No. _____

In the Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN LITTLETON,
ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD,
DANIEL SHELEY, LISA SHELEY, AND
THE ARCHDIOCESE OF DENVER,
Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY CHILDHOOD, AND DAWN ODEAN, IN HER OFFICIAL CAPACITY AS DIRECTOR OF COLORADO'S UNIVERSAL PRESCHOOL PROGRAM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Colorado's so-called universal preschool program pays for families to send their children to the preschool of their choice, public or private. To participate, preschools must ensure all families have an "equal opportunity" to enroll regardless of, *inter alia*, race, religious affiliation, sexual orientation, gender identity, income level, or disability. Colorado nonetheless permits numerous exemptions from this requirement, both categorical and discretionary, allowing preschools to admit only "children of color," "gender-nonconforming children," "the LGBTQ community," low-income families, and children with disabilities. But Colorado excludes Catholic preschools because they admit only families who support Catholic beliefs, including on sex and gender.

The Tenth Circuit upheld Colorado's decision to exclude Catholic preschools. Applying *Employment Division* v. *Smith*, it held that Colorado's secular exemptions and discretion did not undermine general applicability. In so doing, the court sided with the minority position in an entrenched and acknowledged 7-4 split over what kinds of exemptions and discretion undermine general applicability. The court also eschewed *Carson* v. *Makin*, concluding that its rule was inapplicable because Colorado's exclusion was not "on the explicit basis" of religion.

The questions presented are:

1. Whether proving a lack of general applicability under *Employment Division* v. *Smith* requires showing unfettered discretion or categorical exemptions for identical secular conduct.

2. Whether *Carson* v. *Makin* displaces the rule of *Employment Division* v. *Smith* only when the government explicitly excludes religious people and institutions.

3. Whether *Employment Division* v. *Smith* should be overruled.

RULE 29.6 DISCLOSURE STATEMENT

No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

RELATED PROCEEDINGS

St. Mary Catholic Parish in Littleton, et al. v. *Roy, et al.*, District of Colorado, No. 1:23-cv-2079-JLK (June 4, 2024)

St. Mary Catholic Parish in Littleton, et al. v. *Roy, et al.*, Tenth Circuit, No. 24-1267 (Sep. 30, 2025)

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INTRODUCTION

Free Exercise Clause jurisprudence is of two minds. On the one hand, there is the rule of *Employment Division* v. *Smith*, which transformed free exercise doctrine by shifting the judicial focus from religious exercise and the real-world burdens government imposes on it to the abstract qualities of the law imposing the burden. Courts have spent the ensuing decades divining what it means for a law to be "neutral" and "generally applicable," generating an ongoing series of splits for this Court to resolve.

On the other hand, there are separate lines of free exercise precedent that stand entirely outside the rule of *Smith*. This Court's church autonomy decisions in cases like *Hosanna-Tabor* have never been subject to *Smith*. And just last Term, this Court explained that, under a line of precedent rooted in *Wisconsin* v. *Yoder*, courts "need not ask whether the law at issue is neutral or generally applicable." *Mahmoud* v. *Taylor*, 606 U.S. 522, 564 (2025).

The decision below exacerbates existing conflicts and confusion in the lower courts over both aspects of current free exercise jurisprudence.

First, the decision below exacerbates a 7-4 split over how to apply *Smith*'s neutrality-and-general-applicability rule. Three Justices have already deemed this conflict "widespread, entrenched, and worth addressing," *Dr. A* v. *Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., dissenting from denial of certiorari, joined by Alito and Gorsuch, JJ.), and it has only grown more so since. On one side, four circuits and three state high courts agree that *Fulton* v. *City of Philadelphia* requires courts to assess *all* avenues of

discretion and categories of exemptions from a law to see if any undermine the government's asserted interest "in a similar way." 593 U.S. 522, 534 (2021). On the other side, two circuits (including the Tenth) and two state high courts drastically narrow the general-applicability analysis, looking only for "unfettered" discretion and considering only secular exemptions identical to the requested religious accommodation.

Second, the decision below exacerbates confusion over when to apply *Smith*'s neutrality-and-general-applicability rule. In *Carson* v. *Makin*, this Court articulated a clear rule: If religious groups are excluded from a government funding program "because of their religious exercise," strict scrutiny applies. 596 U.S. 767, 781 (2022). But the Tenth Circuit rejected this reading, concluding that *Carson* prohibits only exclusions that are "explicit[ly]" "targeted" at "religious use" or status. The Tenth Circuit thus joins the Ninth and Fourth Circuits in recasting *Carson* in *Smith*'s mold.

Both the conflict over general applicability under *Smith* and the confusion over *Carson*'s relationship to *Smith* can only be resolved by this Court. And each is sufficient grounds for this Court to grant review.

But on a deeper level, the Court will never be able to put Free Exercise Clause jurisprudence on a firm foundation until it reckons with *Smith* itself. *Smith's* rule was supposed to mark a return to "common sense" and "practicality," while avoiding "anarchy" and forms of adjudication "horrible to contemplate." 494 U.S. 872, 885 & n.2, 888, 889 n.5 (1990). As a majority of this Court's Justices have already acknowledged, *Smith* has not lived up to its claims in practice. See *Fulton*, 593 U.S. at 543 (Barrett, J., concurring, joined by Kavanaugh, J., concurring) ("difficult to see why

the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination"); *id.* at 545 (Alito, J., concurring, joined by Thomas and Gorsuch, JJ.) ("fundamentally wrong"). *Smith* has instead been the kind of dysfunctional and difficult-to-administer precedent that generates church-state conflicts rather than resolving them.

This case is paradigmatic of the problems *Smith* poses for religious people. Colorado created a universal preschool program that funds families to send children to the public or private preschool of their choice—but not the Archdiocese of Denver's Catholic preschools. Why the exclusion? Because, Colorado says, these preschools' religious practice of admitting only families who support Catholic teachings, including on sex and gender, is "discrimination." Yet Colorado has permitted many exemptions, both categorical and discretionary, from the "equal opportunity" rule it has invoked against Catholic preschools. And far from facilitating "universal" preschool, Colorado's exclusion of Catholic preschools *reduces* access, pushing parents and children toward preschools that share the government's views on these issues and penalizing the religious schools and families who disagree. All in a program the Tenth Circuit calls a "model" under *Smith*.

This Court promised in *Obergefell* that religious groups would be protected when they dissent from secular orthodoxies about marriage and sexuality. The Free Exercise Clause simply cannot do that important work—which this Court has described as "at the heart of our pluralistic society"—if it can be so easily evaded.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 154 F.4th 752 and reproduced at App.1a. The district court's opinion is reported at 736 F.Supp.3d 956 and reproduced at App.50a.

JURISDICTION

The Tenth Circuit issued its opinion and judgment on September 30, 2025. App.1a, 48a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. Amend. I.

Colo. Rev. Stat. §§ 26.5-4-201 *et seq.* is reproduced in relevant part at App.187a-208a.

8 Code of Colorado Regulations § 1404-1 is reproduced in relevant part at App.209a-215a.

STATEMENT OF THE CASE

A. Colorado's universal preschool program

In 2020, Colorado voters passed a ballot proposition to provide state funding for its universal preschool program (UPK). The General Assembly then codified this program into law, allowing preschools to begin receiving funding for the 2023-24 school year. Colo. Rev. Stat. §§ 26.5-4-201 *et seq.* (UPK statute). UPK is administered by the Department of Early Childhood and covers the cost of fifteen hours per week of "preschool services" for all Colorado children "regardless of their

economic circumstances." App.188a. The program's primary purpose is "[t]o provide children in Colorado access to voluntary, high-quality, universal preschool services free of charge in the school year before a child enrolls in kindergarten." App.195a.

Colorado's universal preschool program is a "[m]ixed delivery system," meaning both public and private preschools participate. App.6a. The UPK statute requires the Department to adopt via regulation "quality standards" for participating preschools. *Ibid.* These standards include an equal opportunity mandate (the Mandate) that "each preschool provider provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability[.]" App.204a. Identical language is included in the Department's regulations and UPK preschool contracts. App.6a, 62a, 212a. And Respondents have conceded that the government's interest in enforcing each of the Mandate's protected characteristics is "the same." See Ex. 21 to Pl's. Mot. Summary J. at 15:10-16:16, *Darren Patterson Christian Acad.* v. *Roy*, No. 23-1557 (D. Colo. June 21, 2024), ECF.78-21.

To enroll in a preschool that participates in Colorado's universal preschool program, families first sign up via the Department's online portal. App.7a. They then rank up to five UPK preschools before being "matched" with a preschool by the Department's algorithm. *Ibid.* The Department requires UPK preschools to admit every family matched with them until their program is full, *unless* the preschool receives a Department-approved exemption. *Ibid.* The Department

grants exemptions "to help match preschools with specific groups of students that they are designed to serve." App.7a, 41a ("making sure that UPK's website matched families with the right preschools for their children").

Despite Colorado's efforts to recruit a broad range of preschools, its universal preschool program has suffered from a shortage of licensed preschools in particular geographic areas, meaning that not every interested family is able to find an available seat.[1]

B. The Archdiocese of Denver and its Catholic preschools

Petitioner the Archdiocese of Denver currently oversees thirty-four Catholic preschools. The central mission of these parish preschools is to partner with families "to bring [their] child to encounter Jesus Christ and the truths of our Catholic faith through their intellectual, spiritual, moral, and human formation." App.235a. To help advance this mission, the Archdiocese requires all administrators, teachers, and staff to sign a statement of "Community Beliefs and Commitments," by which they affirm that they will support the teachings of the Catholic Church and refrain from conduct that would "discredit, disgrace, or bring scandal to" the school. App.221a, 228a, 234a. Parents are required to sign a similar statement at the time of enrollment, which explains that "all Catholic school families must understand and display a positive and supportive attitude toward the Catholic Church,

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[1] *E.g.*, Lindsey Jensen, *Not enough UPK childcare providers for families applying again this year*, KOAA News5, Aug. 1, 2024, https://perma.cc/T8YJ-UL28.

her teachings, her work, and the mission of the Catholic school." App.240a.

This alignment between what the school teaches and what parents want for their children is "vital" because Archdiocesan "schools do not function in [their] mission to help bring children to Jesus Christ if not for bringing them to Jesus Christ through your family." App.235a. If a family actively opposes the teachings of the Catholic Church and lives as "a counter-witness to Catholic doctrine or morals," their participation in the school community would directly impair the ability of the school to form its students in the faith. App.240a, 272a-275a, 316a-317a.

The Archdiocese provides parish preschools—including those of Petitioners St. Mary and St. Bernadette—with binding guidance on how to implement these beliefs in several ways. App.308a-320a; see App.242a-279a. The Archdiocese instructs its school leaders to be "abundantly clear" at the time of a family's enrollment about what the school teaches on matters of faith, and specifically on sexual orientation and gender identity. App.314a-318a. "If the family doesn't see eye to eye on [the Catholic Church's teachings regarding biological sex and marriage], we ask our school leaders to please not admit the child out of abundant respect for the family." App.318a.[2]

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[2] Making families aware of these religious beliefs and expectations at the time of enrollment also helps avoid unnecessary conflicts. Although many parish preschools have been licensed for decades, the Department agrees that not one "has any history of a complaint from an LGBTQ family or other person alleging LGBTQ-based discrimination." App.306a.

If a child is enrolled and only later "begins asserting an identity that's at odds with his or her biological sex," school leaders are directed to "share with the parents the church's teaching" and to "explain that we would not be able to make accommodations that we might see in secular institutions," like using "pronouns," "bathroom[s]" and "uniform[s]" that are "inconsistent with the child's biological sex." App.318a-319a; see also App.319a ("every preschool is expected to follow this guidance").

Petitioners Daniel and Lisa Sheley are parishioners at St. Mary Catholic Parish in Littleton. The Sheleys' Catholic faith directs them to provide a Catholic education for their children. App.84a. They have five children currently attending Petitioner St. Mary's school, two of whom are in preschool now. And they have another child who will begin preschool in 2028.

C. Colorado permits exemptions from the equal opportunity Mandate

The equal opportunity Mandate requires all UPK preschools to give families an "equal opportunity" to enroll and receive services regardless of any protected characteristic. App.6a. Both the Department and the Tenth Circuit agree that every UPK preschool must "follow the letter of the [Mandate] as enshrined in state law." App.26a, 32a (Mandate "is a hard limit"). Yet it turns out the Department has granted numerous exemptions—both written in regulations and permitted in practice.

Income level and disability exemptions. The Department has created by regulation two categorical exemptions from the Mandate. First, it permits UPK preschools to consider income level by allowing Head

Start preschools to prioritize low-income families. App.347a ("families that are above a certain income threshold" can be excluded); App.8a, 35a-37a. Preschools can also consider a child's disability to reserve seats for children "with an Individualized Education Program (IEP)." App.8a, 35a-37a, 347a (agreeing that "some UPK providers only serve children with certain disabilities"). Both Department-created regulatory exemptions violate the plain terms of the Mandate by denying Colorado families an "equal opportunity" to enroll in UPK preschools based on a protected characteristic.[3]

"Catchall" exemption. The Department—during trial—announced new proposed regulations creating a "catchall" exemption that allows UPK preschools to "grant preference to an eligible child" based on "the child and/or family being a part of a specific community." App.9a, 350a-352a. This preference was created to be "inclusive of different types of communities." App.340a, 344a.

Respondent Dawn Odean, the director of Colorado's universal preschool program, testified at trial that this catchall exemption would allow UPK preschools to admit only "gender-nonconforming children" and to prioritize serving "children of color from

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[3] The UPK regulations initially included a "congregation" exemption, permitting "faith-based" providers to limit enrollment to their "congregation." App.66a-70a. The Department took the position in litigation that this would *not* allow Petitioners to consider sexual orientation or gender identity when enrolling families. App.70a. After the district court held this exemption violated the Mandate, Colorado revised its regulations during the appeal and removed it. App.16a-17a, 16a n.8.

historically underserved areas," and "the LGBTQ community." App.353a-355a. Calling the Mandate an "antidiscrimination provision," she claimed that these exemptions are consistent with the Mandate. Specifically, she said she interprets the Mandate to allow UPK preschools to "prioritize[ ] families who have historically been discriminated against." App.337a, 353a-354a.And she repeatedly articulated this view: "it's the law to ensure that these children and their families who historically have been discriminated against aren't[.]" App.342a; see App.322a, 335a, 363a (similar). Odean was "unaware" that Catholics have been historically discriminated against. App.363a.

Statutory exemption. The UPK statute also includes an express grant of discretion: "[T]he department may allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II).

D. The Department denies Petitioners' request for a religious accommodation

On February 17, 2023, the Archdiocese requested an accommodation from the Mandate that would allow its preschools to admit only families who agree with the Catholic Church's teachings, including on gender and sexuality. The request explained that enforcing the Mandate against faith-based preschools' sincere religious exercise "will severely restrict the ability of faith-based providers to participate in the program without compromising their sincerely held religious beliefs." App.283a.

The Department responded that no religious accommodation would be provided, and that "no provider may discriminate against children or families in violation of state statute." App.289a-290a. This bars Petitioners from participating in UPK unless they are willing to compromise their religious beliefs. App.367a ("the [Mandate] is the obstacle to their participating," "[i]f they're choosing to discriminate"); Resp. C.A. Br. 13 (characterizing Plaintiffs' adherence to their religious practices as seeking "permission to discriminate"); App.280a-282a.

E. Procedural background

Petitioners filed suit on August 18, 2023, and requested a preliminary injunction enabling them to participate in UPK for the 2023-24 school year. Instead of ruling on the preliminary injunction motion, the court set a discovery and briefing schedule before holding a three-day bench trial with ten witnesses in January 2024. Citing *Employment Division* v. *Smith*, the court declined to apply strict scrutiny to what it called the "sexual-orientation and gender-identity aspects of the equal-opportunity requirement," instead holding that they were "neutral and generally applicable." App.100a-135a. The court entered final judgment in June 2024. App.172a.

The Tenth Circuit affirmed, again relying on *Smith*. It first held that *Carson*, *Espinoza*, and *Trinity Lutheran* were "distinguish[able]" because *other* religious schools were "welcome participants in Colorado's UPK program." App.21a. Therefore, according to the Tenth Circuit, the Mandate did not exclude religious schools "on the explicit basis that they were religious and not secular." *Ibid.* After concluding *Carson* did not

apply, the court found that Petitioners' religious exercise was only "infringed incidentally," and applied *Smith*. App.22a. Rejecting Petitioners' general applicability arguments, the court held that the Mandate did not permit any "comparable" categorical exemptions, App.40a, and "the Department has no discretion to waive the nondiscrimination requirement." App.34a. Indeed, the Tenth Circuit deemed Colorado's program "a model example of maintaining neutral and generally applicable nondiscrimination laws while nonetheless trying to accommodate the exercise of religious beliefs." App.42a.[4]

During this litigation, two parish preschools—Wellspring Catholic Academy (the parish school of Petitioner St. Bernadette) and Guardian Angels Catholic School—closed their doors due to shortfalls in funding and decreased enrollment. Across the Archdiocese, parish preschool enrollment has declined almost twenty percent since UPK was enacted. And families committed to Catholic education, like the Sheleys, are missing out on thousands of dollars of state funding solely because they chose a Catholic preschool for their children.

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[4] The district court and Tenth Circuit agreed that Petitioners Daniel Sheley, Lisa Sheley, St. Mary Catholic Parish in Littleton, and St. Bernadette Catholic Parish in Lakewood have standing. App.16a-18a. On appeal, Respondents do not dispute these Petitioners' standing. See Resp. C.A. Br. 75-79. The district court, however, held that the Archdiocese of Denver did not have associational standing to represent its preschools. App.14a.The Tenth Circuit found that resolving this question was unnecessary as the relief sought by all Petitioners was essentially the same, and it therefore declined to address the issue. App.17a-18a.

REASONS FOR GRANTING THE PETITION

The decision below misreads this Court's decisions in *Fulton* and *Carson*. In so doing, the Tenth Circuit exacerbated a 7-4 split among the lower courts, undermined the rule this Court articulated in *Carson*, and provided a clear example of why *Smith* should be overruled.

First, there is a deep, acknowledged split over how to apply *Fulton* to determine which secular exemptions undermine general applicability in the free exercise context. Seven courts consider *all* secular exemptions and government discretion in determining whether any would undermine the government's asserted interest. Four courts, meanwhile, use a cramped set of potential secular comparators, looking only for *identical* secular exemptions and *unfettered* discretion.

Second, the Tenth Circuit held that *Carson* governs only when the government excludes religious groups "on the explicit basis" that their conduct is religious. App.21a-22a. This contradicts *Carson*'s clear rule: Excluding religious schools from a public benefit "because of their religious exercise" triggers strict scrutiny. 596 U.S. 767, 778-781 (2022) (citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963)); see also *Mahmoud* v. *Taylor*, 606 U.S. 522, 561 (2025) (access to public benefits cannot be conditioned "on parents' willingness to accept a burden on their religious exercise"). By limiting *Carson* to explicitly religious exclusions, the Tenth Circuit joins a growing number of courts that have read *Carson* solely to prohibit religious targeting. But *Carson* should not be so easy to circumvent.

In both instances, the source of the mischief is the unsound rule of *Smith*, which will only continue to resist predictable application and distort other free-exercise doctrines until this Court addresses it. This case therefore also presents an opportunity to reconsider *Smith* and put the Free Exercise Clause back onto the right path.

I. The decision below exacerbates a 7-4 split over the test for determining whether a law is generally applicable under the Free Exercise Clause.

Fulton confirmed that, under *Smith*, a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." 593 U.S. 522, 534 (2021); see also *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022); *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021). A 7-4 split has developed among the lower courts over the interpretation of *Smith*'s general applicability rule.

The majority rule evaluates all discretion and categorical exemptions permitted by a regulatory scheme to determine if they pose a similar threat to the government's asserted interest as the prohibited religious conduct. The minority rule, which the court here embraced, holds that only *unfettered* discretion or categorical exemptions for *identical* secular conduct can undermine general applicability.

Three Justices of this Court have explicitly acknowledged this split, correctly identifying it as "widespread," "entrenched," and worthy of this Court's review. *Dr. A* v. *Hochul*, 142 S. Ct. 2569, 2570 (2022)

(Thomas, J., dissenting from denial of certiorari, joined by Alito and Gorsuch, JJ.) (split over whether law is "generally applicable" if it "exempts secular conduct that similarly frustrates the specific interest that the [law] serves"). The split has only grown since then, with the addition of *six* more decisions—including an en banc Ninth Circuit decision, a Second Circuit decision, and the decision below, which recognized the split by expressly rejecting the leading case on the other side.

A. Seven courts evaluate all discretion and categorical exemptions to determine whether they undermine the government's asserted interests in a similar way.

The leading case for the majority rule is the Ninth Circuit's decision in *Fellowship of Christian Athletes* v. *San Jose Unified School District*, 82 F.4th 664 (9th Cir. 2023) (en banc) (*FCA*). There, a school district claimed that a religious student group's requirement that its leaders share its religious beliefs about marriage constituted religious and sexual orientation discrimination in violation of the district's nondiscrimination policy. The district, however, had discretion to grant exemptions from the policy when doing so aligned with its "Board-adopted equity policy." *Id.* at 687. And the district permitted exemptions for secular student groups that discriminated "on the basis of sex and ethnicity." *Id.* at 688.

The en banc Ninth Circuit found this scheme violated "bedrock requirements of the Free Exercise Clause." *FCA*, 82 F.4th at 686. On discretion, the court rejected the argument that discretion mattered only if it was "unfettered." *Id.* at 687. Rather, under *Fulton*,

the "mere existence of a discretionary mechanism * * * can be sufficient to render a policy not generally applicable" because it allows the government to favor secular conduct over religious conduct. *Id.* at 687-688 (calling a focus on "unfettered" discretion "overly narrow"); accord *Bates* v. *Pakseresht*, 146 F.4th 772, 797 (9th Cir. 2025) (rejecting argument that discretion must be "completely unfettered").

