --
8 he doesn't fit inside of a public school box. He
9 can't -- he just doesn't learn that way.

10 Q. And has Nathaniel had any safety issues
11 at school?

12 A. Nathaniel was assaulted on school
13 grounds. He was hit with a pair of nunchucks.

14 Q. Mrs. Oakley, are you familiar with the
15 Individuals with Disabilities Education Act?

16 A. Yes.

17 Q. And if I use the acronym IDEA, would you
18 associate it with that?

19 A. Yes.

20 Q. Did Eagle Ridge provide any educational
21 services to help Nathaniel under that?

22 A. Yes. A Nate has -- I'm sorry.

23 Q. Go ahead.

24 A. Nate has an IEP, which is an individual
25 education program.

1 Q. And were you satisfied with those
2 services last year?

3 A. No.

4 Q. Okay. Will Nathaniel be attending public
5 school next year?

6 A. No.

7 Q. Why not?

8 A. He doesn't fit inside those lines.

9 Q. Where will you be sending Nathaniel for
10 school next year?

11 A. I want to send Nathaniel to the Humanex
12 Academy.

13 Q. Is that a private school?

14 A. It is.

15 Q. Referring back to the IDEA very briefly,
16 are you familiar with the term "free and appropriate
17 public education" as it's used under the IDEA?

18 A. Yes.

19 Q. And is it your understanding that while
20 Nathaniel was at Eagle Ridge, he was entitled to
21 receive a free and appropriate public education?

22 A. He was entitled to a free and appropriate
23 education. He received a free education, but it was
24 not appropriate.

25 Q. Okay. I should say he was entitled to

1 what the district would deem a free and appropriate
2 public education; is that correct?

3 A. The district would deem, but not what
4 parents would deem.

5 Q. Is it also your understanding that by
6 removing Nathaniel from public school and placing him
7 in a private school, that he will forego his right to
8 a free and appropriate public education?

9 A. Yes.

10 Q. And you've still chosen to take Nathaniel
11 out of the public school system?

12 A. Yes.

13 Q. Why will you forego that right to a free
14 and appropriate public education in?

15 A. Because at the free and appropriate
16 public education place, his safety was compromised,
17 which is not appropriate. He was not academically
18 proficient. That's not appropriate.

19 Q. Have you and Mark applied for a Choice
20 Scholarship under the Douglas County Choice
21 Scholarship Program for Nathaniel?

22 A. Yes, we have.

23 Q. And did you receive a scholarship for
24 Nathaniel?

25 A. Yes, we have.

1 Q. And have you and Mark chosen a school for
2 Nathaniel for the upcoming school year?

3 A. Yes, we have.

4 Q. And that school would be -- I'm guessing
5 I know the answer to this already.

6 A. The Humanex Academy.

7 Q. Can you tell us what Humanex Academy is?
8 I know it's a private school, but does it have a
9 special focus or --

10 A. It is a fabulous place to go. It is --
11 they do -- curtail to special needs kids. They have
12 not dyslexic kids, some other as berger kids. The *S
13 teacher to parent -- or teacher to student ratio is
14 five to one. It is an awesome place.

15 Q. Is Humanex Academy a religious school?

16 A. No.

17 Q. And why did you -- briefly, why did you
18 select Humanex for Nathaniel?

19 A. Nathaniel has shadowed students there two
20 separate times, and he is excited to be there. He's
21 actually excited about school. When he was there, and
22 I watched him in a classroom, he -- I could tell that
23 he was comfortable. The other kids didn't treat him
24 like he was a freak. And, you know, his shoulders
25 came down -- or his ears came down from his shoulders,

1 and he was excited to be there.

2 Q. Are there particular aspects of this
3 school's curriculum that factored into your and Mark's
4 decision to choose this school for Nathaniel?

5 A. Yeah. There is a couple things that we
6 like. One of them being that they follow a parent --
7 or follow a love and logic model.

8 Mark and I have raised the kids under a
9 love and logic parenting model, and which gives kids
10 lots and lots of choices and the ability to make wise
11 decisions and be competent in their decisions. That
12 is one of the number one things that we are really
13 excited about.

14 They'll curtail his -- his second thing
15 would be that they'll curtail his curriculum to him.
16 Another trait of an Asperger kid and autistic kids, as
17 well, is, they usually focus on one subject, and will
18 almost to an obsession. And Nate likes World War II
19 history. He likes -- well, he wants to be a marine
20 biologist. And he likes to talk about parasites.

21 And if, inside of that context, you could
22 teach Nate -- you can teach Nate anything inside of
23 that context, because you're talking about the thing
24 he loves. So we are -- I mean, the Humanex school
25 meets and exceeds that goal.

1 Q. Are there any particular aspects -- this
2 is an unusual question. Are there particular aspects
3 about the school building itself, the Humanex school
4 building, that factored into your and Mark's choice of
5 that school for Nate?

6 A. There is. There is. The actual building
7 has mostly natural lighting. There is -- it's a very
8 quiet school. There's only 50 students there. There
9 are -- Nate -- how do I explain this?

10 When we first walked into the school to
11 take a tour, it was like the Las Vegas casino was just
12 left right outside. It was amazing to be in that
13 building.

14 Q. And why would something like natural
15 lighting or quiet be important for Nathaniel?

16 A. Again, with sensory disorder, Nathaniel
17 can get overstimulated very easily. He can -- he can
18 hear somebody tapping a pencil in another room and not
19 realize that it's getting to him and pushing his
20 buttons.

21 And, you know, it's a very quiet place.

22 Q. Have you enrolled Nathaniel at Humanex
23 yet?

24 A. Yes.

25 Q. And when did you do that?

1 A. July of this year.

2 Q. Did you ever -- did you or Mark ever feel
3 coerced or compelled by the school district to select
4 Humanex for Nathaniel?

5 A. No.

6 Q. Did you or Mark ever feel coerced or
7 compelled by the school district to choose a religious
8 school for Nathaniel?

9 A. No.

10 Q. Did you or Mark -- I'm sorry. Strike
11 that.

12 Did anyone from the school district ever
13 tell you or Mark that there were advantages to
14 choosing a religious school for Nathaniel?

15 A. No.

16 Q. How much is the tuition at Humanex?

17 A. \$17,900.

18 Q. And how much of that will be covered by
19 the Choice Scholarship that Nathaniel receives?

20 A. \$4,575.

21 Q. Have you received any assistance from
22 Humanex itself?

23 A. Yes. They gave us \$2,000.

24 Q. \$2,000. And so roughly what would be the
25 difference between the total tuition and the portion

1 of the tuition which would be covered by the Douglas
2 County scholarship and the 2000 that you've received
3 in assistance? *S?

4 A. \$11,535.

5 Q. And were you and Mark able to simply
6 write a check for that amount?

7 A. No.

8 Q. How will you and Mark pay for that
9 difference?

10 A. We've had to take out a line of credit on
11 our house.

12 Q. Why did you have to take a line of credit
13 on your house?

14 A. We simply do not have that amount of
15 money lying around.

16 Q. Have you and Mark had to pay anything --
17 any amount to Humanex yet?

18 A. Yes. We had to pay testing fees and an
19 entrance fee, which was \$750.

20 Q. Is that fee refundable?

21 A. No, it is not.

22 Q. If the Choice Scholarship Program is
23 enjoined, will you and Mark be able to keep Nathaniel
24 at Humanex?

25 A. No, we will not be able to do that.

1 Q. Why not?

2 A. We don't have enough money to pay for his
3 tuition.

4 Q. If the program is enjoined and you're not
5 able to send him back to Humanex, does that mean you
6 would send him back to public school?

7 A. No.

8 Q. And why will you not send Nathaniel back
9 to public school?

10 A. His safety has been compromised. He's
11 not academically efficient. He's not happy there.

12 Q. So if the program's enjoined and you
13 won't send Nathaniel back to public school, what will
14 you and Mark do for his schooling this upcoming school
15 year?

16 A. We -- although we remain very optimistic,
17 we have thought we would have to home school Nate.

18 Q. And who will home school Nate?

19 A. I'll have to home school Nate, because
20 Mark is in South Carolina.

21 Q. But you mentioned earlier that you work
22 outside of the home; is that correct?

23 A. I do.

24 Q. And how many days in a typical week do
25 you work?

1 A. I work Monday through Thursday.

2 Q. And what hours on a typical day?

3 A. 7:30 to 6:00 typically.

4 Q. And Mark works in South Carolina.

5 A. He does.

6 Q. How will you home school Nate if you're
7 gone four days during the week and Mark's in South
8 Carolina?

9 A. I am going to have to home school him
10 nights and weekends. I also have a niece that might
11 be able to help out a little bit. I don't know.

12 Q. And would home schooling be a burden on
13 your family?

14 A. It would be a huge burden on everybody in
15 our family.

16 Q. And do you think Nate would -- Nathaniel
17 would enjoy being home schooled?

18 A. Nathaniel would not enjoy being home
19 schooled.

20 Q. Why not?

21 A. Well, I asked him this morning, what do
22 you think about that, and he said there's too many
23 distractions here. *S you know, my toys and my
24 games and all this stuff. And he said, there's too
25 many distractions here.