Turning to the secular comparators, the Ninth Circuit held that district-permitted exemptions from other aspects of the non-discrimination provision—*i.e.,* allowing clubs to distinguish among students based on their sex and ethnicity—were comparable to the religious accommodation FCA sought regarding a student leader's sexual orientation and religion. This was because "[w]hether [the secular exemptions] are based on gender, race, or faith, each * * * pose[s] an identical risk to the District's stated interest in ensuring equal access for all student to all programs." *FCA*, 82 F.4th at 689. The Ninth Circuit thus treated *different* secular exemptions from the non-discrimination provision as "comparable" because those exemptions for other protected characteristics still undermined the district's asserted interest in ensuring equal treatment. *Ibid.*; contra App.38a-39a (holding that only exemptions for the same form of "discrimination" are comparable).[5]

The Third, Sixth, and Eleventh Circuits, and the state supreme courts of Louisiana, Iowa, and Hawaii,

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[5] Several district courts have also applied this approach to general applicability. See *Fellowship of Christian Athletes* v. *District of Columbia*, 743 F. Supp. 3d 73, 90-92 (D.D.C. 2024) (collecting cases).

have likewise refused to cabin general applicability as the court did below.

In *Blackhawk* v. *Pennsylvania*, the Third Circuit agreed that the general applicability of a bear-possession permitting requirement was undermined both through "discretionary exemptions" and by "categorical exemptions." 381 F.3d 202, 209-211 (3d Cir. 2004) (Alito, J.). The court rejected the defendant's argument that the government's discretion was permissible because the discretion was objectively tailored to its interests—*i.e.*, not unfettered. *Id.* at 209-210. The court separately explained that the "state's interest in raising money is undermined by *any exemption*" that would similarly undercut that asserted interest. *Id.* at 211 (emphasis added). It did not cabin relevant exemptions solely to identical conduct, instead treating exemptions for "circuses and zoos" as comparable to the requested religious exemption. *Ibid.* See also *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (treating medical and religious beard accommodations as comparable); *Smith* v. *City of Atlantic City*, 138 F.4th 759, 772 (3d Cir. 2025) (rejecting focus on one "provision" "in isolation" and instead considering all exemptions that could similarly undermine the government's interest).

In *Monclova Christian Academy* v. *Toledo-Lucas County Health Department*, the Sixth Circuit compared the pandemic-era closing of religious schools not just to also-closed secular schools, but also to still-open "gyms, tanning salons, office buildings, and the Hollywood Casino." 984 F.3d 477, 482 (6th Cir. 2020). The court rejected a "myopic focus solely on" the portion of the restrictions that applied to schools, as that would "allow for easy evasion of the Free Exercise guarantee

of equal treatment." *Id.* at 481. It further reasoned that this Court "routinely identifies as comparable" secular activities that are "very different" from the prohibited religious conduct at issue, but which pose a similar threat to the government's interests. *Ibid.*

In *Midrash Sephardi, Inc.* v. *Town of Surfside*, the Eleventh Circuit similarly held that private clubs were valid comparators to a synagogue seeking to build in a downtown commercial district. 366 F.3d 1214, 1234-1235 (11th Cir. 2004). The court rejected the argument that they were not comparable because private club patrons were more likely to spend time and money at the other retail establishments in the downtown commercial zone. *Ibid.*

The supreme courts of Louisiana, Iowa, and Hawaii likewise evaluate all secular conduct posing similar risks to the government's interests. See *Louisiana* v. *Spell*, 339 So.3d 1125, 1135-1137 (La. 2022) (comparing exemptions allowing "Walmart, Target and Home Depot" to remain open during COVID to denied exemptions for churches); *Mitchell County* v. *Zimmerman*, 810 N.W.2d 1, 15-16 (Iowa 2012) (road ordinance not generally applicable when it banned traditional Amish carriage wheels because of road damage but allowed school buses to use ice grips and snow studs year-round); *Hawaii* v. *Armitage*, 319 P.3d 1044, 1067 (Haw. 2014) (law banning access to protected island

not generally applicable because it incorporated discretionary permit process).[6]

B. Four courts consider only unfettered discretion and categorical exemptions for identical secular conduct.

Four courts—the Tenth Circuit, the Second Circuit, Connecticut, and California—take a myopic view of what types of discretion or exempted secular conduct can undermine general applicability.

In *Emilee Carpenter, LLC* v. *James*, the Second Circuit held that New York's public accommodations law was generally applicable despite express exemptions allowed by the same statute for discrimination based on sex and gender identity, claiming that "unique policy and legal considerations" distinguish those exemptions from a religious exemption from the same law based on sexual orientation. 107 F.4th 92, 111 (2d Cir. 2024) (government's "interests in prohibiting discrimination on different protected grounds [listed in public accommodations law] are not identical"); see also *Miller* v. *McDonald*, 130 F.4th 258, 267 (2d Cir. 2025) (per curiam), petition for cert. pending, No. 24-681 (filed Aug. 4, 2025) (concluding that religious and medical exemptions are not comparable). The Second Circuit has also held that *Fulton* bars only discretionary exemptions that are "unfettered" and not "objectively defined." *We The Patriots USA, Inc.* v.

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[6] The First Circuit has left open the question whether all secular exemptions must be considered in determining general applicability. See *Brox* v. *Woods Hole, Martha's Vineyard & Nantucket Steamship Auth.*, 83 F.4th 87, 100 (1st Cir. 2023) (leaving open question whether existing medical exemption had to be compared with requested religious exemption).

Hochul, 17 F.4th 266, 288-289 (2d Cir. 2021) (quoting *303 Creative LLC* v. *Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021), rev'd on other grounds, 600 U.S. 570 (2023), and *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1081-1082 (9th Cir. 2015)).

Connecticut has followed the Second Circuit's lead. In *Spillane* v. *Lamont*, the Connecticut Supreme Court held that a law's medical exemptions, which vested substantial discretion in medical providers, did not defeat general applicability because its application by government officials was not "entirely discretionary" and was "framed in objective terms." 323 A.3d 1007, 1024-1025 (Conn. 2024) (citing *We The Patriots*).

California follows the same path. *North Coast Women's Care Medical Group* v. *Superior Court* held in a single sentence that California's public accommodations law, the Unruh Act, is neutral and generally applicable under *Smith* because its text calls for equal services for all. 189 P.3d 959, 965 (Cal. 2008). *North Coast* ignored the Unruh Act's express, categorical exemption for age discrimination in housing, and its judicially created exemption for any discrimination that is "reasonable" and consistent with "public policy." Cal. Civ. Code §§ 51.2-51.4; *Koire* v. *Metro Car Wash*, 707 P.2d 195, 197-198 (Cal. 1985). It also ignored that the Act does not "confer any right or privilege * * * limited by law"—a carveout that has been used to exempt discriminatory practices at both insurance companies and car rental agencies. Cal. Civ. Code § 51(c). California courts have continued to rely on *North Coast* despite this Court's intervening decisions. See *Civil Rts. Dep't* v. *Cathy's Creations, Inc.*, 109 Cal. App. 5th 204, 265 (Cal. Ct. App. 2025), as modified on

denial of reh'g (Mar. 5, 2025), petition for cert. pending, No. 25-233 (filed Aug. 26, 2025) ("*Fulton* does not fatally undercut *North Coast*").

The decision below reaffirmed the Tenth Circuit's position in this split. After first trying to "interpret" away the secular exemptions, the court concluded that exemptions from the Mandate based on disability and income level weren't "comparable" to exemptions based on sexual orientation and gender identity because the conduct they prohibit isn't the same. App.39a-40a (each protected characteristic addresses different "barriers" to equal access). See also *303 Creative*, 6 F.4th at 1188 (refusing to consider the law's discretionary exemption because it was not "entirely discretionary"), rev'd on other grounds, 600 U.S. 570 (2023).

In the decision below, the Tenth Circuit also expressly broke with the Ninth Circuit's decision in *Fellowship of Christian Athletes*. The court first noted that "[w]e are not bound by th[at] case," then sought to distinguish the decision by claiming that "disability and income level are fundamentally different from other suspect classifications" protected by Colorado's Mandate. App.40a-41a. But by concluding that these varied exemptions from the same Mandate *aren't* comparable for free exercise purposes, the Tenth Circuit simply reinforced the split. Contra *FCA*, 82 F.4th at 689 (evaluating *all* exemptions from district's non-discrimination requirement to determine what is "comparable" under *Tandon*).

C. The decision below is wrong.

The decision below conflicts with *Fulton* and *Tandon* v. *Newsom* both in its comparability analysis and

in its failure to recognize Respondents' discretion to create exemptions. On comparability, the Tenth Circuit said that that disability and income level exemptions from the Mandate aren't "comparable" to exemptions based on sexual orientation and gender identity, because they address different "barriers to equal access." App.40a (barriers are "completely different and thus not comparable").

That flips general applicability analysis on its head. Instead of assessing whether multiple exemptions to the same law undermine the government's interest in similar ways, the Tenth Circuit did exactly what this Court has said *not* to do: It focused on the different reasons Colorado exempts others from complying with the Mandate. See *Tandon*, 593 U.S. at 62. Even *assuming* children with disabilities face "different barriers" to enrollment than, *e.g.*, children who identify as transgender, denying equal access in either case "undermines the government's asserted interests [in enforcing the Mandate] in a similar way." *Fulton*, 593 U.S. at 534. Here, all the protected characteristics are treated identically in the same statutory sentence, and Respondents conceded their interest in all of them is the same. App.6a; see p. 5, *supra*. Permitting a government to "divvy up its exemption regimes provision-by-provision"—or here, word-by-word—"would permit governments to subvert free exercise through clever drafting." *Atlantic City*, 138 F.4th at 772.

On discretion, the Tenth Circuit simply ignored the ample discretion Respondents have to accommodate preschools that require exemptions from the Mandate's plain text. That conflicts with *Fulton*'s holding that a law burdening religious exercise is not generally

applicable whenever "it invites the government to consider the particular reasons for a person's conduct" through some discretionary mechanism—"regardless whether any exceptions have been given." 593 U.S. at 523, 537.

The trial record shows the Department has many forms of discretion. Respondent Odean testified that the catchall exemption could be used to allow preschools to admit only "gender-nonconforming children" and to prioritize serving "children of color from historically underserved areas" and "the LGBTQ community." See pp. 9-10, *supra*. Similarly, the UPK statute permits exemptions from quality standards to "allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance with the quality standards." App.33a.

Respondents' actions also confirm they have broad discretion: The Department consistently treats the Mandate not as a strict obligation, but as a flexible provision that allows it to take into consideration all kinds of *other* important interests (*e.g.*, helping kids with disabilities and prioritizing historically discriminated against communities), while nevertheless refusing to accommodate sincere religious exercise. Respondents believe these preferences are permissible because they interpret the Mandate "to ensure that these children and their families who historically have been discriminated against aren't." App.322a, 342a. Indeed, this interpretation of the Mandate is so flexible that the only providers who had to seek (and were denied) exemptions were a handful of religious preschools. See Ex. 21 to Pl's. Mot. Summary J. at 77:5-19, *Darren Patterson Christian Acad.* v. *Roy*, No. 1:23-

cv-1557 (D. Colo. June 21, 2024), ECF No. 78-21 (listing Petitioners St. Mary and St. Bernadette alongside three other religious preschools).

Respondents contend there are no exemptions at all because they "interpret[]" the Mandate to implicitly permit these exemptions. *E.g.*, Resp. C.A. Br. 8, App.36a. But "that is word play." *Maryville Baptist Church, Inc.* v. *Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (rejecting attempt to use clever drafting and interpretation to get around practical impact of the law). What matters is the real operation of the law. If the Mandate can be read to accommodate other interests *despite* the law's plain text, Respondents could similarly interpret the Mandate to respect the First Amendment and accommodate Petitioners.

II. Lower courts are defying *Carson*'s prohibition on denying religious people benefits "because of their religious exercise."

The Tenth Circuit also defied this Court's *Trinity Lutheran–Espinoza–Carson* line of precedent by limiting the rule of *Carson* to situations where the law excluding religious people from a generally available benefit is phrased in explicitly religious terms. A growing number of lower courts have made the same move, rejecting *Carson*'s straightforward rule and offering an easy workaround for governments to pick winners and losers among religious groups in public programs. This radical narrowing of *Carson* should be rejected before it metastasizes further.

1. This Court has long held that "[a] person may not be compelled to choose between [religious] exercise" and "participation in an otherwise available pub-

lic program," regardless of whether the exclusion is explicit or "neutral on its face." *Thomas* v. *Review Bd.*, 450 U.S. 707, 708, 717 (1981). So when government conditions "a benefit or privilege" on a person's "willingness to violate" her religious beliefs, it triggers strict scrutiny. *Sherbert*, 374 U.S. at 404-409. This rule reflects the straightforward principle that, under the First Amendment, each faith must "flourish" or wither "according to the zeal of its adherents and the appeal of its dogma," *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)—not because the government has put a thumb on the scale.

The Court has repeatedly applied this rule in the context of religious education, holding that excluding religious schools from otherwise-available public benefits is "odious to our Constitution," *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 467 (2020); that the rule applies equally to tuition aid as to other types of benefits, *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 475-476 (2020); and that the rule applies not only when schools are excluded because of their religious status but also "*because of their religious exercise*," *Carson*, 596 U.S. at 781 (emphasis added). Cf. *Mahmoud*, 606 U.S. at 561 ("Public education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise.").

Indeed, *Carson* repeatedly confirmed that the First Amendment presumptively prohibits "enactments that exclude some members of the community from an otherwise generally available public benefit *because of their religious exercise*." *Carson,* 596 U.S. at 781 (emphasis added); see also *id.* at 785 ("the prohibition on

denying the benefit based on a recipient's *religious exercise*" (emphasis added)); *id.* at 789 ("Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their *religious exercise*." (emphasis added)).

In reaching these conclusions, this Court has eschewed *Smith*, relying instead on the separate public benefits line of free exercise caselaw originating with *Sherbert* and passing through *Thomas, Trinity Lutheran, Espinoza,* and *Carson*. In short, when it comes to free exercise cases concerning access to public benefits, *Carson* is the governing standard, and *Smith* is at best a backup rule.

2. Despite this clear instruction, several states have sought to dramatically narrow the rule of *Trinity Lutheran*, *Espinoza*, and *Carson*. They claim that religious people can be excluded from generally available public benefit programs based on their religious exercise as long as the exclusion isn't *explicitly* religious. And so far, several lower courts—the Fourth Circuit, the Ninth Circuit, and now the Tenth Circuit, have agreed. The rule in these courts is that religious groups can be excluded "because of their religious exercise," *Carson*, 596 U.S. at 781, as long as the exclusion was not made "on the explicit basis" that the burdened activity was religious, and as long as religion was not "specifically targeted." App.21a, 22a.

Courts taking this cramped view of *Carson* have followed a common pattern.

In *Youth 71Five Ministries* v. *Williams*, an Oregon "Youth Community Investment Grant Program" with-

drew grants from an otherwise-eligible Christian ministry because the ministry required its employees and volunteers to agree with a "Christian statement of faith," a violation of the program's nondiscrimination requirements. 153 F.4th 704, 714 (9th Cir. 2025). The Ninth Circuit rejected the ministry's *Carson* claim, saying that "unlike the religious-use prohibition at issue in *Carson*," the challenged "[r]ule does not deny funding based on a practice exclusive to religious organizations." *Id.* at 719. The Ninth Circuit went on to hold that *Smith* was the right rule to apply, not *Carson*, and that the religious plaintiffs' claims failed under the *Smith* standard. *Id.* at 720.

Similarly, in *Kim* v. *Board of Education of Howard County*, the Fourth Circuit concluded that *Trinity Lutheran*, *Espinoza*, and *Carson* "stand only for the point that religious schools cannot be excluded from grant programs solely because of their religious character." 93 F.4th 733, 748 (4th Cir. 2024). That is because, the court said, "[t]he programs in those cases *explicitly* barred public funds from going to religious actors 'solely because of their religious character.'" *Ibid.* (emphasis added). The Fourth Circuit thus distinguished *Carson* and applied the rule of *Smith*, finding that the exclusion of the religious plaintiff from a benefits program was both neutral and generally applicable. *Id.* at 747-748.

In the decision below, the Tenth Circuit similarly refused to apply strict scrutiny, distinguishing "the *Carson* line of cases" on the ground that they "addressed laws that targeted 'religious status' and 'religious use' on the explicit basis that they were religious and not secular." App.21a. It described the exclusion

of Catholic preschools from UPK as "not a targeted burden on religious use." App.22a. And it held that "when a particular religious practice is alleged to be infringed incidentally, rather than religious status or use being specifically targeted, the Supreme Court requires that the law at issue be neutral and generally applicable." *Ibid.* That is, *Carson* doesn't apply; *Smith* does.[7]

3. The decision below is wrong. Under *Carson*, when "otherwise eligible schools" are "exclude[d]" from a benefits program "on the basis of their religious exercise," the exclusion triggers strict scrutiny. 596 U.S. at 789; accord *id.* at 785. Here, there is no question that the parish preschools are otherwise eligible for UPK funding. And there is no question that those preschools have been excluded from that benefit "because of their religious exercise," *id.* at 781—namely, their religiously motivated policies related to sex and gender. So, under *Carson*, the exclusion should have been "subjected to 'the strictest scrutiny.'" *Id.* at 780.

It defies *Carson* to reject this conclusion because the exclusion does not "specifically target[]" religious exercise "on the explicit basis that" it is "religious."

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[7] Even the town-tuitioning program at issue in *Carson* itself has now been held to be outside the reach of *Carson*. In *St. Dominic Academy* v. *Makin*, 744 F. Supp. 3d 43 (D. Me. 2024), and *Crosspoint Church* v. *Makin*, 719 F. Supp. 3d 99 (D. Me. 2024), religious schools sued over Maine's town-tuitioning program. While *Carson* was pending, Maine amended its laws to exclude from public funding schools that "discriminate" based on "sexual orientation or gender identity." *St. Dominic*, 744 F. Supp. 3d at 53. As a result, the district court treated the exclusion of those schools as governed by *Smith* rather than *Carson*, and upheld it. *Id.* at 69-70, 77-79; *Crosspoint*, 719 F. Supp. 3d at 117-123.

App.21a-22a. *Carson* itself embraced no such limitation. And both before and after *Carson*, this Court has applied the prohibition on religious-exercise-based benefits exclusions even when the exclusion is "neutral on its face." *Thomas*, 450 U.S. at 717; see also *Sherbert*, 374 U.S. at 401. In *Mahmoud*, for example, this Court applied "the *Carson* line of cases" (App.21a), where parents were excluded from the "benefit" of public education if they exercised their religion by declining to submit their children to "LGBTQ+-inclusive" instruction. 606 U.S. at 561, 563 (citing *Trinity Lutheran*). And the Court did so even though the County did not deny opt-outs "on the explicit basis that" objections were "religious" (App.21a), but rather had a "no-opt-out" policy that said nothing about religion at all. *Mahmoud*, 606 U.S. at 538, 563.

Nor does it matter that Colorado has included *other* "religious schools as welcome participants." App.21a. In *Carson* itself, Maine didn't exclude *all* religious schools, but only those that "present[ed] academic material through the lens of th[eir] faith." 596 U.S. at 786-787. And differentiation *between* religions is constitutionally problematic—indeed, "fundamentally foreign to our constitutional order." *Catholic Charities Bureau, Inc.* v. *Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 249 (2025); see also *id.* at 250 ("eligibility" "ultimately turn[ed] on inherently religious choices," like whether to "serve only co-religionists").

Carson thus controls. "Regardless of how the benefit and restriction are described," the "operat[ion]" is the same: Catholic preschools have been excluded from UPK "because of [their] religious exercise." *Carson*, 596 U.S. at 781, 789. And this Court's holdings in

this area have "turned on the substance of free exercise protections, not on the presence or absence of magic words." *Id.* at 785.

This case presents the Court with the opportunity to stop lower courts' misbegotten effort to constrain *Carson* and reduce the protection of the Free Exercise Clause to a question of targeting only. It's especially appropriate to do so here, where the Department has put not just "a thumb" but an anvil "on the scale"—promising free tuition at any state-licensed preschool *unless* the preschool adheres to traditional religious beliefs that the State's "legislative majorities * * * find unseemly or uncouth." *Espinoza*, 591 U.S. at 513-514 (Gorsuch, J., concurring).

III. *Employment Division* v. *Smith* should be overruled.

Smith is at the root of both errors identified above. The Tenth Circuit looked to *Smith* instead of *Carson* because it concluded that Colorado's actions only "infringed incidentally" Petitioners' religious exercise. App.22a. And the Tenth Circuit's general applicability analysis confirms that this standard is easily misapplied. Worse, *Smith* continues to exert a gravitational pull on supposedly separate forms of free exercise analysis: By limiting *Carson* to "explicit" religious exclusions, App.21a, the Tenth Circuit refashioned an admittedly "independent line of precedent," App.19a, into merely another iteration of the stingiest applications of *Smith*'s prohibition on religious targeting.

In *Smith*, the Court "ambitiously attempted" to impose "a test that would bring order and predictability." *American Legion* v. *American Humanist Ass'n*, 588 U.S. 29, 48 (2019). But that test was not derived from

the text, history, or tradition of the Free Exercise Clause. See *City of Boerne* v. *Flores*, 521 U.S. 507, 565 (1997) (Souter, J., dissenting) (*Smith* Court "never had" briefing and argument on *Smith*'s historical merits as a general matter—not even in "*Smith* itself."); see also Stephanie Hall Barclay & Matthew M. Krauter, *The Untold Story of the Proto*-Smith *Era: Justice O'Connor's Papers and the Court's Free Exercise Revolution*, 174 U. Pa. L. Rev. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5143931 (describing *Smith* Court's "near total lack of discussion about the historical and textual meaning of the Free Exercise Clause"). And *Smith* has not delivered the administrability it promised.

Instead of a clear standard, *Smith*'s framework has proven highly malleable and unpredictable. Indeed, application of the test has "generated a long list of Circuit conflicts." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 284 (2022); see pp. 14-23, *supra*; *Fulton*, 593 U.S. at 608-612 (Alito, J., concurring). As this case and recent history demonstrate, "judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced." *Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring) (noting the Court's corrections to lower-court misapplication in COVID cases). The neutrality-and-general-applicability rule has thus invited semantic games and religious gerrymandering. See pp. 19-24, *supra*; *Fulton*, 593 U.S. at 624 (Gorsuch, J., concurring).