1 Q. Do you have -- do you believe that if
2 Nathaniel were told that he is going to be home
3 schooled, do you think that would sit well with him?
4 Would he take that well?

5 A. No, he would not. No, he would not.

6 Q. I'd like to get back to the Individuals
7 with Disabilities Education Act very briefly. And
8 I'll represent to you the plaintiffs have maintained
9 in their briefing that there is a mechanism by which
10 you and Mark could place, on your own accord,
11 Nathaniel in a private school and then seek
12 reimbursement from the school district to cover that
13 money. Are you familiar with such mechanism under the
14 IDEA?

15 A. Yes, I am.

16 Q. Did you ever investigate that mechanism
17 or that procedure?

18 A. Yes, we did.

19 Q. Did you ever pursue that procedure?

20 A. Pursue meaning -- we did hire an
21 applicant for Nathaniel, and went to this school
22 during an IEP meeting, and tried to hash out
23 information.

24 When we met with her later, asking if we
25 can use that mechanism, it would entail hiring a

1 lawyer. It would be a very lengthy process. While
2 Nate's in school, we've paid for the tuition, lengthy
3 process, with little likelihood that that would be --
4 that we would retain -- or get money from the
5 district.

6 Q. Do you and Mark have any desire whatever
7 to sue the school district?

8 A. I do not want to sue the school district.

9 Q. Do you or Mark have the money to hire an
10 attorney to sue the school district?

11 A. We do not have the money to hire an
12 attorney.

13 Q. Now, I'll ask you one last question,
14 Mrs. Oakley. What do you, as Nathaniel's mom, believe
15 the best educational option for your son is?

16 A. I think the best educational option for
17 Nathaniel is at the Humanex Academy.

18 MR. BINDAS: No further questions, Your
19 Honor.

20 THE COURT: Cross-examination?

21 MR. DEIHL: Very briefly, Your Honor.

22 THE COURT: There's that phrase again.
23 Mr. Deihl, go right ahead.

24

25

1 CROSS-EXAMINATION

2 BY MR. DEIHL:

3 Q. *S Mrs. Oakley, my name is Colin Deihl.
4 Nice to meet you.

5 A. Hi, Colin.

6 Q. You spoke of your efforts to hire an
7 advocate for Nathan meet with the Douglas County
8 school district to get an appropriate education for
9 him, and that that didn't work, correct?

10 A. Correct.

11 Q. Did Douglas County inform you that you
12 were entitled to receive a free and appropriate public
13 education for Nate, even if that meant they had to pay
14 for Nate to go to private school?

15 A. Did they inform me of that?

16 Q. Yes.

17 A. No.

18 MR. DEIHL: I have no further questions.
19 Thank you.

20 THE COURT: Any redirect limited to
21 that brief cross-examination?

22 MR. BINDAS: No, Your Honor.

23 THE COURT: All right. Ms. Oakley,
24 thank you for your patience and your time today.

25 THE WITNESS: Thank you.

1 THE COURT: You may step down.
2 Defense, call your next witness, please.

3 MR. LYONS: Your Honor, we have two
4 witnesses remaining who are listed, but I have good
5 news. We're not going to call one of them,
6 Mr. Rudolph. And with respect to the other, which is
7 a representative of Valor High School, we have taken
8 the court's suggestion and would present his testimony
9 by a limited affidavit, which I have given to counsel,
10 and would tender it to the court.

11 This is provided for by local rule of
12 practice 121, section 1-5, subsection 2, which deals
13 with motion practice in hearings such as this.

14 THE COURT: Okay. Is he presently
15 available?

16 MR. LYONS: He is not, Your Honor.

17 THE COURT: All right. So does that
18 conclude the defense evidentiary presentation?

19 MR. LYONS: It does. I'd like to tender
20 the affidavit and have it marked as an exhibit.

21 THE COURT: Let's mark it as an exhibit
22 so it's in the record. I believe you're up to HHH.
23 *S.

24 MR. LYONS: I think that's correct, Your
25 Honor. I might just double-check.

1 THE COURT: Go right ahead.

2 MR. LYONS: I think that's right.

3 Defendants would offer Exhibit HHH.

4 THE COURT: Any objection to

5 Exhibit HHH?

6 MR. DOUGLAS: Yes, Your Honor. We would
7 object as hearsay. I understand that under rule
8 43(e), which Your Honor referenced the other day, it
9 says, when a motion is based on facts not appearing of
10 record, the court may hear the matter on affidavit to
11 be presented by the respective parties."

12 This motion, our preliminary injunction
13 motion, is based on facts appearing on the record over
14 the next three days, a very extensive record. This
15 witness is a local witness. The school is in
16 Highlands Ranch. And defendants, until today, said
17 they may or may not call him. And then just today
18 said, well, we have an affidavit and handed it to us.
19 The first time we saw it was less than five minutes
20 ago.

21 If the affidavit had been given to us
22 last Friday, we could have considered whether to
23 subpoena him for cross-examination. I was prepared
24 today to cross-examine him and would like to
25 cross-examine him. And I believe I have a right to

1 cross-examine him on this information that's contained
2 in the affidavit. There's no reason he can't be here
3 live. And I think he should either be here live or
4 not present testimony. So we do object.

5 THE COURT: Mr. Douglas, typically my
6 practice is to -- in this scenario is to either have
7 mutual presentation of affidavits by 43(e) or
8 submission of partial testimony by affidavit with the
9 opportunity to cross-examine. That's why I asked if
10 he's present.

11 Nonetheless, reviewing the rule and
12 understanding my own discretion and your objection,
13 I'm going to overrule the objection. I'll accept the
14 affidavit for the limited purpose that it's been
15 offered.

16 That concludes the defendants'
17 evidentiary presentation. Is there any rebuttal
18 testimony?

19 MR. McCARTHY: Your Honor, no rebuttal
20 testimony.

21 THE COURT: Okay. Why don't we do
22 this. Since I expect that you all wanted to complete
23 these proceedings with sterling closing arguments, I'm
24 going to take a recess and let the court reporter
25 regain her finger faculties. And then we'll come

1 back, let's say, in about 20 minutes. And we'll get
2 started with closing arguments. So about 3:00
3 o'clock. Court's in recess.

4 (Recess taken, 2:37 p.m. to 3:05 p.m.)

5 THE COURT: Please be seated.

6 Returning to the record, 11CV4424. The
7 court has heard all the presentation of evidence.
8 We're going to proceed to closing arguments.

9 Before I do that --

10 (Pause in the proceedings.)

11 THE COURT: Mr. McCarthy, I've read the
12 bench memorandum that you gave me yesterday, so I have
13 just a couple questions about it.

14 Your instincts were correct. I'm not
15 inclined to change my mind, but I did want to get some
16 additional record briefly.

17 On the question of the appropriate burden
18 of proof, and in particular the inquiry that's being
19 made, I recognize the case is styled as a rule 65
20 preliminary injunction. And for the reasons I
21 previously stated, in citing the Allen case, my
22 assessment was that realistically the proceedings this
23 week were directed toward a request for relief that
24 was more in line with the mandatory. So that was the
25 record I made before.

1 MR. McCARTHY: Understood, Your Honor.

2 THE COURT: And so the information you
3 provided to me in this bench memorandum -- I'm sure
4 counsel for the defense has seen it -- is not
5 inconsistent with what you've said before. But I
6 wanted to make sure that I'm not missing something
7 here, and that my recollection was the complaint
8 sought declaratory relief, specifically a declaration
9 by the court that the provisions -- or that the Choice
10 Scholarship Program in Douglas County is
11 unconstitutional on any number of grounds, and also
12 fails to comply with the statutory criteria, not the
13 least of which is the Public School Finance Act.

14 MR. McCARTHY: That's correct, Your
15 Honor.

16 THE COURT: I've spent the better part
17 of three days now, and with you and your colleagues'
18 wonderful efficiency, which I will applaud in this
19 case, to get through all of the stuff that we've
20 heard. But I've heard a wealth of evidence and
21 testimony on these issues, including the
22 constitutionality claims, and I understand you're
23 rebutting or supporting your ability to have
24 ultimately success on the merits of the claim at
25 trial.

1 I'll go back to my initial inquiry in
2 terms of when I made my initial record, which was,
3 what relief are you seeking that I can't address in
4 this proceeding? And I'll give you a point of where
5 I'm coming off from.

6 My concern is, this situation cries out
7 for a resolution ASAP, for you all and your clients
8 and the concerns that have been raised in this case,
9 and these folks and their clients and the concerns
10 that have been raised in their case. It's a
11 difficult, challenging environment.

12 And so I understand that typically you
13 come in on this type of matter and you file a
14 preliminary injunction, and we have a brief hearing
15 and I make a ruling, and if it's granted, somebody has
16 some relief, take that up. Occasionally the Supreme
17 Court will take a look at it, either by way of a rule
18 21 or otherwise, or there will be some additional
19 appellate review. But ultimately, the matter comes
20 back down for another hearing, evidentiarywise.

21 But my assessment was, there wasn't
22 anything in a subsequent evidentiary hearing that I
23 wasn't going to hear in this case. Perhaps more of
24 it, which would then subject it to an assessment of
25 whether it be cumulative evidence beyond what I've

1 already heard.

2 Does that make sense? I might not be
3 being clear. I wanted to make sure I'm not missing
4 something. You put in your brief -- your
5 memorandum -- bench memorandum -- excuse me -- the
6 specifics of what you were claiming and the
7 distinction between the preliminary injunction relief
8 that you hope with the lesser burden of proof rather
9 than my intention to evaluate the evidence in this
10 case under the higher burden of proof.

11 Am I missing something there? Is there
12 something else that you would introduce at trial
13 beyond the evidence we've heard in this case?

14 MR. McCARTHY: Your Honor, the way I
15 would respond to the question is that because there
16 hasn't been any discovery of significance yet, there
17 may well be additional information.

18 But to get more to the point of what
19 you're saying, the reason we submitted a bench
20 memorandum to the court is because we have some
21 concern that the Colorado appellate courts, frankly,
22 with the Allen case, has created some confusion and
23 ambiguity.

24 THE COURT: Thank you.

25 MR. McCARTHY: Welcome to the world, I

1 guess.

2 Has created some confusion and ambiguity
3 about the standard that applies to a mandatory
4 injunction. And what we were trying to -- what we
5 were trying to share with the court is that the nature
6 of the relief that we seek here is not causing -- it's
7 not like a busing case, if you will, where, you
8 know -- or a case where -- the court's probably
9 familiar with the situation where the state was sued
10 over the system for distributing welfare gains, where
11 there was ongoing supervision by the court, where, you
12 know, you, Your Honor, would have to overlook the --
13 as they called it, the dismantling of the system.

14 That's not the relief that we're seeking
15 here. And we believe that properly interpreted, under
16 the facts of Allen, which would have required the city
17 to do stuff, to build culverts, that the higher
18 standard applies to those kinds of injunctions. And
19 this injunction is not that kind of injunction, and it
20 should, therefore, not be subject to that higher
21 standard. So that's a real critical point that we're
22 making.

23 The related point, but it's a different
24 one, relates to -- I guess it's the notion of judicial
25 conservation of resources, for lack of a better word,

1 which is sort of -- you know, to use a baseball
2 analogy, it's sort of hit and miss their pitch. And
3 what we have -- what we have presented to the court is
4 a motion for preliminary injunction that seeks to
5 preserve the status quo, that is prohibitory in
6 nature. And what we are saying to the court is,
7 please stop this now.

8 And the thing that I think probably every
9 lawyer in this courtroom realizes is that, in all
10 likelihood -- and I know the order's going to be
11 written to discourage anybody who loses from trying to
12 do this, but in all likelihood, somebody's going to
13 appeal. Somebody's going to appeal the preliminary
14 injunction ruling. And so for that reason we think
15 that it is truly prohibitory. It's preservation of
16 the status quo so that we don't go further down this
17 road.

18 So I don't know if that's helpful at all,
19 Your Honor, but I'm trying to -- I'm trying to
20 address, actually, I think, the confusion that the
21 Allen case has created for all of us in trying to
22 determine what the standard is.

23 Having said all that, we respect the
24 court's ruling. And if the court, after reflecting
25 further upon hearing final argument, closing argument,

1 decides that that's the standard that you need to
2 apply, we're going to argue it to you. I mean,
3 that's --

4 THE COURT: That's why I'm talking
5 about it now.

6 MR. McCARTHY: And I appreciate that,
7 Your Honor. We're going to argue it to you on the
8 assumption that you're going to hold us to a high
9 standard. So we gave you the bench memo, Your Honor,
10 just to ask that you reflect on this and give some
11 consideration to potential confusion that we think
12 that Allen has created.

13 THE COURT: Okay.

14 MR. McCARTHY: I hope that's helpful.

15 THE COURT: I think it is. Mr. Lyons,
16 did you need a word on that issue?

17 MR. LYONS: Well, Your Honor, what the
18 plaintiffs are trying to do here is put a square peg
19 in a round hole. This is not about preserving the
20 status quo. The status quo ended on March 15th when
21 this program was adopted and began to be implemented.

22 It's in implementation now. They want an
23 order to stop the program. That's not preserving the
24 status quo. That's point number one.

25 Point number two, I disagree that there's

1 confusion in Allen. The facts may be different, but
2 the test in Allen is, what is the effect of the relief
3 you seek. The effect they seek -- the relief they
4 seek in their complaint is declaratory judgment, that
5 this CSP program is unconstitutional. That's exactly
6 the same relief, by way of effect, that is sought by
7 this injunction. Allen couldn't be clearer.

8 You have to prove that by clear and
9 certain evidence. And it's only granted in rare
10 circumstances. I think that's where we are.

11 THE COURT: Okay. Well, I appreciate the
12 additional words and the opportunity to reflect
13 Mr. McCarthy provided me. So it is an interesting
14 question, and we'll find out soon enough what you all
15 think about it.

16 So I am prepared to hear closing argument
17 if counsel are ready to proceed. Mr. Douglas, you're
18 sitting on the edge of your chair.

19 MR. DOUGLAS: Thank you, Your Honor. We
20 are ready to proceed.

21 THE COURT: All right. You have 30
22 minutes. Divide it how you will. Do you know how you
23 want to divide it?

24 MR. DOUGLAS: Yes. I'm planning to
25 divide it equally. 15 minutes, myself and

1 Mr. McCarthy.

2 THE COURT: Fair enough. You may
3 proceed.

4 MR. DOUGLAS: Thank you, Your Honor. And
5 I would like to again thank the court for making this
6 much time for hearing this important case. I'm going
7 to use my time this afternoon to discuss the merits of
8 the plaintiffs' claim under the primary religion
9 clauses of the Colorado Constitution in light of the
10 evidence that was presented over the past few days.

11 Mr. McCarthy is going to discuss some of
12 the other claims and also the other factors that the
13 court must consider in reaching its decision.

14 And what we've seen over the last few
15 days is that there's a reason that no other school
16 district in the last 135 years in Colorado has tried
17 to do what Douglas County is attempting to do with
18 this program. And that's because the evidence
19 overwhelmingly demonstrates the multiple ways in which
20 this program violates the Colorado Constitution.

21 And what I'm very interested in over the
22 last few days is that in the end, the underlying facts
23 supporting these violations were not really disputed
24 by the defendants during the course of the hearing.
25 And I want to talk about that in a little bit of

1 detail right now.

2 I want to turn first to the elements of
3 article 9, section 7 of the Colorado Constitution, and
4 just break it down.

5 "No school district shall pay from any
6 public funds or moneys whatever." It's not disputed
7 that we have a school district paying with public
8 funds -- "Anything in aid of any church *S or to help
9 support or sustain any school controlled by any church
10 or sectarian denomination whatsoever."

11 Now, some of the schools are actually
12 part of a church. There's evidence of that.
13 Including Lutheran High School. That was one example.
14 Assistant superintendent -- Superintendent Cutter
15 admitted that the number of schools are part of a
16 church; sometimes physically part of a church.

17 And the evidence in the record and also
18 Dr. Cutter's testimony with some of the exhibits
19 established clearly that a number of schools in the
20 program are controlled by churches or sectarian
21 denominations. So again, no dispute on these facts.
22 There was no contrary evidence whatsoever.

23 So what is the evidence on whether this
24 tuition money aids, supports, or sustains these
25 churches or schools controlled by churches?

1 Mr. Bignell and Mr. Gehrke from Cherry Hills Christian
2 and Lutheran High School respectively both testified
3 specifically that the revenue from the program tuition
4 directly supports their schools and specifically
5 supports the religious activities, religious
6 instruction, and religious mission of those schools.

7 Mr. Gehrke talked about how the revenue
8 from the increased enrollment from the program will
9 help support Lutheran in making payments towards a 10
10 million dollar loan that comes from a bank that's
11 actually part of the Lutheran Church.

12 Again, this evidence was not disputed.
13 And those are -- those are the elements. That's it.
14 That's article 9, section 7. That's clear and certain
15 evidence of a violation of article 9, section 7.
16 Under any standard applied by the court, we meet that
17 standard.

18 Now, the defendants' response to this is
19 exactly what I said it would be in opening. They say
20 that since the checks are made out with the parents'
21 names on them, there is no violation, even though the
22 checks can only be restrictively endorsed by the
23 parents over to the school.

24 But what did the evidence show on that
25 point? The evidence from Dr. Cutter was that the only

1 reason the district makes the checks out to the
2 parents is to try to get around the constitution.
3 There's no other reason, he said, behind that policy.
4 And there was no evidence to the contrary.

5 Dr. Cutter also said that the reason the
6 checks are mailed to the schools, even after they put
7 the parents' names on them, is so the district can
8 make sure the money gets where it is intended to be.
9 Those are his words. The district is paying the
10 school. That's what it intends to do, and that's what
11 it does. Putting the parents' names on the checks is
12 an obvious and intentional ruse done for the sole
13 purpose of trying to find a loophole in the
14 constitution. And if that's all it takes to get
15 around such a blatant violation of article 9, section
16 7, then that provision is meaningless.