If *Smith* were rooted in text, history, and tradition, continuing to straighten out these repeated tangles would be a worthy task for this Court. But *Smith* is rootless. *Smith* "paid shockingly little attention to the text of the Free Exercise Clause. Instead of examining

what readers would have understood its words to mean when adopted, the opinion merely asked whether it was 'permissible' to read the text to have the meaning that the majority favored." *Fulton*, 593 U.S. at 564 (Alito, J., concurring) (quoting *Smith*, 494 U.S. at 878).

In short, the *Smith* test will not "work itself pure." *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 419 (2024) (Gorsuch, J., concurring) (quoting *Omychund* v. *Barker*, 1 Atk. 22, 33, 26 Eng. Rep. 15, 23 (Ch. 1744)). Only if this Court confronts *Smith* head on can it bring the jurisprudence of the Free Exercise Clause back into sync with its text, history, and tradition.

That renaissance of the Free Exercise Clause cannot come too soon. Religious people across the country are stuck in forever conflicts precisely because of the (sometimes willful) confusion among the lower courts over the meaning of the Free Exercise Clause. See, *e.g.*, *Pennsylvania* v. *President*, No. 25-2575 (3d Cir. appeal filed by Little Sisters of the Poor Aug. 20, 2025), on remand from *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 591 U.S. 657 (2020) (complaint filed Oct. 11, 2017) (religious order helping the elderly poor); *Klein* v. *Oregon Bureau of Lab. & Indus.,* No. A159899 (Or. Ct. App. argued Jan. 30, 2024), on remand from *Klein* v. *Oregon Bureau of Lab. & Indus.,* 143 S. Ct. 2686 (2023) (complaint filed Jan. 17, 2013) (religious baker); *Miller* v. *Civil Rts. Dep't*, No. 25-233 (petition for cert. filed Aug. 26, 2025) (administrative complaint filed Oct. 18, 2017) (religious baker); *Yeshiva Univ.* v. *YU Pride All.*, 143 S. Ct. 1 (2022) (religious university); *Roman Catholic Diocese of Albany* v. *Harris,* 145 S. Ct. 2794 (2025) (second

GVR; religious groups seeking protection from abortion mandate). Religious people should not have to endure years of litigation because the law is unclear and state governments are unyielding.

IV. This case is an excellent vehicle to address issues of nationwide importance.

This case is an excellent vehicle to resolve the questions presented. It comes to the Court after final judgment and with a robust record reflecting the three-day bench trial in the district court. Both the district court and the Tenth Circuit fully addressed the legal issues presented by each of the first two questions presented, with the Tenth Circuit noting its disagreement with the en banc Ninth Circuit's majority position. And both courts below explicitly relied on *Smith* to rule against Petitioners, even grasping the nettle and embracing not only *Smith*'s rule but also its much-criticized reasoning. *E.g.*, App.23a ("While the Constitution protects religious freedom, * * * the government must be able to enforce the law equally against everyone, no matter an individual's beliefs, lest we 'permit every citizen to become a law unto himself'" (quoting *Smith*, 494 U.S. at 879)). There are thus no barriers preventing this Court from reaching and resolving all the questions presented.

And those questions are important. Indeed, getting the Free Exercise Clause analysis right has only become *more* critical as government funding programs—especially in the education context—become ubiquitous. Enrollment in state-funded preschool programs alone reached an all-time high of over 1.75 million children in 2023-24. Allison H. Friedman-Krauss et al., *Executive Summary*, *The State of Preschool 2024 Year-*

book, NIEER, https://perma.cc/CN23-A455. And a record sixteen states plus the District of Columbia are now providing universal preschool funding, reflecting a trend toward mixed-delivery systems that integrate (and fund) private providers. NIEER, *National Report: State-by-State Disparities Widening in Preschool Access, Quality, Funding* (Apr. 18, 2024), https://perma.cc/5KNE-FYA9. Recent research into these programs also shows that—even after *Fulton* and *Carson*—"exclusion of religious providers is pervasive." Nicole Stelle Garnett, Tim Rosenberger & J. Theodore Austin, *The Persistence of Religious Discrimination in Publicly Funded Pre-K Programs*, Manhattan Institute (Jan. 21, 2025), https://perma.cc/PJ7D-VKJ8 (describing various ways in which states use participation requirements to bar or dissuade religious preschools).

Perversely, this imposes the greatest harm on those who can least afford it: low-income and historically disadvantaged families. Religious schools—and Catholic schools in particular—are "more likely to be associated with better civic outcomes," including "political tolerance, political participation, civic knowledge and skills, and voluntarism and social capital." EdChoice Br. at 27-29, *St. Mary Catholic Parish* v. *Roy*, No. 24-1267 (10th Cir. Aug. 21, 2024). Colorado is thus excluding the very schools that are the best at advancing civic values for children who are left out.

Nor are government attempts at religious exclusion by any means limited to education. In our pluralistic society, religious organizations participate in all kinds of government programs as they seek to serve both neighbor and country—education, job training,

refugee and immigration support, housing, social services, disaster relief, historic preservation, food assistance, and more. The Tenth Circuit's opinion paves the way for governments to exclude religious groups with politically unpopular beliefs from any of these programs—simply by invoking "nondiscrimination." That opens the door to even more religious gerrymandering. All but the most unsophisticated government actors will be able to craft neutral-sounding requirements that give them broad discretion to flexibly accommodate favored secular groups while penalizing disfavored religious believers.

Finally, this Court also need not speculate about the practical effect of the Tenth Circuit's decision. Since litigation began, two Archdiocesan preschools have closed, and enrollment at Archdiocesan preschools is down almost twenty percent. Families like the Sheleys have been forced to either follow the dictates of their faith at the cost of thousands of dollars per year or abandon their religious exercise. Colorado is thus imposing enormous—and unconstitutional—pressure on religious preschools to conform or close, and it is doing so in a way that the Tenth Circuit held up as a "model" to be replicated elsewhere. Allowing the decision below to stand will only fuel and expand this pressure campaign, which is damaging to religious groups, our country, and the rule of law.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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NOVEMBER 2025

APPENDIX

APPENDIX TABLE OF CONTENTS

FILED
United States Court of Appeals
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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 24-1267

ST. MARY CATHOLIC PARISH IN LITTLETON; ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD; LISA SHELEY; DANIEL SHELEY; ARCHDIOCESE OF DENVER,

Plaintiffs - Appellants,

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood; DAWN ODEAN, in her official capacity as Director of Colorado's Universal Preschool Program,

Defendants - Appellees,

THE JEWISH COALITION FOR RELIGIOUS LIBERTY; THE ROCKY MOUNTAIN DISTRICT LUTHERAN CHURCH MISSOURI SYNOD; THE COLORADO ASSOCIATION OF PRIVATE SCHOOLS; EDCHOICE, INC.; THE CONSCIENCE PROJECT;

ANDY ABOLS; KARINA RAMIREZ; ANA KAREN MEIER; JILL HALL; MELISSA DE LA CRUZ; PROTECT THE FIRST FOUNDATION; LAWRENCE G. SAGER; NELSON TEBBE; SCHOLARS FOR THE ADVANCEMENT OF CHILDREN'S CONSTITUTIONAL RIGHTS; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; ACLU OF COLORADO; CENTRAL CONFERENCE OF AMERICAN RABBIS; INTERFAITH ALLIANCE; INTERFAITH ALLIANCE OF COLORADO; KESHET; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; THE SIKH COALITION; UNION FOR REFORM JUDAISM; WOMEN OF REFORM JUDAISM; FIRST AMENDMENT SCHOLAR,

Amici Curiae.

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:23-CV-02079-JLK)

Nicholas R. Reaves, (Eric C. Rassbach, Mark. L. Rienzi, Joseph C. Davis, Jordan T. Varberg, and Amanda G. Dixon with him on the briefs), The Becket Fund for Religious Liberty, Washington, District of Columbia for Plaintiffs - Appellants.

Helen Norton, Deputy Solicitor General (Philip J. Weiser, Attorney General, Virginia R. Carreno, Second Assistant Attorney General, Janna K. Fischer, Senior Assistant Attorney General II with her on the brief), Colorado Department of Law, Denver, Colorado, for Defendants - Appellees.

Andrew M. Nussbaum, First and Fourteenth PLLC, Colorado Springs, Colorado, filed an amicus curiae brief for The Jewish Coalition for Religious Liberty, the Rocky Mountain District Lutheran Church Missouri Synod, and the Colorado Association of Private Schools.

Thomas M. Fisher, EdChoice Legal Advocates, Indianapolis, Indiana, filed an amicus curiae brief for EdChoice, Inc.

Gene C. Schaerr and James C. Phillips, Schaerr | Jaffe, LLP, Washington, D.C., filed an amicus curiae brief for Protect the First Foundation.

Andrea Picciotti-Bayer, The Conscience Project, Mclean, Virginia, filed an amicus curiae brief for The Conscience Project and individuals Andy Abols, Karina Ramirez, Ana Karen Meier, Jill Hall, and Melissa De La Cruz.

G.S. Hans, Civil Rights and Civil Liberties Clinic, Cornell Law School, Ithaca, New York, filed an amicus curiae brief for Professors Lawrence G. Sager and Nelson Tebbe.

Lauren Fontana, University of Colorado, Aurora, Colorado, filed an amicus curiae brief for Scholars for the Advancement of Children's Constitutional Rights.

Alex J. Luchenitser and Scott Lowder, Americans United for Separation of Church and State, Washington, D.C.; Timothy R. Macdonald, Sara R. Neel, and Anna I. Kurtz, American Civil Liberties Union Foundation of Colorado, Denver, Colorado; Daniel Mach, American Civil Liberties Union Foundation, Washington, District of Columbia; Karen L. Loewy and Kenneth D. Upton, Lambda Legal Defense and Education

Fund, Inc., Washington, District of Columbia, filed an amicus curiae brief for Americans United for Separation of Church and State, American Civil Liberties Union, American Civil Liberties Union of Colorado, Central Conference of American Rabbis, Interfaith Alliance, Interfaith Alliance of Colorado, Keshet, Lambda Legal Defense and Education Fund, Inc., The Sikh Coalition, Union for Reform Judaism, and Women of Reform Judaism.

Amalia Sax-Bolder, Craig M. Finger, and Lance T. Collins, Brownstein Hyatt Farber Schreck, LLP, Denver, Colorado, filed an amicus curiae brief for First Amendment scholar Amanda Shanor.

Before **PHILLIPS**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

FEDERICO, Circuit Judge.

In 2020, Colorado voters approved a proposition that created a dedicated source of public funding for voluntary, universal preschool in the state. Following this vote, Colorado passed legislation and established a Universal Preschool Program (UPK). Appellants are the Archdiocese of Denver, two Catholic parishes, and two parents of preschool-age children, challenging a section of UPK that requires all preschools receiving state funds to sign a nondiscrimination agreement. They argue that this requirement violates their rights under the First Amendment to the United States Constitution and seek an injunction preventing the nondiscrimination requirement from being applied to

them. After a three-day trial, the district court found that the nondiscrimination requirement does not run afoul of the First Amendment, denied injunctive relief, and entered final judgment. This timely appeal follows, and we have jurisdiction under 28 U.S.C. § 1291.

Our opinion will proceed as follows. In Section I, we begin by detailing Colorado UPK, discussing its legislative and regulatory structure and how it works for preschools and families. Next, we describe the plaintiffs and their lawsuit, the district court's findings, and the arguments on appeal. In Section II, we briefly explain why we need not decide one issue raised on appeal: the standing of the Archdiocese of Denver. In Section III, we explain the standard of review when a party seeks a preliminary injunction while raising a First Amendment challenge. Section IV is the heart of this appeal, where we dive into First Amendment doctrine and apply it to Colorado's UPK program. We reach our conclusion in Section V, affirming the district court's decision to deny injunctive relief.

I

A

In 2020, Colorado voters passed proposition EE to provide state funding for UPK. Colo. Rev. Stat. § 26.5-4-202(1)(a)(V). The Colorado General Assembly then implemented UPK by passing the Early Childhood Act (the Act). H.B. 21-1304, 73rd Gen. Assemb. (Colo. 2021). The purposes of this law are to "provide children in Colorado access to voluntary, high-quality, universal preschool services free of charge" and to "establish quality standards for publicly funded preschool providers that promote children's early learning and development, school readiness, and healthy

beginnings." Colo. Rev. Stat. § 26.5-4-204(1)(a), (d). The Act, along with additional legislation passed the next year, established a "[m]ixed delivery system" where a variety of different kinds of preschools, public and private, would be supported by state funds. *Id.* § 203(12). The implementation of the law was given to the executive director of the newly created Colorado Department of Early Childhood (the Department). *Id.* § 26.5-1-104(1).

To meet the goals of the Act, the General Assembly tasked the executive director of the Department with prescribing uniform quality standards for all preschools funded through UPK. *Id.* § 26.5-4-204(4)(a)(V). These standards would govern the minimum number of teaching hours, classroom sizes, teacher qualifications, and so forth. *Id.* § 205(2)(b). The legislature stated that, at a minimum, these quality standards must include a nondiscrimination requirement for all participating schools.[1] *Id.* Under the nondiscrimination requirement, each preschool must "provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family." *Id.* § 205(2)(b). This requirement was also codified as a final regulation by the Department. 8 Code of Colorado Regulations 1404-1 § 4.110.

Colorado preschools are not required to participate in UPK. But those that wish to participate in UPK and

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[1] Plaintiffs refer to this as "the Mandate" while the Department calls it the "equal-opportunity requirements." Op. Br. at 10; Resp. Br. at 17.

receive state funds are required to sign an agreement stating that they will adhere to the Act's quality standards, including the nondiscrimination requirement. These standards are absolute. UPK only has discretion to grant waivers "for a limited time" to preschools that do not meet its standards, so long as those schools are actively "working toward compliance with the quality standards" and the unmet standard does not relate to "health and safety[.]" *Id.* § 205(1)(b)(II).

Starting in 2022, preschools began registering with UPK to receive state funds. Families enroll their children in UPK preschools through an online portal. Families can select up to five registered preschools on Colorado's UPK website and then rank them in order of preference. An algorithm then matches families with one of their ranked choices.[2] Initially, some participating preschools thought this kind of ranking system was too haphazard because schools had no control over which students they were matched with. In response, the Department added a function where preschools can set different preferences in how the algorithm matches them with students (hereinafter the preference system). This preference system was designed to help match preschools with specific groups of students that they are designed to serve. For instance, preschools can prefer to be matched with students in a way that is consistent with school district boundaries. Preschools are allowed to decline to enroll children they are matched with who do not fit their enrollment preference, although their choice to decline a student is subject to Department review.

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[2] If none of these five choices ends up being available, families can select additional preschools. Aplt. App. II at 171.

When the preference system was first codified in the Code of Colorado Regulations, it listed ten different preferences that could be selected:

> 1. Faith-based providers granting preference to members of their congregation;
>
> 2. Cooperative preschool providers requiring participation in the cooperative;
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> 3. School districts maintaining enrollment consistent with their established boundaries;
>
> 4. Participating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 (2004), or the Exceptional Children's Education Act, Article 20 of Title 22, C.R.S.;
>
> 5. Head Start programs' adhering to any applicable federal law requirements including eligibility requirements;
>
> 6. Participating preschool providers granting preference to an eligible child of one (1) of their employees;
>
> 7. Participating preschool providers granting preference to an eligible child to ensure continuity-of-care for that child;
>
> 8. Participating preschool providers granting preference to an eligible child to keep siblings similarly located;
>
> 9. Participating preschool providers granting preference to an eligible child who is

> multilingual, to ensure proper delivery of services to that child[; and]
>
> 10. Participating preschool providers may grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity.

Aplt. App. II at 172–73.[3]

The final preference is a catchall, allowing for individual preschools to request a new matching preference from the Department. Preschools that seek a specific preference under the catchall preference can request it through a separate online form. However, the catchall preference has several restrictions:

> Participating preschool providers seeking to utilize this preference, must ensure:
>
> a. That the specific community, competencies or interests, relationship, public assistance benefit, or activity being required of children and/or families who attend, is a requirement of all participating children and/or families.
>
> b. That implementation of requiring the specific community, competencies or interests,

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[3] As discussed in greater depth below, these regulations have since been changed. One preference has been removed and the others are codified in a different section. Hereinafter, all citations are to the latest version of the regulations contained in 8 Code of Colorado Regulations 1404-1, effective as of April 24, 2025.

> relationship, public assistance benefit, or activity does not conflict with any other provision of the Colorado Universal Preschool Program statutes at sections 26.5-4-201 through 26.5-4-211, C.R.S., nor with any other applicable law or regulation.
>
> c. Examples of approved preferences include, but are not limited to: participating preschool providers who require a focus in a certain knowledge area (such as science, technology, engineering, and math ("STEM")); providers who serve families with a family member who works or attends school at a specific site(s) or location(s); providers who serve families within a specific geographical catchment area; providers who require a certain amount of volunteering or participation by the participating family; providers who require certain vaccinations for the health and safety of its staff and students; and providers who serve families who are receiving a specific public assistance benefit(s) such as housing assistance.

8 Colo. Code Reg. 1404-1 § 4.109(A)(9). Finally, after listing these preferences, Colorado regulations state that "[i]n utilizing these programmatic preferences, eligible preschool providers must still comply with [the nondiscrimination provision]." *Id.* § 4.109(B).

B

Plaintiffs are two catholic [sic] parishes, St. Mary Catholic Parish and St. Bernadette Catholic Parish, and their associated preschools, St. Mary's Catholic Preschool and Wellspring Catholic Academy, the Archdiocese of Denver, along with Daniel Sheley and Lisa

Sheley, parents who hope to enroll their children in a UPK-eligible preschool. St. Mary's Catholic Preschool and Wellspring Catholic Academy are a part of the Catholic Church under the authority of the Archdiocese, which oversees thirty-six Catholic preschools in Colorado. These schools are expected to "adhere[] to Catholic faith, morals, [and] the building up of Catholic culture within the school[.]" Aplt. App. III at 44. Likewise, teachers, staff, and the parents of children at these schools are required to sign a "Statement of Community Beliefs" broadly affirming that they will live in accordance with the teachings of the Catholic Church. *Id.* at 50–51.

Plaintiffs (hereinafter collectively referred to as "the Parish Preschools") hold a sincere belief that Catholic teaching requires them to consider the sexual orientation and gender identity of a student and their parents before admitting them to a Catholic school. The Archdiocese does not recognize same-sex relationships or transgender status, and it states that enrolling a child of same-sex parents in a Catholic school is "likely to lead to intractable conflicts." Aplt. App. V at 116. The Parish Preschools do not categorically ban the children of same-sex parents, but Wellspring has declined to admit an elementary school student in the past for this reason. Regardless, the Parish Preschools state that their beliefs are incompatible with the part of the nondiscrimination requirement stating that schools must "provide eligible children an equal opportunity to enroll and receive preschool services regardless of . . . sexual orientation [or] gender identity . . . as such characteristics and circumstances apply to the child or the child's family."

Soon after UPK was passed, the Parish Preschools and others expressed concerns about the nondiscrimination requirement. During UPK's development, the Department organized working groups with different preschool providers to solicit input at regular meetings. Among these was a working group for faith-based preschool providers, which included representatives from religious groups, interfaith groups, and faith-based preschools. One of the preferences in the preference system – a preference for faith-based providers to enroll members of their congregation (the congregation preference) – was created as a result of conversations with this working group. St. Mary's participated in the faith-based working group and raised concerns about the nondiscrimination requirement.

In 2023, the Archdiocese of Denver instructed its preschools not to register with UPK so that they would not have to agree to the nondiscrimination requirement. However, the Archdiocese did permit several preschools affiliated with Catholic Charities and aimed at low-income families to participate in UPK.[4] The Archdiocese and several other faith groups sent a letter to Governor Jared Polis requesting "exemptions for faith-based religious providers" from the nondiscrimination requirement. Aplt. App. V at 221. Lisa Roy, executive Director of the Department, sent a reply, informing the Archdiocese that the Department

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[4] According to the Parish Preschools, Catholic preschools operate under "two different ministries within the Archdiocese of Denver." Aplt. App. III at 72. The Office of Catholic Schools, which manages most of the Archdiocese's preschools, is distinct from Catholic Charities, which runs some Early Head Start and Head Start programs. These two programs have distinct theological purposes and thus are different ministries within the Archdiocese.

could not create an exemption from the nondiscrimination requirement because it is enshrined in state law. But she reassured the Archdiocese that "faith-based providers can reserve all or a portion of their seats for their members, and decline a match from a family that is not part of the congregation." *Id.* at 223.

The Parish Preschools then sued Director Roy and Dawn Odean, Director of Colorado's Universal Preschool Program, in their official capacities under 42 U.S.C. § 1983 for infringing upon their rights under the First Amendment as applied to the states through the Fourteenth Amendment. The Parish Preschools brought seven claims and sought an injunction prohibiting enforcement of the nondiscrimination requirement against them with respect to religious affiliation, sexual orientation, and gender identity. They argued that the nondiscrimination requirement triggered strict scrutiny, which the government could not satisfy.

Three of the Parish Preschools' arguments are relevant on appeal.[5] First, they claim that the

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[5] The Parish Preschools' complaint contained seven separate First Amendment claims in total: Count One: violation of the Free Exercise Clause by exclusion from a government benefit based on religion; Count Two: violation of the Free Exercise Clause by ignoring the ministerial exception to employment discrimination law; Count Three: violation of the Free Exercise Clause by interfering with church autonomy; Count Four: violation of the Free Exercise Clause by refusing to grant an exemption to a law not of general applicability that burdens religious practice; Count Five: violation of the Free Exercise Clause by not treating religious practices as equal to comparable secular activities; Count Six: violation of the Free Speech Clause by compelled speech and expressive association; and Count Seven: violation of the First Amendment by denominational favoritism. Some of these claims were found to be moot by the district court because they were

nondiscrimination requirement "precludes religious entities and families from obtaining generally available state benefits solely because of their religious character" in violation of the Free Exercise Clause. Aplt. App. I at 48. Second, they claim that UPK has created both discretionary and categorical exemptions to the nondiscrimination requirement that make the law "not neutral and generally applicable[,]" entitling them to an exemption under the Free Exercise Clause. *Id.* at 53. Finally, they claim that the nondiscrimination requirement violates the Free Speech Clause by "forcing a group formed for expressive purposes to accept members who oppose those purposes." *Id.* at 56.

The Department moved to dismiss the complaint on the grounds that the Parish Preschools lacked standing and that their claims were not ripe. After ordering supplemental briefing, the district court granted the motion to dismiss only with respect to the Archdiocese. The district court held that "the Archdiocese has failed to allege a sufficient injury to have standing in its own right and has not established it has standing as a representative of the Archdiocesan preschools" because those preschools are "legally independent" and the Archdiocese itself "does not seek to participate in UPK[.]" Aplt. App. II at 43.

In January 2024, the district court held a three-day bench trial to determine whether to grant injunctive relief, including hearing testimony from both expert and fact witnesses. In its findings of fact, conclusions of law, and order for entry of judgment, the district

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based on a separate employment agreement that the Department later eliminated and disavowed. On appeal, we are asked to consider only parts of Counts One, Four, Five, and Six.

court concluded that the application of UPK's nondiscrimination requirement to the Parish Preschools with respect to sexual orientation and gender identity should not be subjected to strict scrutiny.[6] As part of its analysis, the district court stated that the nondiscrimination requirement "does not exclude [the Parish Preschools] from the UPK Program solely because of their religious status or exercise." *Id.* at 205. The court also found that "the Department has applied the [nondiscrimination] requirement in a neutral and generally applicable manner, as dictated by the statute[.]" *Id.* at 161. It also held that "Plaintiffs' free-speech claim is entirely without merit as Plaintiffs ignore applicable doctrines and attempt to stretch precedent beyond recognizability." *Id.* Accordingly, the district court applied rational basis review to deny injunctive relief with respect to the sexual orientation and gender identity provisions of the nondiscrimination requirement.[7]

The district court did, however, find that UPK had created an unlawful exception to its requirement for nondiscrimination on the basis of religion by creating

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[6] The district court also stated that "even if strict scrutiny applied, it would be satisfied." Aplt. App. II at 231. Because we ultimately find that rational basis review should apply, we do not conduct a strict scrutiny analysis here.

[7] A separate case from the District of Colorado has come out the opposite way. In *Darren Patterson Christian Academy* v. *Roy*, the district court found that the nondiscrimination requirement infringed on the free exercise rights of a private faith-based preschool seeking to participate in UPK. 2025 WL 700268 (D. Colo. Feb. 24, 2025). The district court in that case permanently enjoined UPK from enforcing that portion of the nondiscrimination requirement against that school. *Id.* That case was appealed, and the appeal remains pending.

the congregation preference. As a result, it enjoined UPK from requiring the Parish Preschools to "agree to provide [preschool enrollment] regardless of religious affiliation for as long as the Department allows exceptions from the religious affiliation aspect of the nondiscrimination requirement[.]"[8] *Id.* at 258–59. This ruling is not challenged on appeal, and UPK has since updated its regulations to remove the congregation preference. 8 Colo. Code Reg. 1404-1 § 4.109(A).

The district court then entered final judgment, and the Parish Preschools timely appealed. The Parish Preschools appeal two decisions of the district court. First, they appeal the denial of a permanent injunction with respect to the nondiscrimination requirement. Second, they appeal the dismissal of the Archdiocese from the case for lack of standing.

We will address these arguments in reverse order. First, we decline to decide whether the Archdiocese has standing. We then turn to the heart of the Parish Preschools' appeal and ask whether the nondiscrimination requirement triggers strict scrutiny under the Free Exercise Clause. Finally, we examine the Parish Preschools' argument that the nondiscrimination

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[8] Because the Parish Preschools were always able to utilize the congregation preference, this injunction appears to have had no direct effect. The Parish Preschools' effort in this regard apparently stemmed from a concern that UPK's congregation preference might not allow them to prioritize the admission of Catholic families from other parishes. But based on Director Odean's testimony, the Department had always interpreted "congregation" broadly such that it could be used to cover Catholic students from other parishes. Aplt. App. IV at 65–66. Regardless, after the district court's decision, the Department eliminated the congregation preference to comply with state law mandating the nondiscrimination requirement.

requirement triggers strict scrutiny by infringing on their expressive association.

II

The Parish Preschools urge us to reverse the district court's finding that the Archdiocese lacked standing, but we decline to address this question. The Department does not contest the standing of the other four plaintiffs on appeal, and we do not independently hold that they lack standing, so there is no constitutional bar to this court considering this case based upon the standing of the remaining plaintiffs. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."); *Biden v. Nebraska*, 600 U.S. 477, 489 (2023) ("Because we conclude that the Secretary's plan . . . directly injures Missouri—conferring standing on that State—we need not consider the other theories of standing raised by the States.").

If an injunction were granted, the presence of the Archdiocese as a party with standing would likely affect the number of preschools impacted by that relief. However, the relief sought by the Parish Preschools is subsumed by the relief sought by the Archdiocese, and we discern no material differences in the parties' arguments for relief. The outcome is the same regardless of whether the Archdiocese remains a party to this litigation because we are affirming the district court's denial of injunctive relief to the Parish Preschools. Because it makes no difference to the bottom line, we decline to consider the district court's dismissal of the Archdiocese from the case for lack of standing. *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 759 (10th Cir. 2023) ("If one appellant has standing, we

need not worry about the standing of another appellant raising the same issues and seeking the same relief."); *see also Thiebault v. Colorado Springs Utilities*, 455 F. Appx. 795, 802 (10th Cir. 2011) (unpublished).

III

"For a party to obtain a permanent injunction, it must prove: '(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.'" *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (quoting *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003)). The parties do not discuss the latter three factors on appeal. As such, we confine our analysis to a consideration of the merits of the Parish Preschools' First Amendment claims.

"We review the district court's decision to deny a permanent injunction for abuse of discretion." *United States v. Uintah Valley Shoshone Tribe*, 946 F.3d 1216, 1222 (10th Cir. 2020). "An abuse of discretion occurs when the district court 'commits an error of law or makes clearly erroneous factual findings.'" *Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009) (quoting *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007)). In general, when reviewing for an abuse of discretion, "we examine the district court's legal determinations de novo, and its underlying factual findings for clear error." *Id.* at 776. However, "[i]n a First Amendment case, we have an obligation to make an independent examination of the whole record" and "review the district court's findings of constitutional fact and its

ultimate conclusions of constitutional law de novo." *Revo v. Disciplinary Bd. of the Supreme Ct. for the State of N.M.*, 106 F.3d 929, 932 (10th Cir. 1997).

IV

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. "[A] plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise [Clause]." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). If a plaintiff meets that burden, "the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law." *Id.* "[A] plaintiff may carry the burden of proving a free exercise violation in various ways," *Id.* at 525, two of which the Parish Preschools argue here.

A

The Supreme Court has held that when a state offers subsidies for private education, it cannot categorically withhold those funds from religious institutions. This principle comes from three cases: *Carson v. Makin*, 596 U.S. 767, 768 (2022), *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 487 (2020), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017). These cases form an independent line of precedent in the Supreme Court's Free Exercise case law, and the Parish Preschools allege that they control the outcome here.

We disagree. The religious exclusions addressed by the Supreme Court in these three cases are different from the nondiscrimination requirement in Colorado's

UPK statute. Before we explain why, we briefly describe each of the three cases in chronological order.

First, in *Trinity Lutheran*, the Court addressed a Missouri program that gave grants to nonprofits to install playgrounds with rubber made from recycled tires. 582 U.S. at 454. Pursuant to the state constitution, Missouri refused to give these grants to "any applicant owned or controlled by a church, sect, or other religious entity." *Id.* at 455. The Court found that this violated the Free Exercise Clause on the principle that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion[.]" *Id.* at 458.

Later, in *Espinoza*, the Montana Supreme Court struck down a tuition assistance program that could be used to fund students at private religious schools on the grounds that the state constitution barred aid to institutions "controlled in whole or in part by any church, sect, or denomination." 591 U.S. at 470 (quoting Mont. Const., Art. X, § 6(1)). The Court again found that this violated the Free Exercise Clause on the basis of "status-based discrimination" against religious institutions. *Id.* at 478.

Finally, in *Carson*, Maine enacted a tuition assistance program that only reimbursed students who attended "nonsectarian" schools that did not "promote" a "faith or belief system[.]" 596 U.S. at 775. The Court concluded that this limitation violated the Free Exercise Clause because it discriminated against the "religious use" of funds in the same way the prior cases involved discrimination against "religious status[.]" *Id.* at 786–87.

This case is different from these three cases. The Department did not exclude faith-based preschools from participating in UPK. Indeed, they welcomed and actively solicited their participation. The only relevant limitation on any preschool's participation is the nondiscrimination requirement, which applies to all preschools regardless of whether they are religious or secular. Thus, the inclusion of religious schools as welcome participants in Colorado's UPK program distinguishes this case from Supreme Court decisions where the plaintiffs were excluded from participation based upon their religious exercise and status.

The Parish Preschools attempt to blur this distinction by equating the nondiscrimination requirement with a restriction on public funds being used for religious purposes, arguing that both limit their religious exercise.[9] But the *Carson* line of cases addressed laws that targeted "religious status" and "religious use" on the explicit basis that they were religious and not secular. *Id.* at 786–87; *see also id.* at 780 ("While the wording of the Montana and Maine provisions is

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[9] The Parish Preschools' logic would mean that whenever a state conditions school funding on any activity, courts would have to ask if that activity is secular or religious to ensure the condition does not violate *Carson*. But so long as a plaintiff is sincere, beliefs that are commonly described as secular can warrant religious status under the law. *See Welsh v. United States*, 398 U.S. 333, 340 (1970) ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience . . . those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by God' in traditionally religious persons.") (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)). In practice, the Parish Preschools' interpretation would mean that *Carson* prevents states from placing almost any condition on school funds.

different, their effect is the same: to disqualify some private schools from funding solely because they are religious." (emphasis added) (citation and internal quotation marks omitted)); *Trinity Lutheran*, 582 U.S. at 463 ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." (emphasis added)); *Kim v. Bd. of Educ. of Howard Cnty.*, 93 F.4th 733, 748 (4th Cir. 2024) ("These cases stand only for the point that religious schools cannot be excluded from grant programs solely because of their religious character.").

Colorado is not attempting to prohibit funds from being used for religious purposes. Unlike in *Carson*, preschools funded through UPK may use those funds to educate students on matters of faith. The restrictions imposed by the nondiscrimination requirement universally cover enrollment policies and conduct, but they are not a targeted burden on religious use. The Parish Preschools allege, of course, that this universal restriction nonetheless infringes upon their ability to exercise their religious beliefs. But when a particular religious practice is alleged to be infringed incidentally, rather than religious status or use being specifically targeted, the Supreme Court requires that the law at issue be neutral and generally applicable. *See Trinity Lutheran*, 582 U.S. at 460–61 (discussing *Emp. Div., Dept. of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)). We turn to this inquiry next.

B

The Free Exercise Clause does not prevent individuals from being subject to a "valid and neutral law of general applicability" that incidentally conflicts with

their religion. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).[10] While the Constitution protects religious freedom, courts have long recognized the simple reality that the government must be able to enforce the law equally against everyone, no matter an individual's beliefs, lest we "permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). Thus, we ask if the law is neutral and generally applicable to assess if the law is holding everyone to the same standard, regardless of their religion.

If a law is neutral and generally applicable, it "need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). "On the other hand, if a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny," and must be "narrowly tailored to advance a compelling governmental interest." *Id.* Which is to say, the neutrality and general applicability inquiry guides the standard of judicial review to determine whether the law violates the Constitution.

Our question, then, is whether the nondiscrimination requirement is a neutral law of general applicability. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 533 (2021). "A law is not generally applicable if it

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[10] The Parish Preschools also argue, for preservation purposes, that *Smith* was wrongly decided.

'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions[,]'" *id.* (first alteration in original) (quoting *Smith*, 494 U.S. at 884), or if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *id.* at 534. We now examine each of these standards in turn.

1

Neutrality is, essentially, a question of intent. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United Methodist Church*, 451 F.3d at 649–50. Did Colorado implement the nondiscrimination requirement to try and suppress religious views or conduct?

First, we look at the nondiscrimination requirement itself. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The nondiscrimination requirement does not. Rather, it applies to all preschools and does not mention religion except to prohibit discrimination based on religious affiliation.

But a lack of neutrality is not always obvious. The government can also violate the Free Exercise Clause through "subtle departures from neutrality" and "covert suppression of particular religious beliefs[.]" *Id.* at 534 (internal citations and quotation marks omitted). While the nondiscrimination requirement appears neutral, the Parish Preschools argue that the Department has taken actions that "evidence religious

hostility." Op. Br. at 46. Examining the record, however, we find no support for this claim.

The Parish Preschools first accuse the Department of a lack of neutrality because they "compared [the Parish Preschools] to 1970s segregation academies in the South and characterized [the Parish Preschools'] millennia-old religious beliefs as stigmatization and bullying." *Id.* But the only reference to segregation academies occurs in the context of legal arguments citing *Runyon v. McCrary*. 427 U.S. 160 (1976). *Runyon* is relevant to the Parish Preschools' free association argument, and the comparison is a purely legal one.[11] As for bullying and stigmatization, the Department appears to raise these issues only to demonstrate the reasoning behind the nondiscrimination requirement and their concerns about admissions policies that violate the requirement. They make no claim as to whether the Parish Preschools' religious beliefs themselves are right or wrong. As such, the Parish Preschools cannot point to any part of the record where the Department has disparaged their preschools or their religion.

Second, the Parish Preschools argue there is evidence of religious hostility because the Department

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[11] Many lawsuits arise out of difficult circumstances and unsavory contexts. Lawyers should not be penalized for arguing and applying the legal rules that arise from any case, no matter its context. We likewise cite to *Runyon* here because it helps us understand how the First Amendment right to expressive association, as interpreted in binding precedent by the Supreme Court, applies to school admissions. *See infra* Section IV.C. This is part and parcel of legal analysis and does not disparage the Parish Preschools or equate their character or beliefs with that of other parties in other cases.

has "repeatedly recalibrated their policies in a manifest attempt to gerrymander around [the Parish Preschools'] claims" including by "tweaking the scope of the congregation preference[.]" Op. Br. at 47. If anything, the congregation preference shows the opposite. The Department created the congregation preference to address the concerns of the working group it convened with faith-based preschools. One of those preschools was St. Mary's itself. When faith groups raised concerns about the nondiscrimination requirement, Director Roy tried to use the congregation preference to assuage those concerns and ensure the participation of faith-based preschools. In doing so, she was clear that "faith-based providers can, and are encouraged to, participate in the UPK program." Aplt. App. V at 222.

After the Parish Preschools sued and the district court enjoined the use of the congregation preference, it was dropped from state regulations. 8 Colo. Code Reg. 1404-1 § 4.109(A). But far from suggesting a "gerrymander" around their claims, this shows that the Department has consistently sought to follow the letter of the nondiscrimination requirement as enshrined in state law. "[R]epeated changes in position" and "evolving policy" can sometimes be evidence of nonneutrality. *Meriwether v. Hartop*, 992 F.3d 492, 515 (6th Cir. 2021). But not where, as here, those changes came from attempts to try and accommodate the plaintiffs.

Compare this case with *Church of Lukumi Babalu Aye*, where the City of Hialeah, Florida, passed ordinances against animal sacrifice to target the practice of the Santeria religion. 508 U.S. at 534. There, the Supreme Court found that "[t]he record . . .

compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* Hialeah never considered ordinances against animal sacrifice until a Santeria house of worship announced that it would be opening in the city. *Id.* at 541. The city decided to impose these ordinances after city council meetings where local officials called Santeria "abhorrent[,]" an "abomination[,]" and "in violation of everything this country stands for." *Id.* at 541–42. The city council president even asked, "[w]hat can we do to prevent the Church from opening?" *Id.* at 541. The answer was a series of ordinances prohibiting the killing of animals that nonetheless allowed "almost all killings of animals except for religious sacrifice[.]" *Id.* at 536. However, these ordinances contained exemptions that would allow for the kosher slaughter of animals consistent with other religious traditions. *Id.* at 536–37. In simple terms, the Supreme Court found the ordinances were not neutral because they were blatantly intended to prohibit a specific religious practice and tradition.

Our analysis is also guided by *Masterpiece Cakeshop*, which dealt with Colorado's prohibition on discrimination based on sexual orientation in places of public accommodation. 584 U.S. 617, 627 (2018). The Colorado Civil Rights Commission found that a bakery had unlawfully discriminated against a same-sex couple trying to order a cake for their wedding. *Id.* at 628–29. But the Supreme Court held that the Commission violated the Free Exercise Clause because its decision contained "elements of a clear and impermissible hostility toward the sincere religious beliefs" of the plaintiff. *Id.* at 634. In the Commission's public hearings on the case, commissioners made "inappropriate and dismissive comments" and described the plaintiff's

rhetoric as "despicable[.]" *Id.* at 635. Even after the hearings concluded, the government never disavowed "official expressions of hostility to religion[.]" *Id.* at 639. Criticism of the plaintiff's religious practices demonstrated that Colorado failed to act neutrally towards him.

Nothing about this case – neither the nondiscrimination requirement nor the record of its implementation – looks anything like the clear religious suppression displayed in *Church of Lukumi Babalu Aye*. It does not even resemble the general undercurrent of animus the Supreme Court highlighted in *Masterpiece Cakeshop*.[12] Rather, the record indicates that the Colorado General Assembly passed, and the Department implemented, the nondiscrimination requirement to prevent discrimination on any grounds, secular or religious. And in implementing UPK, the Department made every effort to encourage faith-based preschools to participate (short of violating state law by granting exceptions to the nondiscrimination requirement). Many faith-based preschools – including Catholic preschools under the Catholic Charities of the Archdiocese of Denver – currently participate in UPK. The Department has not been "intolerant of religious beliefs" and has not restricted certain practices "because of their religious nature." *Fulton*, 593 U.S. at 533. As such, it has demonstrated the law's neutrality, as required by the Free Exercise Clause.

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[12] The Court also found an unwarranted disparity in how the Colorado Civil Rights Commission treated other cases where bakers had refused to make cakes seen as derogatory towards same-sex couples. *See Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 636–37 (2018). There is nothing in the record here to indicate any kind of disparate enforcement.

2

While neutrality is a question of a law's intent, general applicability is a question of a law's structure and implementation. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884 (internal citation and quotation marks omitted). The Parish Preschools identify two alleged systems of individual exemptions: the catchall preference and the temporary waiver provision.

At first blush, the catchall preference looks a bit like a system of individual exemptions. Rather than simply providing an option for preschools to prefer being matched with certain categories of students, it allows preschools to request a unique preference through an online form, with the Department deciding whether to approve it. As such, the catchall preference is an individualized addition to the list of preferences.[13] But the preference system is merely a way of adjusting the algorithm that the UPK website uses to match preschools with students. It does not give preschools the authority to reject certain classes of students if doing so would contravene state law. And the regulation itself notes that "eligible preschool providers must still comply with" the nondiscrimination provision. 8 Colo. Code Reg. 1404-1 § 4.109(B). So, the catchall preference is not a system of individualized

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[13] As Appellants note, the Department's online form used the phrase "[e]xception [r]equested" to describe these unique preferences. Aplt. App. VII at 245–46. However, such labels do not tell us whether the preferences are a legally significant exception to the challenged part of the law.

exemptions from the nondiscrimination requirement, which is what counts.

The Parish Preschools' argument relies on case law concerning policies that contained built-in exemptions. In *Fulton*, Philadelphia's foster care referral contract had a nondiscrimination clause that prevented discrimination based upon the prospective foster parents' sexual orientation. 593 U.S. at 535. But that nondiscrimination requirement stated that it applied "unless an exception is granted by" the city's Commissioner of the Department of Human Services at their "sole discretion." *Id.* The Commissioner was authorized by the policy itself to grant individual exemptions. *Fulton*'s holding, finding the law was not generally applicable, is based on *Sherbert v. Verner*, which concerned a work requirement for public benefits that was only implicated if a citizen failed to accept work without good cause. *See* 374 U.S. 398, 400 n.3 (1963). It was the state Employment Security Commission's failure to consider a religious objection to working on Saturday a good cause that implicated the plaintiff's free exercise rights. *Id.* at 403. Again, this was contained within the law itself, giving government officials the power to make individual exemptions by deciding what constitutes good cause.

The preference system regulations, in contrast, explicitly state that the regulations cannot be used as an exception to the nondiscrimination requirement. Unrelated exceptions do not mean that the challenged portion of a law lacks general applicability. *See Grace United Methodist Church*, 451 F.3d at 654. ("Although the City of Cheyenne's zoning ordinance allows for limited objective exceptions . . . (such as churches, schools, and other similar uses) the regulation bars any

organization or individual from operating a daycare center in this residential zone, for either secular or religious reasons.").

The Parish Preschools frame this as mere doublespeak: the Department facially insisting that they will comply with the nondiscrimination requirement while still blatantly discriminating through the preference system. This argument hinges in part on the testimony of Director Odean. She was asked on direct examination whether, hypothetically, a preschool could request a preference for "gender-nonconforming children," "children of color from historically underserved areas[,]" or the children of parents that are part of "the LGBTQ community" because these groups are part of a "specific community[.]"[14] Aplt. App. IV at 70–72. Odean testified that these preferences could be given, but only "[a]s long as there wasn't discrimination that was aligned to the [non]discrimination provision[.]" *Id.* at 71. While these preferences would certainly seem to violate the nondiscrimination requirement, Director Odean clarified that these hypotheticals had never been considered by the Department. She also did not have sole discretion over these preferences: they would

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[14] The Parish Preschools call this a "categorical exception" for "sexual orientation, gender identity, and race[.]" Op. Br. at 36–37. They argue that this "categorical exception" is comparable to their requested religious exception because it "undermines the government's interest" similarly. *Id.* at 37. But Odean's testimony on this point concerned the catchall preference, which (if it overrode state law) would be an individual exemption, not a categorical one. The real question raised by Director Odean's testimony on this point is whether the Department has created a system of individual (not categorical) exemptions to the prohibition on discriminating based on sexual orientation and gender identity. It has not, and thus the law is still generally applicable.

not be granted without consulting others at the Department, including counsel.