17 Article 2, section 4, no person shall be
18 required to attend or support any ministry or place of
19 worship, religious sect, or denomination against his
20 consent. Again, the evidence clearly established that
21 state taxpayer dollars are going directly to churches,
22 and some of these schools are part of churches, and
23 also schools that are directly controlled by churches.
24 That's undisputed, and that constitutes compelled
25 support.

1 It's also undisputed that almost all of
2 the private school partners compel attendance at
3 religious worship and other services. Now, all the
4 other evidence that was presented about the religious
5 instruction that is infused in these schools'
6 programs, curriculum, and all their activities also
7 relate to this provision and article 9, section 8.

8 But I want to talk specifically now
9 about article 9, section 8. I'm sorry. Article 9,
10 section 7. All three of those provisions are related
11 to the evidence about the curriculum and religious
12 instruction. But article 9, section 8, specifically
13 states you cannot have a religious test for
14 qualification as a condition of admission. You cannot
15 have a requirement to attend or participate in any
16 religious service whatsoever. And no sectarian tenets
17 or doctrines shall ever be taught in the public
18 school.

19 Now, again, the evidence that all that is
20 going on is undisputed. It wasn't challenged, and
21 there was no contrary evidence.

22 You heard specific testimony and evidence
23 about how these schools discriminate in enrollment
24 decisions on the basis of religion, and how that is
25 specifically permitted under the program policy for

1 them to be able to do that.

2 And as I just mentioned, these schools
3 also require attendance at religious services, and the
4 opt-out provision in the program says they still have
5 to go to the services. They can just sit quietly.
6 And the evidence was overwhelming that a religious
7 document is the foundation for the entire curriculum
8 in some of these schools.

9 So the only thing in dispute on this one
10 is whether these are public school students. Douglas
11 County wants to say, well, even though we're getting
12 the money for them, because we're counting them as
13 public school students, they're really private school
14 students, so this -- this section of the constitution
15 doesn't apply.

16 But the evidence shows that Douglas
17 County set up a charter school, the one with no
18 building, no classrooms, no teachers, no books,
19 nothing at all relating to the education of students.
20 A charter school that the program students do enroll
21 in so they can be counted for the state money. That's
22 a public charter school of Douglas County.

23 And I do want to clear up one quick point
24 of confusion that I think came out during Dr. Fagen's
25 testimony about the charter school enrollment. If we

1 can put up Exhibit 5, please. This is in evidence.
2 This is the Choice Scholarship application. That's
3 the charter school that's been created that the kids
4 are going to enroll in and the program be administered
5 through this school.

6 If we look at page 8, near the bottom, it
7 lists the enrollment policy. It says, "To be eligible
8 for enrollment in CSS" -- the Choice Scholarship
9 school, the charter school -- "a student must qualify
10 and receive a DCSD Choice Scholarship" -- so they have
11 to get one of the vouchers -- "be accepted and attend
12 a private school partner."

13 So it is a condition of enrollment in the
14 charter school that administers the program that
15 you've been accepted and attend one of the private
16 schools. And those are the private schools that
17 openly discriminate in their admissions, and
18 extensively teach the students religious doctrine.

19 We even saw an e-mail from Denver
20 Christian Schools, it's Exhibit 87, saying that they
21 would try to steer families away during the
22 application process if the families don't share the
23 school's religious beliefs.

24 And Dr. Cutter testified that that's just
25 fine under the program policy. In fact, he heard

1 similar thoughts from other superintendents at some of
2 these religious schools. Subjecting public charter
3 school students to religious indoctrination and
4 enrollment discrimination is a third clear and certain
5 violation of the Colorado Constitution.

6 And defendants' own expert, Dr. Glenn,
7 testified that the language of these provisions in the
8 Colorado Constitution was intended to keep public
9 funds from going to private and religious schools.
10 And that's exactly what Douglas County is trying do.

11 Now, Dr. Glenn went on to say that he
12 believes there was anti-Catholic sentiment behind
13 actually five separate Colorado Constitution *S
14 provisions 135 years ago. And defendants asked this
15 court to essentially repeal those provisions of the
16 Colorado Constitution based on Dr. Glenn's testimony
17 about what he believes was in the minds of those
18 framers 135 years ago, despite the fact that we don't
19 even have a transcript of what was talked about.

20 But more importantly, defendants cite no
21 legal precedent or authority for such a radical
22 request. And the evidence that was presented is
23 speculative, at best, about the motives of these
24 particular individuals who framed this constitution.

25 But, Your Honor, one of the great things

1 about our constitution is that it is a living
2 document. It can be amended or supplemented. In
3 fact, every election cycle we've seen how easy it is
4 to at least put an amendment on the ballot in this
5 state. And there are specific procedures for doing
6 that.

7 Asking this court to throw out five
8 sections of the Colorado Constitution is not one of
9 those procedures, and that's not what this case is
10 about.

11 Article 9, section 7, along with the
12 other provisions in question, have been the law of the
13 land for over a century, and this program violates the
14 specific and detailed (period) *S prohibitions against
15 public funding of religious schools and the teaching
16 of religious doctrines in those schools that were
17 included in that original constitution.

18 So what else do the defendants say when
19 faced with this plain language that prohibits exactly
20 what they're trying to do? They claim that federal
21 cases such as Zelman versus Simmons Harris have
22 already decided this case and control this court's
23 decision. Once again, if you can't win the fight
24 you're in, try to pick another fight.

25 First of all, there's no federal

1 constitutional claim in the complaint in this case.
2 There are multiple claims relating to multiple
3 separate specific religion clauses in the Colorado
4 Constitution, each of which is far more detailed and
5 specific than the First Amendment. And as to those
6 Colorado provisions, Colorado law controls. *ES *S
7 Zelman has no application in this case.

8 It's the Americans United decision we
9 need to look at, the Colorado Supreme Court. And
10 based on the evidence before the court, the Americans
11 United decision strongly supports a finding that this
12 program violates the Colorado Constitution. I noted
13 for the court in opening statement the key factors
14 from the Americans United decision, which related to a
15 number of things: The lack of control of the colleges
16 that were involved in that program by churches and
17 religious faiths, the fact that the colleges were
18 providing a non-religious education to their students,
19 and that there was, quote, little risk of the grant
20 money, the public money seeping over, as they said,
21 into religious instruction or other activities or
22 religious activities, and specifically there was no
23 religious bent in the curriculum. And what Your Honor
24 heard over the last few days could not be more
25 different.

1 These private partner schools, many of
2 them are entirely religious, have no secular component
3 at all.

4 Dr. Cutter admitted that many schools
5 embed religious studies in all aspects of their
6 curriculum, and even participating schools. And the
7 school materials themselves, the applications, the
8 websites, only a fraction of which were shown to the
9 court during the trial -- they are all in evidence.
10 They demonstrate the all-encompassing nature of
11 religious instruction at these schools.

12 One quick example that we did look at, in
13 Exhibit 88, the Rock academy states, "We integrate
14 faith into every aspect of our school day."

15 And the evidence showed more than just
16 religious instruction as in a Bible or in a theology
17 class. Mr. Bignell and Mr. Gehrke and the school
18 exhibits in evidence discuss the extensive religious
19 aspects of the program.

20 Mr. Gehrke at Lutheran High even
21 described his school as a ministry that provides
22 ministry to the students. A ministry of the Lutheran
23 Church. And part of providing ministry is an attempt
24 to convert the students to the Lutheran religion.

25 So under the analysis of Americans

1 United, the factors that the court considered and how
2 the evidence applies to those facts strongly supports
3 a finding that plaintiffs have met their burden of
4 establishing clear and certain violation of the
5 Colorado Constitution.

6 Now, speaking of that all-encompassing
7 instruction, I think the story of the opt-out
8 provision that we heard a lot of evidence on really
9 goes to the heart of what is going on with this
10 program. Originally, and again solely as an attempt
11 to try to get around constitutional problems, the
12 district proposed that the program students would be
13 able to opt out of both religious services and
14 religious instruction at these schools.

15 But the private schools bought, the
16 religious schools said that proposal is not going to
17 work. *S they is said religious beliefs and
18 instruction are such an indivisible part of everything
19 that goes on in our schools, that would be a deal
20 breaker. A number of them said that, and we saw the
21 evidence of that.

22 But as Dr. Cutter testified, it was very
23 important for Douglas County to get the religious
24 schools to participate. So the district agreed to the
25 watered down opt-out that exists today, which is not

1 much of an opt-out, according to the district's
2 attorney, Mr. Ross.

3 And in the end what this means is that
4 the program students, if they want a voucher, have to
5 sit through religious instruction and faith woven into
6 everything that goes on in these schools. And they
7 still have to attend the religious services, although
8 they can sit quietly, as long as they don't call
9 attention to the fact that they're not actively
10 participating.

11 So under those circumstances, if we want
12 to talk about choice -- and that's much of what the
13 defendants want to talk about -- under those
14 circumstances, parents are left with little, if any,
15 actual choice.