We do not interpret Director Odean's testimony to imply that the Department was using the catchall preference to violate the nondiscrimination requirement. If anything, Director Odean's insistence that the Department follow the nondiscrimination requirement when considering a requested catchall preference suggests the opposite: that the statutory nondiscrimination requirement is a hard limit. This not a situation where one part of the law renders another "a nullity." Op. Br. at 43 (quoting *Fulton*, 593 U.S. at 537). Rather, this is a common situation where an agency regulation is limited by state law.

In practice, we can see that the Department has followed state law on nondiscrimination. The record shows that the Department has approved individual preferences under the catchall preference seventeen times. These include admissions preferences such as "teen parents/students in [a] building that will need to be placed together[,]" "fully [v]accinated [c]hildren[,]" and "families who live in the Blue Lake Subdivision." Aplt. App. VII at 273–74. None of these approved preferences concern sexual orientation or gender identity or otherwise implicate the nondiscrimination provision in admissions. Finding a system of individual exemptions would require that we invert a clear reading of the Department's regulations based not on their language or operation, but a series of hypotheticals posed unexpectedly to one witness at trial.

Likewise, as evidence of compliance, we can look at the fate of the congregation preference. The Department added this preference to accommodate faith-based providers. However, once the district court

determined that this preference was incompatible with the nondiscrimination requirement, it was removed. The Department has tried repeatedly to accommodate faith-based providers, but when it comes to the nondiscrimination provision, it can make no exceptions because the provision is required by statute.

Simply put, the nondiscrimination requirement is a matter of state law, and any regulations must comply with that law. By challenging the provider agreement, the Parish Preschools are challenging state law itself as infringing on their right to free exercise. But because state law gives no room to the Department to make exceptions, it stays generally applicable, and thus does not implicate the Free Exercise Clause. *See Fulton*, 593 U.S. at 544 (Barrett, J., concurring) ("A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that *a law burdening religious exercise* must satisfy strict scrutiny *if it gives government officials discretion* to grant individualized exemptions." (emphases added)).

The Parish Preschools also argued that the temporary waiver provision defeats general applicability. Colorado law states that "if necessary to ensure the availability of a mixed delivery system within a community, the [D]epartment may allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance with the quality standards[.]" Colo. Rev. Stat. § 26.5-4-205(1)(b)(II). However, no waiver can be granted for "quality standards relating to health and safety as a condition of participating in the preschool program." *Id.* The Parish Preschools argue that because the nondiscrimination

requirement is a quality standard, the Department's ability to temporarily waive these standards constitutes a system of individualized exemptions. Again, we disagree.

The temporary waiver provision cannot be reasonably understood to authorize even a temporary exception to the nondiscrimination requirement. Preschools must be "working toward compliance with the quality standards" to be eligible for a temporary waiver. *Id.* For some quality standards relating to school operations, a preschool might need to take some time to meet state quality standards. For instance, smaller preschool providers might need time to adequately train their staff on required childcare practices. *See* Aplt. App. IV at 34. But when it comes to ensuring nondiscrimination based on gender identity and sexual orientation, there is no way a preschool could be out of compliance while simultaneously working toward compliance. A school that is out of compliance could simply choose to change its admissions policies. Following the nondiscrimination requirement is a matter of intent and practice, not simply about effort. As such, the Department has no discretion to waive the nondiscrimination requirement even on a temporary basis.

The Department also argues that the nondiscrimination requirement is a "health and safety" quality standard that is unwaivable. The district court agreed. Based on expert testimony, it found that "discrimination can be harmful, both mentally and physically" to children. Aplt. App. II at 215. The Parish Preschools respond that "health and safety" is not clearly defined in the statute, but that it should only apply to physical conditions at a preschool and not be broadened to

include admissions decisions. We do not find it necessary to decide this issue by interpreting the meaning of "health and safety." Even without that limitation, the temporary waiver provision cannot be reasonably understood to give the Department discretion to allow a preschool to ignore the nondiscrimination requirement. And the Parish Preschools cannot point to any actual example of the temporary waiver provision being used this way. Thus, there is no system of individualized exemptions at play that defeats the law's general applicability.

3

Finally, the Parish Preschools argue that there are categorical secular exceptions to the nondiscrimination requirement that "undermine[] the government's asserted interests in a similar way" to the religious exception that they have been denied. *Fulton*, 593 U.S. at 534. The Parish Preschools' claim that the preference system allows for discrimination based on disability and income level, thus undermining the government's interest in nondiscrimination for secular reasons.[15] Specifically, they point to two preferences: one for "[p]articipating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act . . . or the Exceptional

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[15] This is an issue of categorical exceptions. A system of individualized exceptions only exists to the extent that officials apply a "subjective test" to grant particular claimants exceptions. *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998). That differs from a categorical system that grants "only recognized exceptions" to "strict categories" of people. *Id.*

Children's Education Act" (the IEP preference) and one preferring "Head Start programs' adhering to any applicable federal law requirements including eligibility requirements" (the Head Start preference). 8 Colo. Code Reg. 1404-1 § 4.109(A)(3), (4). The Parish Preschools argue that allowing preschools to prefer enrolling children placed in IEPs and Head Start programs denies other students an "equal opportunity to enroll and receive preschool services regardless of . . . income level[] or disability[.]"[16] Colo. Rev. Stat. § 205(2)(b).

There are several reasons why this claim fails. First, we are not persuaded that the IEP and Head Start preferences amount to a violation of the nondiscrimination requirement. The Department interprets the nondiscrimination requirement to prevent preschools from denying admissions to children because they are disabled or from a low-income family. It does not, however, protect children without disabilities or children from high-income families. Disability and income level are treated differently from other protected classes in light of the Colorado General Assembly's substantive goals in implementing UPK. The General Assembly specifically declared its intention to try and expand the number of disabled and low-income students attending preschool. Colo. Rev. Stat. § 26.5-4-202(3), (4). Other provisions of the law state that "a child with disabilities must be offered preschool services" in accordance with their IEP and that low-income children may be entitled to additional hours of

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[16] The Parish Preschools also made this same argument with respect to the congregation preference and religious affiliation. We need not consider this argument because the congregation preference no longer exists, and thus cannot undermine the law's general applicability.

preschool. *See* Colo. Rev. Stat. § 26.5-4-204(3)(a)(II), (III).

These provisions do not speak in general terms about ignoring disability status or income level. They specifically concern children who *have* a disability or *are* low-income. And the IEP and Head Start preferences were developed to help preschools comply with federal laws that specifically protect disabled and low-income children. *See* 20 U.S.C. § 1400(d)(1)(A) (Individuals with Disabilities Education Act) ("The purposes of this chapter [include] . . . to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs[.]"); 42 U.S.C. § 9831 (Head Start) ("It is the purpose of this subchapter to promote the school readiness of low-income children[.]"). The Supreme Court has long advised that the state must consider disability and income level to make social policy, and so these categories are distinct from other protected classes and do not trigger heightened scrutiny. *See Harris v. McRae*, 448 U.S. 297, 323 (1980); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440–42 (1985). It is farcical to say that non-disabled children are being discriminated against by being denied special education designed for disabled students,[17] or that high-income students are being

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[17] When Director Odean was asked whether any schools had exercised a preference to only serve children with specific disabilities, she testified that "[w]e have school district-based providers that have specific programs for specific needs that are aligned to their federal mandate" but that these providers "serve all children, but they might have a specific location that's resourced for a special classroom." Aplt. App. VII at 134.

discriminated against by preschools participating in Head Start. Given the unique nature of these protections, preferences for IEPs and Head Start are not exceptions to the nondiscrimination requirement.

Even assuming, arguendo, that the Parish Preschools are correct, and these preferences constitute discrimination based on disability and income level, that does not necessarily remove the general applicability of the nondiscrimination requirement as it relates to sexual orientation and gender identity. These different aspects of the nondiscrimination requirement are only relevant if they are comparable. The state may not treat "comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021); *see also Does 1-11 v. Bd. of Regents of Univ. of Colorado*, 100 F.4th 1251, 1277 (10th Cir. 2024) ("When a [p]olicy makes a value judgment in favor of secular motivations, but not religious motivations, it is not generally applicable." (citation and internal quotation marks omitted)). "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62; *see also Fulton*, 593 U.S. at 534.

The Parish Preschools broadly characterize Colorado's interest as being "equal access" for all students. Op. Br. at 39–40. The Department agrees that "[e]ach of the eight equal-opportunity requirements seeks to remove barriers to access experienced by children with different protected characteristics." Resp. Br. at 57. But not all barriers are the same. The real question is if the Parish Preschools' requested relief "*undermines* the government's asserted interests *in a similar way*"

as the IEP and Head Start preferences. *Fulton*, 593 U.S. at 534 (emphases added). To answer that question, we must examine the way each part of the nondiscrimination requirement is intended to promote equal access.

Nothing about the IEP preference or the Head Start preference undermines the government's asserted interest in ensuring equal access to preschools. The district court found, based on expert testimony, that there were "specific barriers" to preschool access faced by the children of same sex and transgender couples. Aplt. App. II at 222–23. As the district court stated, "all discrimination is not the same." *Id.* at 223. That is certainly the case when comparing discrimination based on sexual orientation and gender identity with discrimination based on disability and income level. Allowing some schools to ignore the nondiscrimination requirement with respect to sexual orientation and gender identity would undermine the government's interest in erasing barriers to equal access caused by social stigma in a way that the IEP and Head Start preferences simply do not.[18]

The Parish Preschools' reliance upon *Tandon* does not change this point. The Supreme Court in *Tandon*

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[18] Of course, as previously noted, the IEP and Head Start preferences do not actually undermine the state's interest in the nondiscrimination requirement even with respect to disability and income level. The General Assembly was particularly concerned that disabled and low-income children lacked opportunities to attend preschool. Not every preschool can accommodate special needs children, and the Department implemented the IEP preference to try and ensure those children were accommodated. Likewise, low-income families may need to rely on Head Start to provide their children a preschool education.

found that California's restrictions on at-home religious gatherings during the COVID–19 pandemic were not generally applicable. 593 U.S. at 63. The problem with those restrictions was that California still allowed secular gatherings in hair salons, retail stores, movie theaters, etc. *Id.* Those activities comparably undermined the government's interest in preventing the spread of disease because they acted as similar vectors to transmit COVID–19. *Id.* at 64. But the barriers to equal access to preschool education here are completely different and thus not comparable.

The Parish Preschools' reliance on *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* is equally misplaced. 82 F.4th 664 (9th Cir. 2023). That case concerned a school district that revoked the student club status of the Fellowship of Christian Athletes (FCA) for requiring its members to sign a statement against same-sex marriage. *Id.* at 671. The revocation was justified based on a school district policy prohibiting discrimination "on the basis of race, sex, sexual orientation, religion, and other criteria." *Id.* at 687. However, the school district allowed other clubs to discriminate based on sex and race, such as a club for Senior Women and South Asian Heritage. *Id.* at 688. Thus, the Ninth Circuit concluded that the school district's nondiscrimination policy was not generally applicable because the school district allowed secular exceptions that comparably undermined the interests of its nondiscrimination policy. *Id.* at 689.

We are not bound by this case, but even so, it can be distinguished for two reasons. First, the IEP and Head Start preferences do not undermine the interests of the nondiscrimination requirement because

disability and income level are fundamentally different from other suspect classifications. Second, the school district in *FCA* was freely granting exemptions at its discretion, while the Department does not have the discretion to make exceptions to the nondiscrimination requirement.

It is also instructive for us to remember that this aspect of our general applicability analysis originally comes from *Church of Lukumi Babalu Aye*, where the ordinances passed by the City of Hialeah permitted essentially every kind of animal slaughter except for the sacrifices central to the plaintiffs' religion. *See Fulton*, 593 U.S. at 534 (discussing *Church of Lukumi Babalu Aye*, 508 U.S. at 542–46). The law was self-defeating regarding its stated goals because of how much comparable secular conduct it allowed. The Supreme Court concluded that the law must not have been generally applicable or applicable to anyone except for the plaintiffs in that case. But nothing in the preference system here allows a backdoor for discrimination based on sexual orientation or gender identity on secular grounds. Even if the Parish Preschools are correct (which we do not decide that they are), and the IEP and Head Start preferences are unlawful under the nondiscrimination requirement, it simply means that those preferences could possibly be challenged separately. It does not mean that all other protected classes should then be denied the benefit of the nondiscrimination requirement.

Ultimately, we do not see any First Amendment concerns raised by the preference system. It was designed, and later implemented, as an algorithmic means of making sure that UPK's website matched families with the right preschools for their children.

There are almost 2,000 different preschools participating in UPK, and if the system matched children with preschools at random, it would be an ineffective system. Children would be sent to schools too far away. Siblings would be separated unnecessarily. Special needs children would not be matched with teachers who know how to work with them. What matters is not whether individuals are given specific options, but whether the challenged policy is applied equally to everyone and all schools. In other words, could a state official approve the Parish Preschools' requested religious exemption without violating state law?

Here, the answer is no. No preschool participating in UPK is allowed to take sexual orientation or gender identity into account when making admissions decisions, for any reason. Likewise, any preschool can use any of the other preferences as they wish. The same options apply to everyone. Meanwhile, the Department has made every effort to encourage faith-based preschools to participate in UPK short of granting them an unlawful exemption from the nondiscrimination requirement. As a result, forty faith-based preschools are currently part of UPK. The program is a model example of maintaining neutral and generally applicable nondiscrimination laws while nonetheless trying to accommodate the exercise of religious beliefs.

As such, we can find no reason to rule that the Department has violated the Parish Preschools' free exercise rights. This ruling does not mean that we shirk our constitutional duty to protect the Parish Preschools' freedom of worship. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 679 (2015) ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere

conviction that, by divine precepts, same-sex marriage should not be condoned."). It simply means that when a school takes money from the state that is meant to ensure universal education, then its doors must be open to all. *See Norwood v. Harrison*, 413 U.S. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

C

The Parish Preschools' other First Amendment claim is that the nondiscrimination requirement violates their freedom of expressive association. The First Amendment implicitly "protects acts of expressive association." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). This includes the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). But it also includes a corollary "freedom not to associate" and a recognition that "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express." *Id.* at 648.

Even if a group is engaged in expressive association, its expressive association rights are not infringed upon by the mandated inclusion of a person unless "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* Whether a person's presence has such an effect is highly contextual.

The Parish Preschools primarily rely on a comparison to *Dale*, where the Supreme Court assessed the Boy Scouts' "desire to not promote homosexual conduct as a legitimate form of behavior" by not allowing openly gay scoutmasters. *Id.* at 653 (internal quotation marks omitted). The New Jersey Supreme Court held that the state's public accommodations law prohibited the Boy Scouts from revoking the membership of James Dale because he was openly gay and an activist for gay rights. *Id.* at 644. But the Supreme Court found that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. But even in *Dale* itself, the Supreme Court limited the breadth of its holding, stating that a group cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.*

Soon after, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court took a far more limited view of expressive association. 547 U.S. 47, 68 (2006). The plaintiffs in that case challenged the Solomon Amendment, a federal law requiring that universities receiving federal funds allow military recruiters access to campus equal to that of non-military job recruiters. *Id.* at 55. The Court ruled that the presence of military recruiters did not amount to expressive association because they were not "part of" universities, they merely "interact[ed] with them." *Id.* at 69.

Unlike in *Dale*, this case does not involve the presence of persons who might affect the Parish Preschools' ability to advocate for their viewpoint.[19]

James Dale was a "gay rights activist" in a leadership position as an assistant scoutmaster who openly advocated positions opposite those of the Boy Scouts. 547 U.S. at 653. This is a case about preschoolers.[20] No one would reasonably mistake the views of preschool students for those of their school. And while we must "give deference to an association's view of what would impair its expression[,]" that does not mean that we must buy that "mere acceptance of a member from a particular group" is enough. *Id.* Teachers and staff are the ones responsible for disseminating a preschool's

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[19] The Parish Preschools also cite to *Dale*'s predecessor, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995). That case is even more distinct. *Hurley* addressed whether the organizers of Boston's St. Patrick's Day parade had to include an Irish American gay rights group (GLIB) under Massachusetts' public accommodations law. *Id.* at 560. The court found that the organizers of the parade could exclude groups based on expressive association in light of the "inherent expressiveness of marching to make a point[.]" *Id.* at 568. To state the obvious, the inherently expressive role of a marcher in a parade is very different from the role of a preschool student. And unlike here, "the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (discussing *Hurley*).

[20] Because this is a case about preschool age children, the practical effect of the Parish Preschools' requested exemption from the nondiscrimination requirement would be to allow them to consider the sexual orientation and gender identity of a student's parents. That is yet another degree of separation from the potential effect that their admission might have on the school's expressive association.

message and developing the curriculum, not the preschool children they teach.

Applying *Dale* to this case would expand expressive association far beyond its current limits and undermine a long history of nondiscrimination laws that apply to school admissions. It would also contradict the Supreme Court's holding in *Runyon v. McCrary* that expressive association does not protect a school's right to discriminate in admissions. 427 U.S. at 175–76. Indeed, the Court explicitly differentiated between the right of private schools to teach what they wish and the government's ability to require that those schools not exclude anyone. *Id.* We see no reason why this principle should not apply to a law that prohibits discrimination in admissions based on sexual orientation and gender identity.

Further, unlike in *Dale*, the law merely conditions funds based on the nondiscrimination requirement, rather than forcing Catholic preschools to follow the nondiscrimination requirement under threat of a civil penalty. In general, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 210 (2003) (citation and internal quotation marks omitted). But the Supreme Court has distinguished the kind of compelled association in *Dale* from the mere withholding of a subsidy. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 682 (2010); *see also Rumsfeld*, 547 U.S. at 59. Whether a condition on funds impermissibly infringes on the First Amendment is highly contextual, but

under these facts we conclude that no violation of the First Amendment has occurred.

D

The Parish Preschools have not met their burden to show that their First Amendment rights have been violated and that strict scrutiny applies, and so we apply a rational basis standard of review. Under rational basis review, we will uphold government action "so long as it is rationally related to a legitimate government purpose[.]" *Christian Heritage Acad. v. Oklahoma Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1032 (10th Cir. 2007). The Parish Preschools do not argue that the application of the nondiscrimination requirement fails to meet this standard, nor is there any basis for them to do so. The government has articulated not only a legitimate purpose, but an extraordinarily weighty one in protecting equal access to preschool education for Colorado children. And the application of the nondiscrimination requirement to all preschool providers, as mandated by state law, is rationally related to this purpose.

V

Colorado's UPK program went to great effort to be welcoming and inclusive of faith-based preschools' participation. The nondiscrimination requirement exists in harmony with the First Amendment and does not violate the Parish Preschools' First Amendment rights. The district court correctly denied the Parish Preschools an injunction. The judgment of the district court is AFFIRMED.

FILED
United States Court of Appeals
Tenth Circuit
September 30, 2025
Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 24-1267
(D.C. No. 1:23-CV-02079-JLK)
(D. Colo.)

ST. MARY CATHOLIC PARISH IN LITTLETON; ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD; LISA SHELEY; DANIEL SHELEY; ARCHDIOCESE OF DENVER,

Plaintiffs - Appellants,

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood; DAWN ODEAN, in her official capacity as Director of Colorado's Universal Preschool Program,

Defendants - Appellees,

THE JEWISH COALITION FOR RELIGIOUS LIBERTY; THE ROCKY MOUNTAIN DISTRICT LUTHERAN CHURCH MISSOURI SYNOD; THE COLORADO ASSOCIATION OF PRIVATE SCHOOLS; EDCHOICE, INC.; THE CONSCIENCE

PROJECT; ANDY ABOLS; KARINA RAMIREZ; ANA KAREN MEIER; JILL HALL; MELISSA DE LA CRUZ; PROTECT THE FIRST FOUNDATION; LAWRENCE G. SAGER; NELSON TEBBE; SCHOLARS FOR THE ADVANCEMENT OF CHILDREN'S CONSTITUTIONAL RIGHTS; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; ACLU OF COLORADO; CENTRAL CONFERENCE OF AMERICAN RABBIS; INTERFAITH ALLIANCE; INTERFAITH ALLIANCE OF COLORADO; KESHET; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; THE SIKH COALITION; UNION FOR REFORM JUDAISM; WOMEN OF REFORM JUDAISM; FIRST AMENDMENT SCHOLAR,

Amici Curiae.

JUDGMENT

Before **PHILLIPS**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-02079-JLK

ST. MARY CATHOLIC PARISH IN LITTLETON; ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD; DANIEL SHELEY; and LISA SHELEY,

Plaintiffs,

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood; and DAWN ODEAN, in her official capacity as Director of Colorado's Universal Preschool Program,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF JUDGMENT

Kane, J.

Plaintiffs in this case are two Catholic parishes that operate preschools—St. Mary Catholic Parish in Littleton and St. Bernadette Catholic Parish in Lakewood—and the parents of a preschool-aged child—Daniel and Lisa Sheley. They bring their claims against Dr. Lisa Roy, the Executive Director of the Colorado Department of Early Childhood, and Dawn Odean, the Director of the Colorado Universal Preschool Program, in their official capacities. Plaintiffs' claims allege the equity-related requirements of Colo-

rado's newly implemented Universal Preschool Program ("UPK" or the "UPK Program"), as the requirements are applied to them, violate their rights guaranteed by the Free Exercise, Free Speech, and Establishment Clauses of the First Amendment to the U.S. Constitution.

Presently, in its inaugural year, the UPK Program provides at least 15 hours of free preschool per week for each eligible child in the state. The Program is administered by the Colorado Department of Early Childhood (the "Department") and uses a "mixed-delivery system of preschool providers," that is "a combination of school- and community-based preschool providers . . . funded by a combination of public and private money." Colo. Rev. Stat. § 26.5-4-203(12). In accordance with the implementing statute, the Department must require participating "preschool provider[s to] provide eligible children an equal opportunity to enroll and receive services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family." *Id.* § 26.5-4-205(2)(b). Plaintiffs contend that, by conditioning participation in the UPK Program on compliance with this "equal-opportunity requirement,"[1] namely the religious-affiliation, sexual-orientation, and gender-identity aspects of the requirement, the Department has excluded

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[1] Previously, I referred to it as the "statutory nondiscrimination requirement." However, Plaintiffs are correct that this provision is more appropriately framed as an equal-opportunity requirement.

Plaintiffs from receiving a generally available public benefit.

While it is settled at this point that states may not generally decline to fund religious schools as part of an educational benefits program, the weight of the relevant precedent supports that states administering such programs are not obligated to subsidize discrimination using taxpayer dollars, even when that discrimination is based on religious beliefs. This case involves a statute that requires preschool providers receiving funding through the UPK Program to give students with certain characteristics—those prioritized by the State of Colorado—an equal opportunity to enroll and receive services. Although the equal-opportunity requirement allows providers to specifically serve low-income families and children with disabilities, it does not grant the Department the authority or discretion to exempt providers from complying with the requirement. The key question in this case is whether the Department, in administering the UPK Program, has nevertheless created exceptions to the equal-opportunity requirement that warrant granting Plaintiff Preschools similar exemptions.[2]

In January of this year, I held a three-day trial and now issue the Findings of Fact and Conclusions of Law

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[2] I note at the outset that I must confine my rulings to the case as it has been presented to me. The issues in dispute do not include, for example, permissibility of the UPK Program under the Establishment Clause or the Colorado Constitution, application of the religious nondelegation doctrine, consideration of this case as one involving hybrid rights, whether the UPK Program policies impose a *substantial* burden on Plaintiffs' religious exercise, or any potential violations of the rights of other eligible children and/or their parents as a result of the UPK policies.

below. I dismiss as moot Plaintiffs' claims based on a contractual provision that is separate from the equal-opportunity requirement. I then find the Department has applied the equal-opportunity requirement in a neutral and generally applicable manner, as dictated by the statute, with one exception. The Department has allowed faith-based providers to deny children and families equal opportunity based on their religious affiliation, or lack thereof, and has cited no compelling interest for permitting that discrimination while denying Plaintiffs' request for a related exemption. On that narrow basis, I conclude Defendants have violated Plaintiffs' free-exercise rights and that judgment in favor of Plaintiffs is warranted. I consequently grant Plaintiffs relief in the form of a limited permanent injunction, declaratory judgment, and nominal damages. Because I grant that relief, I decline to address the additional declaratory relief sought under the Establishment Clause. Finally, I conclude Plaintiffs' free speech claim is entirely without merit, as Plaintiffs ignore applicable doctrines and attempt to stretch precedent beyond recognizability.

I. Findings of Fact

A. The Universal Preschool Program

1. History and Statutory Framework

In 2020, Colorado voters approved Proposition EE by nearly a two-to-one margin, creating a dedicated source of funding for voluntary, universal preschool in the State. *See* Colo. Rev. Stat. § 26.5-4-202(1)(a)(V). At the trial in this case, M. Michael Cooke, the former Early Childhood Transition Director of the Colorado State Governor's Office, and Defendant Dawn Odean testified about the development and implementation

of the UPK Program. In 2021, the Colorado General Assembly passed House Bill 21-1304 (the "Early Childhood Act") to begin organizing the Program. *See* H.B. 21-1304, 73rd Gen. Assemb. (Colo. 2021) (enacted). That legislation created the Colorado Department of Early Childhood, using the last executive department permitted by the Colorado Constitution. *Id.*; Trial Tr. (Cooke) 136:12-21. As relevant here, the Early Childhood Act specifies that it is the intent of the General Assembly for the Department to "work with other state and local agencies, public and private early childhood providers, head start agencies, nonprofit organizations, and parents and families to:

> (a) Provide high-quality, voluntary, affordable early childhood opportunities for all children in Colorado;
>
> (b) Coordinate the availability of early childhood programs and services in Colorado to meet the needs of all families;
>
> (c) Establish state and community partnerships that provide for a mixed delivery of child care and early childhood programs through school-based and community-based providers; . . .
>
> (f) Prioritize the equitable delivery of resources and supports for early childhood; . . . [and]
>
> (h) Improve outcomes for children and families through: . . .
>
> (II) Implementation of evidence- and practice-based best practices in education, family support, and child development with a focus on continuous improvement and innovation; . . . [and]

> (IV) Alignment with state and federal requirements under the state "Exceptional Children's Educational Act", part 1 of article 20 of title 22, and part B and part C of the federal "Individuals with Disabilities Education Act", 20 U.S.C. sec. 1400 et seq., as amended . . . .

Colo. Rev. Stat. § 26.5-1-102(1).

Following the passage of the Early Childhood Act, there "was a very robust stakeholder process that was led by the Early Childhood Leadership Commission to talk about what [the D]epartment should look like." Trial Tr. (Cooke) 136:20-24. Monthly town halls were held and "were open to all Coloradans: providers, parents, advocates,[and] anyone with an interest in the work around the establishment of the new [D]epartment and Universal Preschool." *Id.* 137:1216. The stakeholder process resulted in two reports from the Early Childhood Leadership Commission that became the foundation for House Bill 22-1295, which officially created the UPK Program when it was enacted. *Id.* at 142:1-7; *see* H.B. 22-1295, 73rd Gen. Assemb. (Colo. 2021) (enacted).

> Among other obligations, this legislation directs the Department to:
>
> Promote child physical, oral, and behavioral health and use multigenerational and culturally and linguistically appropriate strategies to support child and parent outcomes that improve overall family well-being; [and] . . .
>
> Promote access to quality early childhood care and education, including monitoring

> and increasing the capacity of quality early childhood care and education programs to support the availability of said programs for children throughout the state . . . .

Colo. Rev. Stat. § 26.5-1-109(1)(a).

Colorado Revised Statutes §§ 26.5-4-201 to 26.5-4-210[3] (the "UPK Statute") are the codified portions of House Bill 22-1295 that contain provisions specific to the UPK Program. The UPK Statute obligates the Department to "develop and the executive director [to] establish by rule the quality standards that each preschool provider must meet to receive funding through the [Program]." *Id.* § 26.5-4-205(1)(a). Those standards "must reflect national and community-informed best practices with regard to school readiness, academic and cognitive development, healthy environments, social-emotional learning, and child and family outcomes." *Id.* Ms. Odean testified that this focus acknowledges the importance of "whole child" development, which ensures "that children have access to . . . cognitive development, but also inclusive of physical development, as well as social-emotional development." Trial Tr. (Cooke) 194:1-17. The statute further emphasizes "healthy environments," so the Department must be "thoughtful about the actual environment that a child is in." *Id.* 194:21-25. According to Ms. Cooke, the quality standards were intended to go beyond licensure requirements to ensure that a "high-

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[3] Section 26.5-4-211, creating the bonus payment program to incentivize preschool providers to participate in the UPK Program, was added with additional legislation in June 2023. *See* Act of June 2, 2023, 2023 Colo. Legis. Serv. 336.

quality preschool program" was created. Trial Tr. (Cooke) 143:24-144:7.

i. Equal Opportunity

As highlighted above, one of the specific quality standards the Department must establish is:

> A requirement that each preschool provider provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family . . . .

Colo. Rev. Stat. § 26.5-4-205(2)(b).[4] I will refer to this provision of the UPK Statute as the "statutory equal-opportunity requirement." The UPK Statute defines an "eligible child" as "a child who is eligible to receive preschool services as provided in section 26.5-4-204(3)." Colo. Rev. Stat. § 26.5-4-203(7). Section 26.5-4-204(3) covers every child in the state in the year preceding the school year in which he or she is eligible to enroll in kindergarten, and in particular, that subsection includes children three or four years of age who may receive additional preschool services because

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[4] On April 25, 2024, the Department finalized its rules for the UPK Program. In accordance with this provision, the rules state: "Eligible preschool providers must ensure that children receive an equal opportunity to enroll and receive universal preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family." 8 Colo. Code Reg. 1404-1:4.109(B).

they are in low-income families or meet at least one qualifying factor[5] as well as three- and four-year-olds with disabilities who "must be offered preschool services in accordance with the child's individualized education program" under the Individuals with Disabilities Education Act and Exceptional Children's Educational Act. The incorporation of § 26.5-4-204(3) into the definition of eligible child makes clear that the equal opportunity requirement contemplates allowing additional services for children with disabilities, those in low-income families, and those who meet qualifying factors.

Both Ms. Cooke and Ms. Odean were involved in the drafting of House Bill 22-1295. *See* Trial Tr. (Cooke) 143:11-13; Trial Tr. (Odean) 197:23-24. Ms. Cooke testified that one of the Early Childhood Leadership Commission's reports that was provided to the General Assembly stated that the UPK Program "should be a program that was equitable and grounded in equity" and HB 22-1295 "carried that forward by putting the equity statement[, i.e., the equal-opportunity requirement,] into th[e] legislation." Trial Tr. (Cooke) 142:13-18. Additionally, she understood that Colorado voters, in approving Proposition EE, "intended th[e] program to be available to all families, and equitably delivered to all families," which "carried through the stakeholder process into [House Bill 22-]1295." *Id.* 142:20-25. According to Ms. Cooke, the legislation was developed and enacted with the recognition that it was important "that all families had equal

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[5] Under the statute, "qualifying factors must include identification as a dual-language learner or a child with disabilities and may include such other factors as the department may identify." Colo. Rev. Stat. § 26.5-4-204(4)(a)(II).

access, equitable access to preschool programs of their choosing, and [that they] would not be discriminated against based on any of the factors that are included in the legislation and now in statute." *Id.* 142:25-143:3.

Ms. Odean testified that, among other reasons, the statutory equal-opportunity requirement was included in the UPK Act to "be thoughtful about not putting children in an unsafe or unhealthy environment" and "to be really intentional about children having [a safe and healthy] environment so that they can grow to their maximum ability." Trial Tr. (Odean) 197:17198:9. Her understanding is that the requirement was placed within the quality standards section of the statute because they not only "want children around the state to be able to access programming that best fits their family's needs" but also want to ensure that, once children are in a preschool setting, "they have equitable access to learning and growth." *Id.* 199:15-24. Ms. Odean explained that universal, and not targeted or limited, preschool is "important so that all [preschool-aged] children can have access to [a] high-quality environment and get to the learning outcomes that we know come from a high-quality program" and because "it also allows for families to have opportunity and options, all families." *Id.* 190:10-14.

ii. Mixed Delivery

Mixed delivery, meaning the inclusion of school- and community-based preschool providers, is another foundational aspect of the UPK Program. *See* Colo. Rev. Stat. §§ 26.5-4202(1)(b); 26.5-4-203(12). The UPK Statute specifically lists in the definition of "mixed delivery system" "family child care homes, child care centers, and head start agencies." *Id.* § 26.5-4203(12). Ms.

Cooke testified that the Department's "goal in the mixed delivery program was to recruit and engage providers . . . of all types, school districts, center-based, home-based, faith-based, that could provide a safe, nurturing, inclusive, nondiscriminatory environment for children." Trial Tr. (Cooke) 147:23-148:2. Through Local Coordinating Organizations ("LCOs"), the Department conducted outreach and encouraged qualified providers to participate. *Id.* 150:17-151:5. The Department also organized separate working groups with school district, Head Start, in-home family childcare, corporate, and faith-based providers. Trial Tr. (Odean) 215:10-13.

The working group for faith-based providers benefited from the participation of a diverse array of religious organizations, including the Efshar Project, an umbrella organization for Jewish preschools; Lutheran, Presbyterian, and nondenominational representatives; the Colorado Council of Churches; and the Interfaith Task Force. Trial Tr. (Cooke) 152:8-20. The faith-based working group initially met on a weekly basis and, over time, decreased their meetings to biweekly and then monthly. *Id.* 152:22-153:1. Ms. Cooke explained at the trial that faith-based providers were always "envisioned to be part of the mixed-delivery model." *Id.* 160:16-17. The Department "wanted to certainly give families every opportunity to seek a provider of their choosing, and that includes faith-based providers." *Id.* 160:19-22.

iii. Temporary Waiver of Quality Standards

Ms. Odean testified that the UPK Statute directs the Department to "ensure that families have choice through this mixed-delivery model, and that families

have confidence that those are safe and healthy environments, and that they're in place not only for supervision, but so that their child can grow and begin a positive journey for learning." Trial Tr. (Odean) 197:11-16. In line with that testimony, the UPK Statute permits a temporary waiver of some of the quality standards if it is "necessary to ensure the availability of a mixed delivery system within a community." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II). Under those circumstances, "the [D]epartment may allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance with the quality standards." *Id.* However, "each preschool provider must meet all quality standards relating to health and safety." *Id.* The Department interprets the statutory equal-opportunity requirement to be among the exempted quality standards related to health and safety. Trial Tr. (Odean) 210:10-12; Trial Tr. (Cooke) 147:21-23. The Department believes the statutory equal-opportunity requirement implicates the health and safety of preschool children. *See id.* 147:21148:2. Its interpretation is also based on the fact that the equal-opportunity requirement is set out in the statute and not a Department-created obligation. Trial Tr. (Odean) 210:5-9.

2. Current UPK Program

For the 2023-24 school year, UPK providers are reimbursed by the State for at least 15 hours of preschool per eligible child they enroll. UPK Application Website at 1, Trial Ex. 22; UPK Colorado Provider Guide at 2, 21-22, Trial Ex. 24; Odean Dep. 18:15-25, Trial Ex. 26. There are roughly 1,900 preschool providers participating in the UPK Program this year. Odean Decl. ¶ 9,

Trial Ex. 39.[6] Almost 40,000 children are enrolled in the Program, which is about 60 percent of eligible 4-year-olds in the State. Trial Tr. (Odean) 210:14-19. These numbers include forty faith-based preschools with over 900 preschoolers in the UPK Program. *Id.* 234:8, 23-25.

i. Program Service Agreement

To participate in the UPK Program, a preschool must register in the UPK portal and sign the Department's Program Service Agreement (the "Agreement"). Trial Tr. (Cooke) 149:4-11, 164:24-165:1; *see* Agreement, Trial Ex. 13. But there is no requirement for preschool providers to participate in UPK Colorado. Odean Dep. 71:20-72:2, Trial. Ex. 26. Plaintiffs' claims in this case challenge two provisions of the UPK Agreement: its incorporation of the statutory equal opportunity requirement and a more expansive nondiscrimination provision found in Paragraph 18(B) of Exhibit A to the Agreement. Under the heading "Quality Assurance," the Agreement recites word for word the statutory equal-opportunity requirement. *See* Agreement at 2, Trial Ex. 13 ("Provider agrees to adhere to

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[6] Plaintiffs offered for admission 13 exhibits to which Defendants did not stipulate: Exhibit Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 23, 33, 38, and 39. I reviewed these exhibits and find Nos. 2, 5, 6, 7, 10, and 39 to be admissible and have relied on those exhibits in my Findings of Fact. The other exhibits were either not necessary or not relevant for my Findings of Fact. I note that, although Defendants objected to Exhibit No. 39—Ms. Odean's October 26, 2023 Declaration filed in this case, Defendants cited to that Declaration in their Proposed Findings of Fact and Conclusions of Law. And I specifically find that Exhibit 23—the news article that reported a quote from Colorado Governor Jared Polis—is irrelevant. His off-hand comment does not represent nor dictate the interest of the State or the Department.

the quality standards identified in §26.5-4-205, C.R.S., [including] . . . [the r]equirement that each preschool provider provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family."). Because this provision is identical to the statutory requirement, I refer to the two together as simply "the equal-opportunity requirement." Paragraph 18(B) reads: "Provider shall not . . . discriminate against any person on the basis of gender, race, ethnicity, religion, national origin, age, sexual orientation, gender identity, citizenship status, education, disability, socio-economic status, or any other identity." *Id.* at 28.

Plaintiffs claim that Paragraph 18(B) would inappropriately permit the Department to dictate the hiring decisions of faith-based providers. In pretrial filings in this case, Ms. Odean disclosed that the Department interpreted Paragraph 18(B) to permit religious organizations to make hiring decisions in accordance with federal law, and on behalf of the Department, she disavowed enforcement of Paragraph 18(B) with respect to religious providers' employment practices that were consistent with federal law. Odean Decl. ¶ 16, Trial Ex. 39. At trial, Ms. Odean testified that the Department never intended to analyze providers' employment decisions under Paragraph 18(B). Trial Tr. (Odean) 231:25-232:2. While Ms. Cooke drafted the Agreement, the exhibits to the Agreement were put together by the contracts and procurement offices for the Department of Human Services. Trial Tr. (Cooke) 148:7-12. Exhibit A—the Terms and Conditions for the UPK Program, including Paragraph 18(B), came from

a template written by the Colorado Department of Human Services. Trial Tr. (Odean) 231:8-24. Ms. Odean testified that Paragraph 18(B) has been removed from the 2024-25 contract, and it will not apply to providers going forward. Trial Tr. (Odean) 232:16-22. She explained that the purpose of the Department's previous disavowal was to give assurances that, beyond licensing credentials, the Department would not have or exercise authority related to providers' hiring practices. *Id.* 232:515. Similarly, Ms. Odean indicated that the Department does not have any intention of interfering with the curriculum of faith-based providers. *Id.* 232:25-233:3.

ii. Family Enrollment

Once a preschool has registered as a participating UPK provider and has signed the Agreement, it appears in the Department's Family Search and Application portal, allowing families to apply and match with that preschool. UPK Colorado Provider Guide at 4, 23-60, Trial Ex. 24. Ordinarily, the family of an eligible child uses the portal to select up to five providers and ranks them in order of preference. Odean Decl. ¶ 9, Trial Ex. 39.[7] The child is then matched with one of the family's selected preschools. Odean Dep. 18:10-12, Trial Ex. 26. If none of the family's choices is available, the family may select additional providers for their child. Odean Decl. ¶ 9, Trial Ex. 39.

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[7] After the UPK Program's initial enrollment for the 2023-24 school year, the Department started allowing "direct placement," meaning families may select a participating provider by showing up at that school and being directly registered there by the Local Coordinating Organization. Odean Dep. 27:12-22, Trial. Ex. 26.

iii. Algorithm Preferences

For the UPK portal and to match children with providers, the Department uses BridgeCare software, which was not designed specifically for the UPK Program but is customizable. Trial Tr. (Cooke) 149:5-6, 156:1-9. The software relies on a deferred acceptance algorithm for lottery matching. Trial Tr. (Odean) 212:9-11, 277:2-4. Through testing and development of the system, the Department heard from Local Coordinating Organizations, providers, and families that some important considerations were being overlooked. *Id.* 212:1320; Odean Dep. 79:17-22, Trial Ex. 26. Consequently, the Department added to the system the option for providers to select applicable preferences that enable the matching process to take into account various unique provider characteristics. Trial Tr. (Cooke) 155:17-23; Trial Tr. (Odean) 217:1-9, 277:2-10. Over the course of this case, the Department has continued to evaluate and refine these preferences.

The following preferences are listed in the UPK Colorado Provider Guide as "exception criteria" that providers were able to select for the 2023-24 school year:

- I am a faith-based provider and may require families to be a part of my congregation.
- I am a co-op and will require family participation as a part of my programming.
- I am an immersive or dual language provider and children may need to be screened to participate in my program.

- I am a school district provider and will require families to live in my school district or boundary AND/OR I support children with Individualized Education Plans (IEP).
- I am a Head Start grantee and families may need to meet additional factors to enroll with me.
- I am a provider that prioritizes placement for the children of my employees.

UPK Colorado Provider Guide at 37, Trial Ex. 24. As the Department went through the rulemaking process for the UPK Program, it filled in the details and recognized additional preferences. *See, e.g.*, Proposed Rules at 6, Trial Ex. 21.

Ultimately, the Department's final rules for the UPK Program permit providers to "utilize the following programmatic preferences to the deferred acceptance algorithm component of the matching process:

1. Faith-based providers granting preference to members of their congregation;
2. Cooperative preschool providers requiring participation in the cooperative;
3. School districts maintaining enrollment consistent with their established boundaries;
4. Participating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education

Act, 20 U.S.C. section 1400 (2004), or the Exceptional Children's Education Act, Article 20 of Title 22, C.R.S.;

5. Head Start programs' adhering to any applicable federal law requirements including eligibility requirements;

6. Participating preschool providers granting preference to an eligible child of one (1) of their employees;

7. Participating preschool providers granting preference to an eligible child to ensure continuity-of-care for that child;

8. Participating preschool providers granting preference to an eligible child to keep siblings similarly located; [and]

9. Participating preschool providers granting preference to an eligible child who is multilingual, to ensure proper delivery of services to that child.

10. Participating preschool providers may grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity. Participating preschool providers seeking to utilize this preference, must ensure:

    a. That the specific community, competencies or interests, relationship, public assistance

benefit, or activity being required of children and/or families who attend, is a requirement of all participating children and/or families.

b. That implementation of requiring the specific community, competencies or interests, relationship, public assistance benefit, or activity does not conflict with any other provision of the Colorado Universal Preschool Program statutes at sections 26.5-4-201 through 26.5-4-211, C.R.S., nor with any other applicable law or regulation.

c. Examples of approved preferences include, but are not limited to: participating preschool providers who require a focus in a certain knowledge area (such as science, technology, engineering, and math ("STEM")); providers who serve families with a family member who works or attends school at a specific site(s) or location(s); providers who serve families within a specific geographical catchment area; providers who require a certain amount of volunteering or participation by the participating family; providers who require certain vaccinations for the health and safety of its staff and students; and providers who serve families who are receiving a specific public assistance benefit(s) such as housing assistance."

8 Colo. Code Reg. 1404-1:4.110. The final rules specify that, "[i]n utilizing these programmatic preferences, eligible preschool providers must still comply with" the equal-opportunity requirement. *Id.* 1404-1:4.110(B).