16 The evidence demonstrated the extremely
17 limited number of non-religious schools at any level.
18 And at the high school level, other than Humanex
19 Academy serving a very limited number of special needs
20 students, there is not a single non-religious school.

21 So out of the 58,000 students in Douglas
22 County public schools, the ones who do not share the
23 religious beliefs of the private schools in the
24 program, which are almost exclusively schools of the
25 christian faith, they have little to no choice. At

1 the high school level, they have no choice at all.

2 And not only do they have no choice,
3 they're not welcome at many of the schools, because
4 they don't share the same religious beliefs.

5 And again, for the parents who want to
6 send their children to these schools, they have every
7 right to do that, but public taxpayer funds cannot be
8 used to fund it.

9 The program is unconstitutional. The
10 evidence is clear, and the underlying facts are not
11 disputed. We understand that it will not be an easy
12 decision for Your Honor to issue an order that would
13 stop the program, and we do not make that request
14 lightly.

15 Mr. McCarthy is going to discuss the
16 balance of the equities. But in the face of such
17 clear specific constitutional provisions that prohibit
18 exactly what the district is trying to do, it cannot
19 be allowed to go forward.

20 Thank you.

21 THE COURT: Thank you, Mr. Douglas.

22 MR. McCARTHY: Your Honor, Michael
23 McCarthy, appearing for taxpayers and the Barnards.
24 First I'm going to address, Your Honor, under the
25 Rathke standard and the clear and certain direction

1 that you provided briefly, the likelihood of success
2 on the merits on the principal claims that relate to
3 the non-religious issues.

4 And specifically, Your Honor, those
5 claims are article 9, section 2, requiring a thorough
6 and uniform and free public education. Article 9,
7 section 3, requiring that state school lands funds not
8 be used for anything other than public schools. And
9 article 9, section 15, which requires that local
10 control be exerted.

11 Your Honor, in my opening statement, I
12 pointed out to the court that what we believe the
13 evidence would show is that the factors -- the facts
14 that are critical to our burden would not only be
15 clear and certain that they would be undisputed.
16 (Comma) *S.

17 Your Honor, as to these claims under
18 sections 2, 3, and 15 of article 9, the testimony that
19 you've heard, the evidence that you have seen
20 demonstrates that the facts are undisputed, that
21 Douglas County does not provide a uniform and free
22 education to the children that are involved in this
23 program.

24 Specifically, Your Honor, the court was
25 able to hear directly from Dr. Cutter and from

1 Mr. Carson that the students that are involved in this
2 program who go to schools where the tuition exceeds
3 the amount of the scholarship program do not get a
4 free education. If we were moving for summary
5 judgment, Your Honor, we'd be entitled to summary
6 judgment on those grounds. We are certainly entitled
7 to an injunction. The facts are undisputed that
8 Douglas County does not afford these students a free
9 education.

10 Similarly, Your Honor, the state's
11 witnesses have said that the -- they've said it not
12 only in their brief, they said it on the stand under
13 oath and the documents establish that the moneys that
14 go to Douglas County as part of their per pupil
15 revenue include the state land funds, the state school
16 funds moneys, which must be kept inviolate, which can
17 be used only for public schools.

18 The witnesses said, well, we don't know
19 what happens to that money once it goes to Douglas
20 County. And the record doesn't establish that it does
21 anything other than all the rest of the money does
22 when it goes to Douglas County. And like -- these
23 dollars are not earmarked. They're commingled with
24 all the other dollars that Douglas County gets from
25 its general fund -- allocation from the state, and

1 those moneys go directly, to the extent that they're
2 included, to these private schools. And by virtue of
3 that, article 9, section 3 is violated.

4 And finally, Your Honor, section 15, the
5 requirement for local control, what this case presents
6 is an example of the abdication of local control.
7 What the Douglas County school board here has done is,
8 they have abdicated. They have washed their hands.
9 They have turned over the programs concerning the
10 educational core curriculum to the private students.
11 The court has heard that.

12 I emphasized, Your Honor, in opening
13 statement, and Exhibit 107 on its face will show that.
14 107, the court can see and heard from the witnesses --
15 Dr. Cutter admitted it. Dr. Fagen admitted it. And
16 Mr. Carson, the president of the board, admitted it.
17 The education program, the enrollment policy, the
18 employment policy, the discipline and suspension
19 policy, all of those are completely abdicated and
20 turned over to the private schools. And it's
21 undisputed in the record before the court. There's
22 nothing to contradict that in the record that the
23 court has seen.

24 For that reason, Your Honor, we have
25 satisfied for these claims not only the clear and

1 certain standard. Indeed, Your Honor, the record
2 shows here the facts are undisputed -- they're
3 undisputed in terms of those violations.

4 We turn now, Your Honor, to the issues of
5 balancing the equities and the status quo. And what
6 this really shows, Your Honor, is, when we get to this
7 point of the proceedings, that the hardest job in the
8 room belongs to the person with the black robe. The
9 balancing of the equities in this situation is
10 difficult. We acknowledge that, because we
11 acknowledge that there will be dislocations. There
12 will be dislocations, though, because the status quo
13 was manipulated by Douglas County, because they did
14 everything they could to get out of the blocks as
15 quickly as they could *S and try to change the facts
16 on the ground.

17 And the court was able to see that again
18 in Exhibit 107, where they said their first payment
19 was going to be made in September. And what they did
20 is, without telling anybody, they started paying out
21 the money in July. They pulled the families in, they
22 pulled the schools in. They created reliance. And
23 now they turned that reliance around and say, you
24 can't change the status quo that we have, in fact,
25 manipulated. Well, the case law says, look at the

1 last peaceable condition that existed between the
2 parties. That last peaceable condition was March
3 14th, 2011, the day before they adopted this policy.

4 And in terms of us acting quickly, Your
5 Honor, the discussions of everything that occurred
6 prior to that time, there was nothing to enjoin before
7 the policy was created on March 15th. And then what
8 the court has heard in terms of the vehicle, the
9 critical mechanism that Douglas County was going to
10 use in order to administer this program, was a Choice
11 Scholarship school. The court heard that from
12 Dr. Fagen.' heard it from Dr. Cutter. *S they heard
13 it from Mr. Carson. It was the Choice Scholarship
14 school that is the vehicle to accomplish this. And
15 the Choice Scholarship school didn't even come into
16 existence until July 9th.

17 There is no status quo issue in this
18 case. Those facts are undisputed, Your Honor.

19 And in terms of the balance of equities
20 here, I think some of the most compelling evidence
21 that the court heard in that probably came from
22 Mr. Carson yesterday. When I questioned him about
23 what it was that limited the ability of the Douglas
24 County school board to expand this program, to make it
25 bigger, to bring yet more families into it, to bring

1 yet more schools into it. And what Mr. Carson said --
2 and you'll remember the e-mail that Mr. Carson wrote
3 to his colleague at Cherry Creek Mortgage where he
4 said, if this program is successful, we're going to
5 grow it.

6 Now, he tried to back-pedal away from
7 that statement, Your Honor, but you saw it there in
8 writing. And he also said that the only thing that
9 limits their ability to do that is the discretion of
10 the Douglas County school board.

11 So, Your Honor, in terms of the equities,
12 we ask the court to stop this now before they pull yet
13 more families and yet more schools into this.

14 Yes, there are hardships that flow from
15 this. There's no doubt about this. There are
16 hardships to families. We heard just this afternoon
17 compelling testimony from Diana Oakley about the
18 hardships on her family that's involved with this.

19 Well, the response that we have there,
20 Your Honor, is that the Oakleys' tuition at Humanex
21 should be paid by the federal money that Douglas
22 County gets in order to cover special needs children.
23 And you heard her testimony. Nobody at Douglas County
24 told Mrs. Oakley that she could get that covered by
25 federal funds from Douglas County. Just like Douglas

1 County didn't tell anybody that there was litigation
2 likely here.

3 You heard Dr. Cutter answer my questions.
4 You heard Mr. Carson answer those questions. Well, of
5 course, we didn't tell anybody there was litigation.
6 We didn't tell the schools. We didn't tell the
7 parents. Because what Douglas County has done here
8 is, they have pressed the envelope, under article 9,
9 as far as they can.

10 For those who are interested in
11 preserving public education in this state, unharmed by
12 those who wish to push money to private schools, they
13 have gotten in their face as far as they can, Your
14 Honor. And they will keep that. They will keep
15 pressing that envelope unless you stop them.

16 They will keep growing this program, Your
17 Honor, unless you stop them.

18 There's going to be an appeal taken from
19 this either way. And so what we are here today to ask
20 the court to do is to not be distracted by the talk
21 about other programs that are going to be collateral
22 damage. Those programs aren't before this court.
23 Many of those programs involve federal money, but
24 they're not here to be adjudicated, and they shouldn't
25 be considered in deciding whether or not the equities

1 balance in favor of this.

2 What the court, we beg you to take into
3 account is that these program -- *S they talk about
4 the Blaine amendments infecting the Colorado
5 Constitution. Well, this concept will go viral to a
6 degree to those school districts that want to do it.

7 And what we hear over and over again,
8 Your Honor, is choice. Choice, choice, choice. Well,
9 Your Honor, choice is not the preeminent
10 constitutional value in this state. Choice is an
11 important value, but there are other values and there
12 are more important values. And the values that are
13 embedded in our constitution reflect the fact that we
14 have a social contract in terms of all of us being in
15 this together, to have the strongest possible public
16 school system that we could have.

17 And so we ask Your Honor to enter a
18 preliminary injunction, stop this now. There will be
19 appellate review. Let that appellate review occur,
20 but stop it before yet more families are brought into
21 it, more schools are brought into it, more school
22 districts are brought into it. And let's find out
23 what the constitution really requires.

24 Thank you, Your Honor.

25 THE COURT: Thank you, Mr. McCarthy.

1 Mr. Douglas.

2 MR. HALL: Thank you, Your Honor. Your
3 Honor, I'll discuss the merits of the claims, and then
4 Mr. Lyons will speak, and Mr. Bindas.

5 THE COURT: Do you have a plan on how
6 you want to divide your time, Mr. Hall?

7 MR. HALL: I'm going to take about 15
8 minutes. And then they're going to take less than
9 that.

10 THE COURT: Go ahead.

11 MR. HALL: Thank you. The Choice
12 Scholarship Program provides yet another educational
13 choice to families in Douglas County. Parents may
14 choose from this option or an array of other options.

15 If they choose it, and if they receive a
16 scholarship, then they have a further choice. They
17 may choose from among the partner schools.

18 Receiving a scholarship is in no way
19 contingent upon a child being accepted into a private
20 school. Dr. Fagen testified to this directly in
21 response to your question, Your Honor. She's been
22 charged with implementing this program by the board.
23 She also testified that the program is religiously
24 neutral. And in all material respects, the program is
25 identical to the numerous programs for education in

1 Colorado from pre-K to higher ed. You heard testified
2 during this three-day hearing. All of these programs
3 like the Choice Scholarship Program are religiously
4 neutral and have government money flowing to religious
5 and non-religious organizations.

6 Plaintiffs have from time to time tried
7 to distinguish a few of these programs, but their
8 distinctions are empty. For if article 2, section 4
9 means, as plaintiffs suggest, that no taxpayer
10 dollar -- no taxpayer shall be required to pay taxes
11 that eventually end up supporting a ministry, then all
12 of these programs violate this provision.

13 Likewise, if article 9, section 7 means
14 that no governmental body may ever pay anything that
15 results in aid to a church, then all these programs
16 must come off the books. That these programs remain
17 on the books strongly suggests that the plaintiffs'
18 interpretation of them is incorrect.

19 Both parties agree that Americans United
20 is the most closely analogous Colorado case regarding
21 the religion clauses. Americans United time after
22 time after time noted that the state grants in that
23 case were designed to aid the student. And as a
24 result, any aid to Regis College was only incidental
25 and an irrelevant by-product.

1 In the language of article 9, section 7,
2 the state funds were not in aid of Regis College.
3 They were in aid of the student.

4 Now, plaintiffs try and work with
5 Americans United by relying on these other factors.
6 Those factors in Americans United are attributable to
7 two interrelated things. First, in writing the state
8 aid statutes at issue in that case, the legislature
9 was relying on United States Supreme Court precedent
10 at that time. It's right up front at the outset of
11 the opinion.

12 The court says, on the beginning of page
13 1075, quote, in an attempt to conform to First
14 Amendment doctrine developed by the United States
15 Supreme Court, the statutory grant program expressly
16 excludes the institutions which are, quote, sectarian
17 and theological. End quote.

18 To underscore this same point, in the
19 middle of that sentence, the court drops the footnote,
20 footnote 1, and gives a long discussion of legislative
21 history, including a quote from the latest sponsor.
22 And that quote is, "We do have some recent Supreme
23 Court decisions on this particular question."

24 And the key words are pervasively
25 sectarian. The Americans United court then discusses

1 *S the six pervasive sectarian factors from the
2 statutes at issue in that case. Again and again, it
3 draws on those factors throughout its opinion.

4 The second piece that generates these
5 other factors that plaintiffs rely on is the Americans
6 United court itself relied on U.S. Supreme Court
7 precedent at that time. Hence, there's a long
8 discussion about statute clause in cases like Romer
9 and Tilton and Hunt. These two things explain the
10 other factors plaintiffs would like you to rely on.

11 However, now in 2011, the foundations for
12 these other factors have completely disappeared. As
13 I'll discuss in a minute, First Amendment
14 jurisprudence in the school area moved on to Mueller,
15 Witters, Zavrilla, and most importantly Zelman.

16 Second, the 10th Circuit in Colorado
17 University expressly overruled the pervasive sectarian
18 statutes and approach on which these other factors
19 were based. Indeed, the 10th Circuit found that such
20 inquiries into a school's religious views both
21 constitutionally unnecessary and offensive. The 10th
22 Circuit wrote, quote, the First Amendment does not
23 permit government officials to sit as judges of the
24 indoctrination quotient of theology classes.

25 These points I'm making now about these

1 other factors in Americans United are not mine.
2 They're a mere summary of what the 10th Circuit talks
3 about in Colorado christian. The principles that
4 remain from Americans United are government neutrality
5 and student choice. And the Choice Scholarship
6 Program embodies both of them.

7 Now, note further that when Americans
8 United looked to the closest First Amendment
9 precedent, that was not unique under Colorado law.
10 Far from it. Rather, in every Colorado appellate
11 court case interpreting our state's religion clauses,
12 our courts have looked to the closest federal
13 precedent and interpreted our religion clauses in
14 harmony with the First Amendment. The cases,
15 Zavrilla, Young life, Conrad 1, Conrad 2, Freedom From
16 Religion Foundation and Americans United, just to name
17 a few, all take this approach.

18 Now, plaintiffs ask you to disregard this
19 precedent and strike out in a new direction. That new
20 direction takes you into the Blaine thicket. You
21 heard the testimony today from Professor Glenn,
22 anti-Catholic and anti-immigrant, bias has left a
23 stain on our constitutional history, which our courts
24 up to now have not followed.

25 And rather than follow the plaintiffs

1 into that unchartered territory, this court should
2 follow Colorado precedent, and that means looking to
3 Zelman. There the United States Supreme Court
4 addressed a materially indistinguishable elementary
5 and secondary school Choice Program. The Zelman court
6 upheld that Ohio program, because there is no
7 constitutional bar to, quote, neutral government
8 programs that provide aid directly to a broad class of
9 individuals who, in turn, direct the aid to religious
10 schools or institutions of their own choosing. Close
11 quote.

12 Similarly, when, quote, parents are the
13 ones to select a religious school as the best learning
14 environment for their child, the circuit between
15 government and religion is broken.

16 The payment mechanism in Zelman, like the
17 Choice Scholarship Program, is to make the checks
18 payable to the parents, who then endorse them over to
19 the chosen school. The point of that whole exercise
20 is parent choice. It's the parents that are making
21 the choice.

22 Zelman is also instructed on the facts.
23 For instance, in Zelman, 96 percent of students
24 attended religiously affiliated schools. The court
25 found this fact constitutionally irrelevant, saying,

1 quote, the constitutionality of a neutral educational
2 aid program simply does not turn on whether and why in
3 a particular area at a particular time most private
4 schools are run by religious organizations or most
5 recipients choose to use the aid at a religious
6 school. Close quote.

7 I'll make one more point on the religion
8 clauses. It's about article 9, section 8. It forbids
9 imposing religious tests as a condition of admission
10 into any public school.

11 Again, Your Honor asked this question
12 directly to Dr. Fagen: Does Choice Scholarship
13 Program do that? And she answered directly, no, it
14 doesn't. A student may receive a scholarship without
15 regard to religion and without regard to being
16 admitted to any of the schools.

17 And you heard the testimony clearly from
18 both Mr. Carson and Dr. Fagen that she was directed by
19 the board to implement this program.

20 Article 9, section 8 also forbids public
21 schools from requiring attendance or participation in
22 religious services or teaching sectarian tenets.
23 Neither the Choice Scholarship school nor any other
24 public school in Douglas County does either of these
25 things. It does not require attendance at religious

1 services, and neither is it teaching any sectarian
2 tenets. Religious partner schools do these things if
3 a student chooses them. And the evidence is
4 undisputed that the partners are private schools, and
5 that students may choose these things if they want to.

6 The evidence has been clear throughout
7 that there's no compulsion sending any of these
8 children to any religious schools.

9 Now to turn to the school finance control
10 provisions. I want to begin with article 9, section
11 2. The language that plaintiffs put up in opening in
12 the PowerPoint says this: The general assembly shall
13 provide for the establishment and maintenance of a
14 thorough and uniform system of free public schools.

15 Note that 9.2's actor is the general
16 assembly. It is the one that owes a duty to maintain
17 a thorough and uniform system of free public schools.