While using the UPK portal, a family can either see what preferences providers have or will be asked questions to determine if the family qualifies for a particular provider, considering any applicable preference. Trial Tr. (Odean) 263:20-22; Trial Tr. (Cooke) 167:11-168:2. If a provider has selected a preference and a child who does not fit that preference is matched to that provider, the provider may decline the match. *Id.* 156:19-157:2. When a provider declines a match, the Department reviews that decision to make sure it was accurate for the provider to exercise it. *Id.* 157:3-6. Of the approximately 1,900 UPK providers, the Department has permitted 1,091 preschools to select at least one preference. Trial Tr. (Odean) 255:19-25.

The so-called "congregation preference" allowed by the Department is particularly relevant to Plaintiffs' claims. The Department created the congregation preference in response to conversations with providers, bill sponsors, and community members who questioned whether members of a church family might lose their seats based on the algorithm. Trial Tr. (Cooke) 154:21-25, 157:17-24. Ms. Cooke testified that she shared the development of the congregation preference with the faith-based working group when members of that group raised concerns about the inclusion of sexual orientation in the equal-opportunity requirement. *Id.* 154:19-155:5. The congregation preference permits faith-based providers to reserve for members of their church community all or a portion of the seats for which they are licensed. *Id.* 157:3-10; *see also* Odean Decl. ¶ 8, Trial Ex. 39. The Department considers a provider to be faith-based for the purposes of the congregation preference from the provider's self-identification alone. Trial Tr. (Odean) 275:23-276:6. The

Department has intended to use the word "congregation" as expansively as possible so that faith-based providers could define their own community. *Id.*; *see also* 8 Colo. Code Reg. 8 Colo. Code Reg. 1404-1:4.103(L) (defining "congregation" in the final rules for the UPK Program as "members of the community that the faith-based provider serves as the faith-based provider defines that community").

Testimony at trial established that providers who select the congregation preference may designate seats for preschoolers from families that adhere to a specific faith and may decline children from other families. For example, Ms. Odean testified that a Catholic provider could reserve seats for Catholics, and a Lutheran provider could reserve seats for Lutherans. Trial Tr. (Odean) 239:18-22. Similarly, she indicated that a Catholic provider could limit its seats to members of its congregation only and would not have to provide an opportunity to enroll Lutherans. *Id.* 239:23-240:1. Ms. Odean insisted, however, that no faith-based provider is allowed to discriminate on the basis of religion or religious affiliation, and if the Department learned that a provider was utilizing the congregation preference in a discriminatory way, it would investigate. *Id.* 276:7-9, 16-19. The Department does not consider the congregation preference to act as a workaround for the equal-opportunity requirement because the preference is intended to support inclusive community and "ensure that providers can continue to serve the communities that they have served, and families can continue to participate." *Id.* 276:10-15.

Plaintiffs also highlight as pertinent to their claims the algorithm preferences involving Head Start programs and children with Individualized Education

Programs ("IEPs"). Head Start programs prioritize low-income families and are permitted to participate in the UPK program. Trial Tr. (Odean) 237:14-238:5; *see also* Trial Tr. (Cooke) 171:7-10. It was intentionally written into the UPK Statute that Head Start providers be "prioritized as participants and that the children they serve [be] prioritized as participants." Trial Tr. (Odean) 221:16-18. The algorithm preference involving children with IEPs applies only to school districts and their contracted partners and allows them to place children with specific special needs in a particular classroom consistent with the child's IEP. Trial Tr. (Cooke) 171:11-172:3; Trial Tr. (Odean) 219:24-220:1. The preference was created because it was highlighted in the UPK Statute as a priority. *Id.* 219:18-20. The Department heard from school district providers and the Colorado Department of Education that it was critical for them to be able to participate and satisfy their obligation under the federal mandate associated with the Individuals with Disabilities Education Act, and not every preschool setting can accommodate children with various special needs. *Id.* (Odean) 219:823; Trial Tr. (Cooke) 171:14-17.

The tenth preference included in the final rules promulgated by the Department permits participating providers to prioritize a child based on "the child and/or family being a part of a specific community" or "having specific competencies or interests." 8 Colo. Code Reg. 14041:4.110. Considering that preference, Ms. Odean initially testified that a participating school could be just for "gender-nonconforming children," could prioritize "children of color from historically underserved areas," or could grant preference to a child based on the child or family being part of the

LGBTQ [8] community. Trial Tr. (Odean) 244:15-25, 245:25-246:8. Ms. Odean attempted to qualify her responses by explaining that the equal-opportunity requirement takes precedence and there would need to be a conversation about the appropriateness of such preferences. *Id.* 245:3-10, 19-24. She later clarified that, upon receiving such a request from a provider, she would have a conversation with the leadership team, and likely the attorneys, to determine what the next steps would be, but they would not allow a provider to utilize a preference to violate the law. *Id.* 278:2-8, 279:18-280:5.

Ms. Cooke testified that the algorithm preferences the Department created "were meant to really identify and acknowledge certain relationships . . . that existed between the provider and the community the provider served or families the provider served" and were designed to protect "the seats in a particular provider setting from the unintended consequences of [the] computer algorithm which manage[s] matching." Trial Tr. (Cooke) 153:22-25, 154:9-12. Ms. Odean acknowledged that, because of the variety of programming and settings providers offer in the mixed-delivery program, it would be "really difficult" for providers to be able to participate if they had to accept every child who could be matched to them. Trial Tr. (Odean) 214:7-17. Despite the Department's implementation of the algorithm preferences, though, Ms. Cooke, Ms. Odean, and Dr. Roy have been unwavering in their assertions that

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[8] LGBTQ is an acronym for lesbian, gay, bisexual, transgender, and queer (or questioning). Throughout this Order, I also use the term LGBTQ+ to refer to all individuals who identify as part of that community.

the Department cannot permit a participating provider to violate the equal-opportunity requirement. *See, e.g.*, Trial Tr. (Cooke) 160:4-8; Trial Tr. (Odean) 206:22-207:6, 210:5-9, 268:21-24; Roy Dep. 23:10-15, Trial Ex. 27.

iv. Individual Provider Preferences

In addition to the defined algorithm preferences, the Department allows providers to request other individual preferences through an online form.[9] Trial Tr. (Odean) 256:1-14; UPK Individual Preference Form at 2, Trial Ex. 31. The form provides as examples[10] of individual preferences that may be permitted: "My location only serves teen moms enrolled at a neighboring high school; [and] My location only serves children with specific disabilities." *Id.* The Department has granted many individual preferences, including requests to admit only "fully vaccinated children" and to prioritize subdivision residents. UPK Individual Preference Response Data at 82-83, Trial Ex. 34; Trial Tr. (Odean) 257:9-23. The process for individual preferences was created in response to input from providers with circumstances that had not been considered, and the preferences were permitted "to honor

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[9] In their filings, Plaintiffs addressed these individual preferences as a separate type of "exception" permitted by the Department, and I do the same in this Order. However, the tenth preference included in the final rules subsumes these individualized requests into one of the Department's defined categories of algorithm preferences. *See* Trial Tr. (Odean) 228:22-229:2.

[10] The form uses "i.e." before its "teen moms" example. UPK Individual Preference Form at 2, Trial Ex. 31. In context, I believe "e.g." is intended.

mixed delivery and family choice and be inclusive of [different types of] communities." *Id.* 229:4-20.

B. Plaintiffs

As identified above, the plaintiffs in this case are St. Mary Catholic Parish in Littleton ("St. Mary's"), St. Bernadette Catholic Parish in Lakewood ("St. Bernadette's"), and Daniel and Lisa Sheley. St. Mary's and St. Bernadette's operate Catholic schools—St. Mary's Catholic School and Wellspring Catholic Academy—that include preschools ("Plaintiff Preschools"). At the trial, Plaintiffs presented testimony from Tracy Seul, the Director of Preschool and Development for St. Mary's; Avery Coats, Principal and Head of School for Wellspring Catholic Academy; Abriana Chilelli, the Acting Superintendent of Catholic Schools for the Archdiocese of Denver (the "Archdiocese"); and Ms. Sheley.

1. Plaintiff Preschools

i. Operation and Religious Doctrine

Plaintiff Preschools are subject to the religious authority of the Archdiocese and are overseen by its Office of Catholic Schools. Trial Tr. (Seul) 73:13-15; Trial Tr. (Coats) 105:9-12; Trial Tr. (Chilelli) 36:24-37:5. In total, the Archdiocese oversees 36 Catholic preschools, including Catholic Charities preschools that currently participate in the UPK Program. Trial Tr. (Chilelli) 37:1, 65:18-19, 67:21-22; Trial Tr. (Odean) 234:9-13, 235:1-4. The mission of the Archdiocese's schools is to be "'sanctuaries of education' supporting parents and empowering families to lead their children to encounter and be rescued by Jesus Christ and have abundant life, here on earth and in heaven, for the glory of the Father." Mission and Charter of Catholic Schools at 1,

Trial Ex. 3; Trial Tr. (Chilelli) 40:24-41:20. Ms. Chilelli, from the Archdiocese's Office of Catholic Schools, clarified that this mission is viewed as "serv[ing] the family [and] . . . parents in their duties as primary educators or principal educators of their children." Trial Tr. (Chilelli) 55:15-18. She explained that, for schools to fulfill their mission, parents must therefore understand that mission and "desire to teach it within their family, to promote it, to defend it, and [to] have their children formed in . . . a Catholic worldview." *Id.* at 55:21-25; *see also* Trial Tr. (Seul) 78:18-21, 82:15-17; Trial Tr. (Coats) 116:14-18. Ms. Chilelli further testified that, with their focus on serving parents, the schools "would never want to . . . cause conflict with what the parents are teaching in their home" as it would create confusion for the child and the family. Trial Tr. (Chilelli) 51:13-20; see also Trial Tr. (Seul) 79:9-10; Trial Tr. (Coats) 126:2-5.

Consistent with that perspective, parents of children enrolling in the Archdiocese's schools are required to sign the Statement of Community Beliefs "so that it's abundantly clear what the Catholic school will teach and what the Catholic school community believes." Trial Tr. (Chilelli) 44:18-23; *see also* Statement of Community Beliefs at 7-8, Trial Ex. 2; Trial Tr. (Seul) 79:11-24; Trial Tr. (Coats) 111:12-112:12. The Statement of Community Beliefs for parents and guardians of students informs:

> For our school to properly support you as the primary educators of your children and partner with you in the formation and education of your children, all Catholic school families must understand and display a positive and supportive attitude

> toward the Catholic Church, her teachings, her work, and the mission of the Catholic school. . . . [F]amilies must refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the School, and the Church in the Archdiocese of Denver, or be considered a counter-witness to Catholic doctrine or morals.

Statement of Community Beliefs at 8, Trial Ex. 2. Even baptized Catholics are required to sign the Statement of Community Beliefs to enroll a child at an Archdiocesan preschool, and some may not desire to sign the Statement. Trial Tr. (Chilelli) 68:13-22.

The Archdiocese's oversight of its schools "includes standard operating procedures . . . and adherence to Catholic faith [and] morals [and] the building up of Catholic culture within the school, all ordered towards the formation of the human person, the student, [and] all in service to the family." *Id.* 38:4-11. The Archbishop of the Archdiocese "promulgates policies, directives, [and] guidance" that "are expected to be implemented at the school level." *Id.* 37:22-38:1.

Particularly relevant to this case, the Archdiocese has produced guidance on sexual orientation and gender identity. In a document titled the *Splendor of the Human Person: A Catholic Vision of the Person and Sexuality*, the Archbishop provided a "basic outline for addressing issues of the human person, sexuality and gender for use within parishes and schools in the Archdiocese of Denver." Splendor of the Human Person at 5, Trial Ex. 7; Trial Tr. (Chilelli) 48:20-49:5. The document explains that "[i]t is essential that Catholics,

particularly those working for the Church in parishes and schools, as well as the young people to whom the Church ministers in [its] parishes and schools, receive formation in the Church's teaching on the human person and sexuality." Splendor of the Human Person at 6, Trial Ex. 7. In pertinent part, the document states: "Sexual identity, embodiment as either a man or woman is a gift that is given to us from the moment of creation." *Id.* at 7. It reasons that "same-sex relationships, including those in which one partner identifies as transgender, distort the truth and meaning of sexual identity by suggesting that mothers and fathers are interchangeable." *Id.* at 8.

The Office of Catholic Schools has also provided concrete direction for schools in the document *Guidance for Issues Concerning the Human Person and Sexual Identity*. Guidance on the Human Person and Sexual Identity, Trial Ex. 5; Trial Tr. (Chilelli) 49:6-18. The document instructs Archdiocesan schools to use pronouns that correspond with biological sex, to enforce their dress code that corresponds with an individual's biological sex, and to make changing and bathroom facilities available only as they correspond with an individual's biological sex. Guidance on the Human Person and Sexual Identity at 2, 9-12, Trial Ex. 5. Additionally, the document advises that enrolling a child of a same-sex couple "is likely to lead to intractable conflicts. *Id.* at 16. And it warns that "[a] Catholic school cannot treat a same-sex couple as a family equivalent to the natural family without compromising its mission and Catholic identity and causing confusion about the nature of marriage for all students enrolled." *Id.* (emphasis removed). If a family is seeking to enroll their child in an Archdiocesan school and there is a conflict between what the school teaches

and what same-sex parents are teaching their child regarding human sexuality or parents of a transgender child are teaching their child regarding "the body's biological reality" and identity, then "out of abundant respect for the family and the child," school leaders are not to enroll the student. Trial Tr. (Chilelli) 50:18-53:2. If a child who is a student at one of the Archdiocesan schools "begins asserting an identity that's at odds with his or her biological sex," school leaders are to explain that the school is unable to make accommodations relating to dress, pronoun use, and bathroom access. *Id.* 53:10-54:12. In that circumstance, if the parents decide "they would like those accommodations or they would like their child's identity that they're sharing with us to be affirmed," the school is to "explain that maintaining the relationship with the family with the child's enrollment would not be possible." *Id.* 54:13-20. Plaintiff Preschools are expected to and do follow this guidance. Trial Tr. (Chilelli) 54: 21-23; Trial Tr. (Seul) 80:6-15; Trial Tr. (Coats) 112:20-114:13. In fact, last year, Wellspring Catholic Academy declined to enroll a fifth grader with same-sex parents. *Id.* 113:5-114:13, 125:25-126:10.

In making general admissions decisions, Plaintiff Preschools prioritize siblings of current students, parishioners of their own parish, and Catholic families affiliated with other parishes. Trial Tr. (Seul) 81:8-17; Tr. (Day 1, Coats) 115:17-116:20. A "parishioner," as defined by the Archdiocese, is any Catholic living within the geographic boundaries of a particular parish; the individual does not have to be formally enrolled at the parish. Trial Tr. (Chilelli) 67:9-15. Plaintiff Preschools are obligated to serve their parishioners first because they are a ministry of their parishes. Trial Tr. (Seul) 81:18-20; Trial Tr. (Coats) 116:1-3. Ms.

Seul of St. Mary's testified that the school must then prioritize providing a Catholic education for Catholic parents who want that for their children. Trial Tr. (Seul) 81:20-22. And Ms. Coats from Wellspring Catholic Academy clarified that Catholic families are prioritized because they "share a foundational mission in life." Trial Tr. (Coats) 116:3-5. Archdiocesan preschools also enroll students of non-Catholic families as an act of evangelization. Trial Tr. (Chilelli) 68:4-11.

ii. Potential Conflicts with the UPK Requirements and Request for Accommodation

The equal-opportunity requirement demands that participating preschools "provide eligible children an equal opportunity to enroll and receive preschool services regardless of . . . religious affiliation, sexual orientation, [or] gender identity . . . , as such characteristics and circumstances apply to the child or the child's family." Agreement at 2, Trial Ex. 13; Colo. Rev. Stat. § 26.5-4-205(2)(b). Plaintiffs Preschools contend this requirement prevents them from making enrollment decisions in accordance with their religious beliefs, as it prohibits them from preferencing Catholic families in enrollment and from considering whether a child or family is supportive of the Catholic Church's teachings, in particular its teachings on human sexuality.

Considering these potential conflicts, the Archdiocese determined its schools should not participate in the UPK Program until religious exemptions can be guaranteed and the Archdiocese could "have the confidence that [its] parishes and schools [would] not be placed into a compromising situation that jeopardizes [their] Catholic mission." Dollins Email at 2, Trial Ex.

10. The Archdiocese believed that, if its schools participated in the UPK Program, it "would be in non-compliance for upholding Church teaching in [its] employment and admission practices and programs." *Id.* And it warned that participation "would be to cooperate with an ideology and agenda contrary to [its] beliefs on the human person, which would ultimately compromise the integrity of [its] Catholic schools' mission." *Id.* The Archdiocese directed its parishes and their preschool programs not to enter into any agreements with the State related to the UPK Program. *Id.*; Trial Tr. (Chilelli) 56:8-10, 57:1-5; Trial Tr. (Seul) 90:2-15; Trial Tr. (Coats) 120:23-121:8. As a result, neither of the Plaintiff Preschools participates in UPK Colorado. Trial Tr. (Seul) 89:25-90:7; Trial Tr. (Coats) 120:12-13, 120:23-121:1.

Citing the potential conflicts between school policies and the equal-opportunity requirement, the Archdiocese, along with a coalition of religious preschool providers, sent a letter to the Governor of Colorado in February 2023. Trial Tr. (Chilelli) 59:1-4. The letter asserted that "providing exemptions for faith-based religious providers from aspects of the UPK Program that those providers believe run counter to their sincerely held beliefs will maintain the legal and constitutional integrity of the program while enhancing the number and variety of preschools from which Colorado parents can choose." Coalition Letter at 2, Trial Ex. 11. Dr. Roy, the Department's Executive Director, responded to the letter, stating that she lacked "the authority to create an exemption that excludes faith-based providers from the statute." Roy Letter at 1, Trial Ex. 12. She advised that faith-based providers participating in the Program may give preference to members of their congregation, explaining that they

could "reserve all or a portion of their seats for their members, and [could] decline a match from a family that is not part of the congregation." *Id.* at 2. The Archdiocese did not regard the congregation exception permitted by the Department as a sufficient accommodation because of how the Archdiocese defines and prioritizes parishioners and because all families—Catholic and non-Catholic—enrolling students in Archdiocesan preschools must sign the Statement of Community Beliefs. Trial Tr. (Chilelli) 67:2-69:2.

Pursuing another route for its schools to participate in the UPK Program, the Archdiocese advised its interested schools to sign up as providers but send back the Agreement unsigned with a letter explaining why they were unable to sign it. Trial Tr. (Chilelli) 59:9-15; Trial Tr. (Seul) 95:25-96:5; Trial Tr. (Coats) 121:12-16. The Department did not respond to this effort to participate. Trial Tr. (Chilelli) 59:21-60:3.

iii. Participation in Other Preschool Programs

Plaintiff Preschools have signed agreements for other government-funded, tuition-assistance programs, including the Denver Preschool Program and the Colorado Child Care Assistance Program ("CCCAP"). Trial Tr. (Chilelli) 60:25-61:4; Trial Tr. (Seul) 88:3-4; Trial Tr. (Coats) 117:1-20. Elisa Holguín, the President and CEO of the Denver Preschool Program, and Jesse Burne, who oversees CCCAP as the Division Director for Early Learning Access and Quality at the Department, testified at the trial about those programs and their requirements.

The Denver Preschool Program provides tuition support for children in Denver to attend preschool.

Trial Tr. (Holguín) 422:21-23. The Program requires providers to complete an application to participate in the program. *Id.* 424:2-3, 433:5-11. The Provider Agreement for the 2022-23 school year, which Wellspring Catholic Academy signed, prohibits providers from "discriminat[ing] against any person on the basis of race, color, religion, national origin, gender, age (except as to the age of children qualifying for Tuition Credits), military status, sexual orientation, gender variance, marital status, or physical or mental disability (except as such disability may materially and adversely affect proper administration of the preschool program)." 2022-23 DPP Renewal Agreement at 26, Trial Ex. 43. The application also has language reading: "Nothing in this agreement shall be construed to affect the Provider's right to engage in privately funded, inherently religious activity or affect the independence of Providers, including any rights protected by the Colorado and U.S. Constitutions and applicable law." *Id.* at 16. Ms. Holguín testified that this latter language does not exempt a program from complying with the nondiscrimination requirement and does not allow a faith-based provider to refuse to enroll an LGBTQ child or to discriminate against LGBTQ families. Trial Tr. (Holguín) 439:1-3; 440:1-7.

CCCAP supports low-income children and families in Colorado by offsetting the cost of child care. Trial Tr. (Burne) 399:14-16. The Program provides assistance for children from birth through age 13. *Id.* 399:18-19. To participate in CCCAP, a provider must sign a fiscal agreement with the local county. *Id.* 401:4-17. On August 24, 2023, Ms. Seul, on behalf of St. Mary's, signed a CCCAP fiscal agreement with the Jefferson County Human Services Department that is effective until July 2026. *Id.* 403:12-404:2, 404:10-12.

The fiscal agreement requires providers to "[a]ccept referrals for child care without discrimination with regard to race, color, national origin, age, sex, religion, marital status, sexual orientation or physical, intellectual or mental health disability." 2023 CCCAP Fiscal Agreement at 5, Trial Ex. 42. Mr. Burne testified that CCCAP interprets that provision to mean that a provider is not allowed to discriminate against a child or a family in accepting referrals of children to their program. Trial Tr. (Burne) 404:25405:2. According to Mr. Burne, CCCAP is based on a family's choice, and if a family chooses a registered CCCAP provider, that provider must accept the family without discrimination. *Id.* 406:8-15.