18 Plaintiffs have repeatedly tried to
19 conflate this duty of the legislature with not even a
20 local school district but with one individual school
21 program, the Choice Scholarship Program. They argued,
22 in essence, that since the scholarship program isn't
23 comprehensive in every way they could imagine, it
24 wasn't thorough. And again, the duty is about
25 maintenance of a school system, not one school

1 program.

2 The testimony has been that Douglas
3 County has over 80 traditional public schools, 11
4 charter schools, two online schools, among other
5 options. The Choice Scholarship Program is simply one
6 more choice. If it has any effect on Douglas County
7 schools as a whole, it benefits them.

8 Now, it just so happens, as this court
9 well knows, that genuine article 9, section 2
10 litigation is happening down the hall in the Lobato
11 case. There there are proper plaintiffs talking about
12 whether the general assembly has fulfilled its duty to
13 provide a thorough, uniform system of free public
14 schools. This is not a 9.2 case.

15 If parents want to choose a scholarship
16 program, they can, like other options they can choose.

17 Article 9, section 3. First, we maintain
18 plaintiffs lack standing to bring this claim. On the
19 merits, 9.3 is fundamentally about protecting the
20 statewide Public School Fund from raiding by the
21 general assembly when statewide the entire text of
22 9.3, which is somewhat long, makes that clear.

23 Also, the enabling statute contemplated
24 in 9.3, 22-41-101 and following, if you read that,
25 that also makes clear that what this is about is

1 making sure that funds aren't diverted from the Public
2 School Fund to other parts of the state budget.

3 There is nothing that prohibits districts
4 from spending this money to purchase services from
5 private entities, including private schools. Once
6 distributed to districts, school districts have the
7 discretion, under the Public School Finance Act,
8 22.54-104-1 A to spend the moneys as they wish, *S
9 including paying private schools.

10 And we looked at numerous statutes where
11 this happens again and again and again. If plaintiffs
12 are correct about the interpretation of 9.3, all of
13 those statutes must come off the books.

14 Even if plaintiffs' unprecedented
15 traceability argument about somehow interest from this
16 fund was actually quite small, less than 2 percent,
17 makes its way to a private school, there's
18 unconstitutional action, recall, the percentage is *S
19 less than 2 percent. That was the testimony. Douglas
20 County holds back 25 percent of the funds.

21 Legislation must be presumed
22 constitutional and, therefore, it must be presumed, if
23 we're going to go down this road, that that tiny
24 fraction of the moneys is withheld within the 25
25 percent.

1 Which brings us to article 9, section 15,
2 local control provision. The cases in this area do
3 just two things. First, local school districts are
4 the actors primarily responsible for providing
5 education to children. Lujan, Owens, Booth, and many
6 other cases emphasize that education initiatives are
7 to come from the bottom up in Colorado. We heard the
8 commissioner of education testify to that effect.

9 Local school boards elected by local
10 voters have the constitutional authority and
11 responsibility, under article 9, section 15, to
12 develop programs to educate children.

13 The second thing these cases teach us is
14 that the tension in this area is between local school
15 districts and the state. 9.15 cases are about whether
16 the state has encroached too far into local control.
17 Plaintiffs offer another novel theory or
18 interpretation of 9.15 calling it abdication of
19 authority. But this is wrong for at least four
20 reasons. First, no case law supports it.

21 Second, plaintiffs' theory is exactly
22 backwards. Douglas County has absolute control over
23 this program. Douglas County school choice task force
24 developed it. The Douglas County administration
25 refined it. The Douglas County board adopted it it.

1 The Douglas County board may amend the policy *S at
2 any time. This is total control, not an abdication of
3 control.

4 Third, Dr. Fagen testified that Douglas
5 County has at least equivalent, if not greater,
6 control over the partner schools than over charter
7 schools. In both cases, charter schools and partner
8 schools, the district decides who to partner with. In
9 both cases, districts have a contract with those
10 schools. In both cases, the districts hold the
11 schools accountable to achieving at least as good or
12 better educational results as traditional schools. If
13 not, the districts have the authority to terminate the
14 relationship.

15 Fourth, Colorado cases make this point
16 even stronger. The Supreme Court in Booth held that
17 the state board may require a school district to
18 negotiate with a charter applicant until a charter
19 school is created. And the court of appeals in
20 Boulder Valley said that the state can create another
21 system of schools, charter schools authorized by a
22 state charter authority, without a 9.15 violation.

23 If the state can require districts to
24 accept charter schools on terms not set by the schools
25 themselves -- not set by the districts themselves,

1 then it cannot be a violation of 9.15 if a district
2 creates its own program and puts in place control
3 mechanisms at least as strong as with charters.

4 Your Honor, I'll end with this principle
5 of local control, because this case is the embodiment
6 of local control. Douglas County took the Owens
7 decision to heart. There is no constitutional nor
8 statutory impediment for the Choice Scholarship
9 Program. Plaintiffs cannot carry their burden on the
10 merits.

11 THE COURT: Thank you, Mr. Hall.
12 Mr. Lyons.

13 MR. LYONS: Thank you Your Honor. I'm
14 going to pick up with the other Rathke standards and
15 move forward from there, because, as the court knows,
16 all of the Rathke standards must be satisfied in order
17 for this court to enter an injunction.

18 Let's take irreparable injury. The
19 plaintiffs have presented no evidence whatsoever of
20 irreparable injury to the individual plaintiffs, let
21 alone to the organizations for plaintiffs in this
22 case, other than a generalized interest in
23 constitutional issues. That's insufficient as a
24 matter of law.

25 You have to find next that these

1 plaintiffs lack an adequate remedy at law. Well, I
2 think the state of Colorado directs witnesses.
3 Mr. Hammond and Ms. Emm demonstrated that there is an
4 extensive process to audit all the school districts in
5 the state and to true up, as may be necessary, to
6 correct any financial difficulties. This was not
7 mentioned at all by the plaintiffs.

8 Nor was the next standard you must find,
9 and that is that the injunction does not disserve the
10 public interest.

11 I'd ask you to think about two things in
12 that regard, Your Honor. First, the testimony of
13 Dr. Fagen about what the effect of an injunction at
14 this stage would be on a district and its students
15 that are not in the program. The 58,500 students in
16 the 100 schools of Douglas County. She testified
17 about the impact of returning the CSP students at this
18 point back to Douglas County on classroom size, on
19 split sections, on teacher ratios, as well as the fact
20 that the charter schools from which many of these CSP
21 recipients have now left are full and would not be
22 available to them and they could not return. That's
23 an element of public interest that you must consider.

24 You must also consider, we submit, under
25 the rubric of public interest, the collateral damage,

1 as I called it in opening statement, on the other
2 similar programs where public money, state and
3 federal -- but let's just focus on state -- finds its
4 way into private schools through partnerships, much as
5 Senator King testified to.

6 What happens to those programs and the
7 students and families involved in those programs?
8 It's more than collateral damage. It's damage to the
9 public interest.

10 And then you come to balancing of the
11 hardships. And I agree with Mr. McCarthy, as I
12 frequently do, anyway, that this is perhaps the most
13 difficult thing for you to do. On the one hand, on
14 the plaintiffs' side of the ledger, we have a handful
15 of disgruntled taxpayers and two organizations who
16 didn't even bring a witness to testify to this case,
17 claiming a generalized interest in constitutional and
18 statutory issues.

19 On the other side of the ledger, you have
20 500 students and families that are involved in this
21 CSP program, 271 of which are already paid, enrolled,
22 and participating as we stand here today, having paid
23 well over \$200,000 to the partnership schools. You
24 have next 23 partnership schools, four of whom
25 appeared here. Cherry Hills community, Lutheran,

1 Valor, and Woodlands. *S they all testified what the
2 financial impact would be on them and their students,
3 ranging from 50 to maybe 60 thousand dollars on the
4 low end to well over \$600,000 per year.

5 I remember the testimony of Ms. Martin
6 from Woodlands as to what would happen to her school.
7 And I think the adjective she used was devastated.
8 Teachers being fired, a third of the enrollment being
9 turned away.

10 And last, but certainly by no means
11 least, is the impact on the families. We heard from
12 Mrs. Oakley today. Plaintiffs apparently would have
13 you ignore that circumstance and say, well, she's got
14 a remedy, she can go hire a lawyer and sue Douglas
15 County in order to try and get the services she could
16 otherwise get under this program.

17 I'd suggest to Your Honor if you want to
18 look for real irreparable injury, look to the Oakley
19 family.

20 Let me end with this: From the ancient
21 law of equity, equity aids the vigilant; equity does
22 not aid the invalid. This program was adopted on
23 March 15th. The evidence is clear that there were
24 plaintiffs in this litigation who were involved in the
25 entire process and well aware of it at the time it was

1 adopted.

2 But what happens? The district begins,
3 on March 16th, to implement the program that's now
4 operating? Nothing. We know from Ms. Barnard that
5 she consulted with a lawyer as soon as March 30th. No
6 suits filed in March. No suits filed in April. The
7 program is operating on the website, perfectly open
8 and transparent. No suits filed in May. It's not
9 until the end of June that a lawsuit's filed.

10 Plaintiffs waited over three months. And
11 I will freely concede, Your Honor, if they had filed
12 in a timely fashion, we'd be sitting here with a
13 different argument and a different set of
14 circumstances for you to consider. But we are not.
15 Equity aids the vigilant, not the invalid. Thank you.

16 THE COURT: Thank you, Mr. Lyons.
17 Mr. Blue.

18 MR. BLUE: Thank you, Your Honor.

19 I'm here to reiterate a point or to
20 elaborate on a point from Mr. Hall regarding First
21 Amendment jurisprudence and how Colorado traditionally
22 has followed federal law regarding its religious
23 clauses in the Colorado Constitution.

24 Plaintiffs ask you to return to the
25 Colorado jurisprudence pervasively sectarian analysis

1 that has been used in the past under the U.S.
2 Constitution. The problem for plaintiffs is that this
3 argument was made by my office on behalf of the state
4 of Colorado to the 10th Circuit in 2008.

5 Now, frankly, I was in the room that day
6 and I watched our solicitor general make that
7 argument, and I watched him lose it. The 10th Circuit
8 rejected the exact statutory provision that plaintiffs
9 rely on in Americans United. That provision was a
10 Colorado student incentive grant program determination
11 of eligibility, now now appealed because of that
12 decision. *S.

13 This court should interpret Colorado
14 Constitution -- if this court were to interpret the
15 Colorado Constitution in the way plaintiffs request,
16 it risks putting the Colorado Constitution in
17 violation of the United States Constitution. And the
18 court should interpret the Colorado Constitution so as
19 not to conflict in that manner.

20 Thank you.

21 THE COURT: Thank you, Mr. Blue. Last,
22 but not least, is Mr. Bindas.

23 MR. BINDAS: Thank you, Your Honor. I've
24 just got a little bit to say. Everyone else has used
25 my best material.

1 So I'll start briefly by just discussing
2 the balancing of the equities. You heard, Your Honor,
3 less than an hour from Diana Oakley and the harm that
4 will befall her family if this program is enjoined.
5 An injunction would effectively force Nate Oakley out
6 of Humanex Academy, the one school that will best meet
7 his special needs, where he'll have a chance to thrive
8 and where he'll be safe.

9 And an injunction will put Mrs. Oakley's
10 family in an unbelievably difficult situation of
11 figuring out how to home school their son. As
12 Mrs. Oakley testified, that's going to be incredibly
13 difficult and burdensome on her family and harmful to
14 Nate.

15 This is one story, Your Honor. There's
16 499 other stories like that. As Mr. Lyons so
17 eloquently put it, on the other side, you've got a
18 generalized interest of taxpayers who don't want
19 scholarships going to families who can then make a
20 private and independent choice of where to use that
21 scholarship. This is a close on the equities, Your
22 Honor.

23 And a few points I'd like to make on
24 success, Your Honor. I'll reiterate something that
25 Mr. Hall mentioned, and that is Zelman. The

1 percentages there are overwhelming. 82 percent of the
2 participating schools were religiously affiliated. 96
3 percent of the students selected to those religiously
4 affiliated schools. The plaintiffs made the same
5 arguments they make here. And the court summarized
6 their arguments. Respondents claim you should attach
7 constitutional significance to the fact that 96
8 percent of scholarship recipients have enrolled in
9 religious schools. They claim that this alone proves
10 parents lack genuine choice. The court rejected that
11 argument, or in the court's words, flatly rejected
12 that argument. And I'll requote something Mr. Hall
13 quoted from the opinion.

14 According to the court, the
15 constitutionality of a neutral education aid program
16 simply does not turn on whether and why, in a
17 particular area at a particular time, most private
18 schools are run by religious organizations or most
19 recipients choose to use the aid at a religious
20 school.

21 Now, the plaintiffs, Your Honor, say,
22 don't look to Zelman, don't look to Zelman. That was
23 the federal constitution, First Amendment. Now, we
24 say you have to interpret Colorado religion clauses
25 consistent with the First Amendment. That to read it

1 more restrictively would cause significant federal
2 constitutional problems and would require this court
3 to, as Mr. Hall put it, wade into the Blaine thicket.

4 What's the plaintiffs' response to that,
5 Your Honor? We don't have Blaine amendments here. We
6 bought our stuff from Illinois before Blaine even
7 offered his amendment. Right. Let's look to
8 Illinois, Your Honor. Let's see what the Illinois
9 Supreme Court has to say about how it interprets the
10 Illinois Constitution's religion clauses.

11 I'm quoting from *People versus Falby*,
12 727, Northeast 2d, 200, page 207. "The restrictions
13 of the Illinois Constitution concerning the
14 establishment of religion have been held to be
15 identical to those imposed by the First Amendment to
16 the United States -- to the Constitution of the United
17 States. Thus, any statute which is valid under the
18 First Amendment is also valid under the Constitution
19 of Illinois."

20 One year later, Your Honor, in *Tony*
21 *versus Bauer*, the Illinois Court of Appeals relies on
22 that case to uphold the School Choice Program.

23 Finally, Your Honor, interpreting the
24 Colorado Constitution's religion clauses any other way
25 would run afoul of the Colorado Supreme Court's

1 consistent approach of interpreting those clauses in
2 harmony with, not at loggerheads with, the First
3 Amendment. The court should follow that consistent
4 approach, which allows an educational aid program like
5 Douglas County's, a program that is neutral with
6 respect to religion and that operates on a truly
7 private and independent choice of parents like Diana
8 Oakley.

9 Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Bindas.

11 MR. MCCARTHY: Your Honor, I believe I
12 sat down with about 90 seconds left. Being the
13 plaintiff and -- I'm testing your patience, Your
14 Honor.

15 THE COURT: I'll give you a brief
16 rebuttal.

17 MR. MCCARTHY: Thank you very much, Your
18 Honor.

19 Two quick points, Your Honor. In terms
20 of the irreparable harm and the service to the public
21 interest, the defendants talked disparagingly about
22 the fact that irreparable harm and the service to the
23 public interest flows from the vindication of
24 constitutional rights. That's the law in this state,
25 Your Honor. Irreparable harm can be presumed from the

1 violation of constitutional rights.

2 In particular, we point the court to
3 Fortner against Kuzar, 992 P 2d 697, and a federal
4 case interpreting constitutional provisions, Evans
5 against Romer, 1993, Westlaw, 19678.

6 Those and other authorities establish
7 that irreparable harm and service to the public
8 interest can be presumed from the violation of a
9 constitutional right.

10 The second point that we would make, Your
11 Honor, goes to the reliance that the defendants place
12 upon the federal constitutional provisions. And what
13 we would say there, Your Honor, is that what they are
14 trying to convince this court to do is to take the
15 free exercise clause and put it on steroids, and to
16 take that clause and to interpret it in a way that has
17 been far more aggressive than it has ever been
18 interpreted before.

19 And in particular, Your Honor, in this
20 case, they're asking a judicial officer of this state,
21 sworn to uphold this constitution, to, as a practical
22 matter, not conform the constitution to what they
23 think the federal free exercise clause does. Their
24 interpretation would require you, Your Honor, to
25 advocate the provisions of section 9 of our

1 constitution. And that, Your Honor, you should not
2 do.

3 Thank you very much.

4 THE COURT: All right. Thank you,
5 Mr. McCarthy.

6 Mr. Hall, I'll note you should be
7 cautious with your references to Lobato. You will
8 note I was reversed on that decision.

9 Thank you all for your presentations.
10 Your professionalism is refreshing, and efficiency is
11 welcome.

12 Unlike that present case, we're done in
13 three days, not five weeks. Of course, we don't have
14 the issues they have to discuss.

15 Let me give you a time frame of where we
16 are. Again, I understand the import of the issues and
17 the potential impact of the decision. I think you
18 all, as practitioners, recognize that the practical
19 reality is that -- I don't often like to admit this,
20 but this court serves as effectively a speed bump to
21 the Supreme Court. So I will do my best to get a
22 decision out on this matter. I do contemplate writing
23 a written opinion on it. And I suspect it will be
24 sometime next week. I do have a five-day trial
25 starting next week, so it's going to be interesting

1 how I'll get that done, but I will get it done
2 sometime next week.

3 We'll give you all a courtesy call when
4 you can expect the order to be hitting your electronic
5 services. But I'm confident that what we now in your
6 respective propose findings will assist *S us in
7 drafting an order that addresses the issues raised in
8 this matter.

9 I will ask you to sign a receipt for the
10 exhibits you've submitted. For the original exhibits,
11 please keep them consistent with my pretrial order.
12 Particularly for purposes of appellate proceedings,
13 that will be important.

14 Is there anything else I can help you
15 with today?

16 MR. McCARTHY: Nothing further, Your
17 Honor.

18 THE COURT: From the defense?

19 MR. LYONS: No, Your Honor. Except, I
20 think, from all of us thanks to you and your staff for
21 the way we've been treated the last three days.

22 THE COURT: Well, you're always
23 welcome.

24 MR. McCARTHY: Join in that.

25 THE COURT: Have a good day. Thank you

1 very much. Court's adjourned.

2 4:20 *S

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25