I previously found, in evaluating whether Plaintiff Preschools' alleged injury was sufficient to meet the requirements for standing, that it was not inconsistent for Plaintiff Preschools to simultaneously believe that the UPK Program requirements conflict with their beliefs but that those of the Denver Preschool Program and the CCCAP provision do not. Order on Defs.' Mot. to Dismiss, Pls.' Mot. for Summ. J., and Pls' Mot. to Exclude ("Order in Preparation for Trial") at 16-17, ECF No. 99. This ruling did not determine how the Denver Preschool Program and CCCAP agreements should be interpreted. It merely concluded that Plaintiff Preschools were not prevented from bringing this suit because they had signed the other agreements.

iv. Harm Experienced by Plaintiff Preschools

The evidence at trial established that Plaintiff Preschools have experienced harm from not participating in the UPK Program. Most definitively, Plaintiff Preschools have not received bonuses given to providers

participating in the UPK Program. Trial Tr. (Seul) 91:12-17; Trial Tr. (Coats) 121:19-22. Ms. Seul testified that St. Mary's lack of participation also affected the preschools' ability to recruit families and compete with preschools participating in the Program. Trial Tr. (Seul) 90:23-91:11. Ms. Seul and Ms. Coats had prospective families ask if Plaintiff Preschools are participating in the UPK Program, and Ms. Seul reported that a lot of families did not complete the enrollment process after finding out the preschool was not participating. *Id.* 91:22-92:5; Trial Tr. (Coats) 121:23-122:1, 122:10-12. If the Archdiocese confirmed that participating in the UPK Program was consistent with Catholic teaching, Plaintiff Preschools would immediately seek to participate in the Program. Trial Tr. (Seul) 92:22-25; Trial Tr. (Coats) 122:13-16.

2. Plaintiff Parents

Plaintiffs Daniel and Lisa Sheley are parishioners of St. Mary's. Trial Tr. (Sheley) 98:48. They have a four-year-old and a three-year-old enrolled at St. Mary's preschool, as well as a one-year-old they plan to send to St. Mary's once she is old enough. *Id.* 98:4-8, 98:13-20, 99:4-6, 99:10-14. The Sheleys believe that it is their "directive as Catholics" to provide a Catholic education for their children. *Id.* 98:25-99:3, 100:3-7. Because they send their four-year-old to St. Mary's, the Sheleys do not benefit from the UPK Program and are missing out on approximately $4,700 in tuition assistance for the 2023-24 school year. *Id.* at 100:10-101:3.

3. Plaintiffs' Claims

In their Amended Complaint, Plaintiffs assert seven claims that are as-applied constitutional challenges to Defendants' implementation of the equal-opportunity requirement. The first, fourth, and fifth claims are brought by Plaintiff Preschools and the Sheleys under the Free Exercise Clause of the First Amendment. The first claim alleges that the equal-opportunity requirement and Paragraph 18(B) of the UPK Agreement disqualify Plaintiff Preschools from the UPK Program based on the schools' religious character and exercise. Plaintiffs' fourth claim asserts that the Department's "discretionary exemptions" to the equal-opportunity requirement— what I refer to as the individual provider preferences—confirm the Department has the discretion to grant exemptions and demonstrate that its policies are not generally applicable. Plaintiffs' fifth claim contends that the Department's "categorical exemptions"—what I call the algorithm preferences—prevent the equal-opportunity requirement from being neutral or generally applicable. Based on those arguments, Plaintiffs' fourth and fifth claims contend the equal-opportunity requirement is unconstitutional because it cannot be justified under strict scrutiny. The second and third claims are brought by Plaintiff Preschools and allege Paragraph 18(B) of the UPK Agreement violates the ministerial exception (Claim Two) and the church autonomy doctrine (Claim Three), which originate from the Free Exercise Clause. With the sixth claim, Plaintiff Preschools assert that the at-issue provisions of the UPK Agreement infringe their rights guaranteed by the Free Speech Clause of the First Amendment. Lastly, the seventh claim is brought by Plaintiff Preschools

under the Establishment Clause of the First Amendment, alleging the Department's creation of the congregation preference has resulted in unlawful denominational favoritism.

Plaintiffs seek declaratory judgment, declaring that "exclusion of the preschools at Plaintiffs St. Mary Catholic Parish in Littleton and St. Bernadette Catholic Parish in Lakewood from Colorado's Universal Preschool Program on account of their sincere religious exercise, including: (i) prioritizing Catholic students and families in admissions decisions; (ii) requiring employees to adhere to and support the schools' religious beliefs, including on marriage and sexuality; (iii) considering for purposes of student admission or retention whether a family or child adheres to and supports the schools' religious beliefs, including on marriage and sexuality; and (iv) operating their schools in accordance with their religious beliefs, violates the First Amendment to the United States Constitution." Pls.' Proposed Findings of Fact and Conclusions of Law ("FOFCOL") at 69.

Plaintiffs also contend they are entitled to permanent injunctive relief prohibiting "Defendants Lisa Roy and Dawn Odean from conditioning participation in the Colorado Universal Preschool Program, Colo. Rev. Stat. §§ 26.5-4-201, et seq., by Plaintiffs St. Mary Catholic Parish in Littleton, St. Bernadette Catholic Parish in Lakewood, Daniel Sheley, and Lisa Sheley on their:

i. agreeing to provide, or providing, eligible children an equal opportunity to enroll and receive preschool services regardless of religious affiliation, sexual orientation, or gender identity;

ii. agreeing not to discriminate against any person on the basis of religion, sexual orientation, or gender identity; or

iii. otherwise agreeing to violate, or violating, their religious beliefs, character, and exercise, including:

a. prioritizing Catholic students and families in admissions decisions;

b. requiring employees to adhere to and support the schools' religious beliefs, including on marriage and sexuality;

c. considering for purposes of student admission or retention whether a family or child adheres to and supports the schools' religious beliefs, including on marriage and sexuality; and

d. maintaining operational policies in accordance with their religious beliefs on marriage and sexuality, including with respect to dress codes, pronoun usage, and restroom usage.

Id. at 69-70. Plaintiffs further request an order requiring "that Defendants immediately permit Plaintiffs St. Mary Catholic Parish in Littleton, St. Bernadette Catholic Parish in Lakewood, Daniel Sheley, and Lisa Sheley to begin participating in UPK Colorado, including for the 2023-24 school year, notwithstanding their sincere religious exercise described above." *Id.* at 70. Additionally, Plaintiffs claim $1 in nominal damages. Am. Compl. at 36, ECF No. 30.

A brief was filed by the Jewish Coalition for Religious Liberty, the Rocky Mountain District Lutheran

Church Missouri Synod, and the Colorado Association of Private Schools, as amici curiae. *See* Br. of Amici Curiae, ECF No. 71-1. Amici support the relief sought by Plaintiffs and advocate for "permitting religious preschools to freely participate in the [UPK] Program." *Id.* at 19.

C. Expert Testimony

Defendants presented the testimony of expert witnesses at trial to establish the State's interest in enacting and enforcing the equal-opportunity requirement. Defendants offer two State interests they contend are compelling: (1) ensuring eligible children and their families do not face discriminatory barriers to publicly funded preschool and (2) protecting children from discrimination, i.e., "ensuring that, once enrolled, they receive publicly-funded [sic] preschool services that are safe, healthy, and free from discrimination." Defs.' Resp. to Mot. for Summ. J. at 22, ECF No. 77; Defs.' Proposed FOFCOL at 50. Ms. Holguín from the Denver Preschool Program provided testimony on the importance and impact of preschool. Dr. Abbie Goldberg, a clinical psychologist and psychology professor, testified as an expert about families with LGBTQ+ parents. And Dr. Amy Tishelman, a clinical and research psychologist, provided her opinions as an expert on variations in sex traits[11] and gender diverse and transgender[12] children.

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[11] Variations in sex characteristics or sex traits are "congenital biological conditions whereby there's an atypicality in reproductive or sex anatomical or hormonal expressions." Trial Tr. (Tishelman) 336:12-14.

[12] "[T]ransgender' is an umbrella term to refer to somebody

1. Elsa Holguín[13]

Ms. Holguín testified that "[p]reschool is very important to ensure that children have equal access and equal support to be ready to access school, to be ready for school, but also to be ready for life." Trial Tr. (Holguín) 427:12-14. In terms of school readiness, she explained that it includes "readiness for math, readiness for learning, readiness for reading," and also being "emotionally ready to perform in the classrooms." *Id.* 431:16-21. Children who attend preschool "are less likely to repeat a grade," "more likely to graduate," and "more likely to access college or higher education." *Id.* 430:4-10. Attending preschool "has a multiplying effect, and . . . the children of the children [who] attend preschool are also benefiting." *Id.* 430:11-15. Ultimately, preschool "is a key element for children to be able to succeed, and an equalizer for many children [who] don't have the opportunity to be in a place where

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whose gender identity differs from what their gender identity was assumed to be at birth." Trial Tr. (Tichelman) 336:24-337:1. "'[G]ender diversity' is a broader term . . . [t]hat can refer to diverse gender expressions that maybe aren't expected in [a] particular community, and not necessarily gender identity differences.'" *Id.* 337:1-4.

[13] Plaintiffs challenged Defendants' designation of Ms. Holguín as a non-retained expert on the ground that her testimony should relate only to facts and not her opinions. *See* Pls.' Motion to Exclude at 6, ECF No. 73. I denied that Motion but advised that Plaintiffs may object to a particular opinion provided by a witness during the trial. *See* Order in Preparation for Trial at 31. Other than the testimony summarized here, Ms. Holguín's testimony was limited to the facts as she experienced them. Plaintiffs did not object to this background information on the importance of preschool, and I find Ms. Holguín is qualified to provide these opinions, they are reliable, and they satisfy Federal Rule of Evidence 702.

they can acquire those skills." *Id.* 430:15-18. Ms. Holguín made clear that, to achieve these "quality" results, the providers must also be of quality. *Id.* 449:6-9.

In contrast, not having access to quality early childhood education, "impacts the children's readiness to succeed." *Id.* 430:22-23. Ms. Holguín testified:

> [F]or many children, it's detrimental in that . . . they are held behind, more likely to be in special education, and less likely to succeed academically and socially and emotionally as well. So, the impact is profound, particularly for some of our communities that don't have access to those resources.

Id. 430:25-431:5.

2. Dr. Goldberg

Dr. Goldberg is a clinical psychologist and psychology professor at Clark University in Massachusetts, where she is the Director of Women's and Gender Studies. Goldberg Report at 1, Trial Ex. 45. One of her areas of expertise and research is LGBTQ+ parent families, and she is the author of over 150 peer-reviewed articles, 25 book chapters, and four books. *Id.* at 2.

According to Dr. Goldberg, "LGBT[14] parents are about twice as likely to live in poverty as compared to heterosexual cisgender parents." Trial Tr. (Goldberg)

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[14] Dr. Goldberg used the term LGBT, but she clarified that she did not intend to exclude queer individuals and was using the term with "an implicit asterisk or plus sign." Trial Tr. (Goldberg) 294:23-295:6.

287:15-17. Poverty may affect the reliability of parents' transportation or may require them to use public transportation, and consequently, transportation will often be a factor they consider when looking for an early childhood program. *Id.* 324:4-17. There is also "a disproportionate number of LGBTQ parents parenting in rural areas, meaning when you look at same-sex couples in rural areas, a greater percentage of them will be parents than . . . in urban areas." *Id.* 287:4-9. In rural areas, there are fewer early childhood education environments, and they are more spread out. *Id.* 325:3-8. For those reasons, LGBTQ+ families often have fewer options when looking for early childhood education. *Id.* 287:19-25, 289:21-23, 324:25-325:2. For LGBTQ+ parents in rural environments, sometimes the only option available for early childhood education is a religious provider. *Id.* 325:9-14. "[I]f there is a group that is more likely to live in poverty and more likely to have fewer options in terms of preschools and accessible early childhood education, . . . those families may be at risk for . . . inadequate . . . outcomes . . . ." *Id.* 288:10-14.

Children are impacted by the environments they spend the most time in, which usually includes school. *Id.* 296:5-7, 297:1-4. If a child "is being implicitly or explicitly told that there is something wrong with them or their family, this can create negative self-views." *Id.* 297:11-13. The struggles faced by youth who are raised by LGBTQ+ parents stem not from their parents' sexual orientation or gender identity but from other people's perceptions or reactions to their families. *Id.* 299:2-9. Likewise, "if a child is getting messages that their identity or presentation is non-normative, not accepted, [or] equated with negative

qualities or attributes, they will internalize those qualities as applying to themselves." *Id.* 297:17-20.

3. Dr. Tishelman

Dr. Tishelman is a clinical and research psychologist and currently a Research Associate Professor at Boston College in Massachusetts. Tishelman Report at 1, Trial Ex. 47. She has received funding from the National Institutes of Health for her research, which has focused on gender diverse and transgender youth. *Id.* at 2. She has developed best practices for caring for and assessing gender diverse prepubescent children and has served as an expert witness approximately 40 times. *Id.* at 2-4.

Dr. Tishelman provided testimony on early life adversities and adverse childhood experiences, known as "ACEs." Trial Tr. (Tishelman) 339:19-21, 346:15. "Early life adversities can be child maltreatment" and "can also constitute other kinds of stressors." *Id.* 340:5-10. In basic terms, ACEs are "experiences that have the potential to cause trauma for a child, and they can be single incidents or . . . chronic extreme stress." *Id.* 340:10-13. ACEs "have been demonstrated to be extremely important in terms of development." *Id.* 339:23-24. Discrimination is a form of an ACE, as is significant bullying, which can emanate from adults. Trial Tr. (Tishelman) 340:14-18, 348:1-4, 369:10, 369:16-370:6. Generally, there are "a lot of different kinds of ways for children to be different, and if they're treated poorly because of that difference, it can create a lot of anxiety and low self-esteem." *Id.* 348:10-13. "[T]he way that it works for other children is the way that it works for gender-diverse and transgender children in the sense that if they're rejected for something that they can't change about themselves, that can be very hard,

because they didn't have a way to be different." *Id.* 348:14-18. "[B]eing isolated and excluded [at school] can be very hard for children as well." *Id.* 369:5-6.

Dr. Tishelman reflected on this case as one that is about access to religious institutions for people who do, or who may start to while they're enrolled, identify as transgender, gender diverse, or in the LGBTQ community. *Id.* 382:15-18. In her experience and research, individuals often draw on religion as a source of solace and to help sustain them, and some families may want to not be excluded from religious institutions because it "could be a terrible loss of community and faith that's important to them." *Id.* 382:18-24. Dr. Tishelman specifically indicated that a child could enroll at a school as cisgender and later be revealed as gender diverse. Trial Tr. (Tishelman) 390:16-19. Switching schools for the child could be "really stressful." *Id.* 391:1-2, 383:5-10 ("[I]f children are already at a school and start to identify as within a LGBTQ community and need to be then excluded from a community that they . . . . support and a community that means something to them, that can be a significant adversity and loss."). Dr. Tishelman clarified:

> "[It] is hard to explain to a child that they need to leave a school because of who they are, including something that they can't change . . . . And even more, if a child has been schooled in a particular religion and taught faith, losing and not understanding why they're not able to be part of a community of faith that is important to their family can be really hard as well." *Id.* 391:5-12.

Extreme stress and chronic stress can affect a child's neurodevelopment and ability to learn and interact with others. *Id.* 342:15-19. "Youth who are exposed to early adversities have a higher likelihood of diseases as adults, for instance heart diseases and cancers." *Id.* 343:17-19. These adversities can also cause "higher addiction, higher trauma, . . . PTSD in adulthood, [and] higher suicidality." *Id.* 343:23-24. Transgender children are often affected by chronic stress. *Id.* 345:21-23. And "transgender youth who have been exposed to stressors have a higher likelihood of anxiety, depression, and suicidality." *Id.* 368:3-6.

Plaintiffs are correct that none of the expert testimony presented by Defendants spoke directly to whether Plaintiff Preschools' participation in the UPK Program would increase or decrease the ability of LGBTQ+ families to access preschool services in Denver and the surrounding area. *See* Pls.' Proposed FOFCOL at 29. Nevertheless, I find the expert testimony described here to be reliable and persuasive, and it guides my analysis of Plaintiffs' claims.

II. Conclusions of Law

Now, to apply the law to the facts above, I first address Defendants' disavowal of Paragraph 18(B) of the Agreement and its impact on Plaintiffs' claims. Then, I consider Plaintiffs' first, fourth, and fifth claims brought under the Free Exercise Clause. I move on to Plaintiffs' sixth claim based on the Free Speech Clause and seventh claim implicating the Establishment Clause. After assessing the merits, I evaluate the other permanent-injunction factors and the appropriateness of the additional relief requested.

A. Paragraph 18(B): Claims Two and Three and Part of Claims One, Four, and Six

In Claims One, Two, Three, Four, and Six, Plaintiffs allege that, through the UPK Agreement, the Department is unconstitutionally interfering in the internal operations of religious institutions. These concerns are predicated on the application of Paragraph 18(B) of the Agreement. *See* Agreement at 28, Trial Ex. 13. After this litigation commenced, Defendants submitted a declaration indicating that they construe this provision such that it does not conflict with federal law and the related protections afforded religious organizations in making employment decisions. *See* Odean Decl. ¶ 16, Trial Ex. 39.[15] Additionally, Ms. Odean testified at trial that Paragraph 18(B) would not be applied as presently written in the Agreement and removed in future drafts. *See* Trial Tr. (Odean) 232:16-22. She and Ms. Cooke explained that Paragraph 18(B) came from a template written by the Colorado Department of Human Services and that the De-

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[15] In my Order Denying Summary Judgment, I suggested a stipulation resolving these claims might be appropriate because, according to Defendants, Paragraph 18(B) would not place any additional burdens on Plaintiff Preschools as employers. *See* Order in Preparation for Trial at 27 n.10. At trial, the parties indicated that a written stipulation would be presented to the Court. Trial Tr. 30:10-17 (Defendants' counsel: "We believe that the parties are going to be able to enter into a stipulation as to counts two and three, with the expectation that the contractual provision 18B will be removed from the contract in year two. And to the extent that the plaintiff preschools, or any of the Archdiocese's preschools, for that matter, intend to sign on to the UPK program in year one, that that provision would not apply to them."). No such stipulation has been provided.

partment did not intend to analyze providers' employment decisions under that provision. Trial Tr. (Odean) 231:8-232:2; Trial Tr. (Cooke) 148:7-13. Defendants argue that their disavowal of Paragraph 18(B) moots any analysis of whether it would, as Plaintiffs allege, impermissibly interfere with Plaintiff Preschools' religious hiring policies for their ministerial employees and their other internal decisions based on religious doctrine.[16]

"Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) (quoting *Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 996 (10th Cir. 2005). Unless there is a live controversy, I "lack jurisdiction to consider claims no matter how meritorious." *Id.* (quoting *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223 (10th Cir. 2008)). "A case or controversy becomes moot 'when it is impossible for the court to grant any effectual relief whatsoever to a prevailing party.'" *Church v. Polis*, No. 20-1391, 2022 WL 200661, at *3 (10th Cir. Jan. 24, 2022) (unpublished) (quoting *Colo. Off-Highway Vehicle Coal. v. U.S. Forest Serv.*, 357 F.3d 1130, 1133 (10th Cir. 2004)). A case is live and not moot only if "granting a present determination of the issues offered will have some effect in

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[16] Plaintiffs assert that Paragraph 18(B), in addition to the equal-opportunity requirement, infringes their free-exercise and free-speech rights. *See* Am. Compl. at 26-27, 30-31, 34. There is no argument that Claims One, Four, or Six are wholly moot. Here, I evaluate only the aspect of those claims based on Paragraph 18(B). I consider the rest of those claims and their allegations related to the equal-opportunity requirement below.

the real world." *Fleming v. Gutierrez*, 785 F.3d 442, 444–45 (10th Cir. 2015) (quoting *Rio Grande*, 601 F.3d at 1110); *see also Polis*, 2022 WL 200661, at *4 ("[A] claim for injunctive relief is moot if there is no reasonable likelihood that the injunction would result in any changes.").

With their claims, Plaintiffs request that I prevent the alleged harm Paragraph 18(B) will cause them if they participate in the UPK Program. *See, e.g.*, Am. Compl. at 27-30, 34 (alleging Paragraph 18(B) interferes with Plaintiff Preschools' "selection of preschool teachers and administrators by prohibiting them from selecting employees based on the employee's religious beliefs or willingness to abide by the Catholic Church's beliefs regarding marriage, human sexuality, and gender" and "right to frame policies and doctrine, govern their own internal affairs, and maintain a school environment faithful to their religious beliefs"). In the chain of causation connecting Defendants' actions to this subset of Plaintiffs' alleged injuries, the application of Paragraph 18(B) is an essential step. If Defendants' representations that Paragraph 18(B) would not be applied and would be absent in the next year's draft are genuine, no effectual relief could be granted. Any analysis of Paragraph 18(B)'s constitutionality would, therefore, be advisory and violative of my role under Article III of the U.S. Constitution.

Plaintiffs argue that Paragraph 18(B) remains a threat to their religious autonomy because Defendants' disavowal was made voluntarily and belatedly. Plaintiffs argue that Defendants' "11th-hour decision to drop Paragraph 18(B)" should not be effective because "Defendants likely will seek the freedom" to "en-

gage in unlawful conduct . . . once the claim is dismissed." Pls.' Proposed FOFCOL at 61 (relying on *United States v. Sanchez-Gomez*, 584 U.S. 381, 386 n.* (2018)). "One exception to a claim of mootness is a defendant's voluntary cessation of an alleged illegal practice which the defendant is free to resume at any time." *Rio Grande*, 601 F.3d at 1115 (quoting *Chihuahuan Grasslands All. v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008)).[17] "[T]his exception exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct." *Id.* (quoting *Chihuahuan Grasslands All.*, 545 F.3d at 892). "[V]oluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction." *Id.* (quoting *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir. 2005) (per curiam)). "The party asserting mootness bears the '"heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again.'" *Id.* at 1116 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

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[17] Plaintiffs quote *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), for the principle that "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Pls.' Proposed FOFCOL at 61. However, the Tenth Circuit has made clear that *Aladdin's Castle* is not applicable when there is no evidence in the record to indicate that the defendant intends to resume the challenged practice. *See, e.g.*, *Camfield v. City of Okla. City*, 248 F.3d 1214, 1223-24 (10th Cir. 2001).

Defendants must provide more than "a mere informal promise or assurance on the part of the [government] defendants that the challenged practice will cease." *Id.* at 1118 (quoting *Burbank v. Twomey*, 520 F.2d 774, 748 (7th Cir. 1975)). Generally, mootness is not established "follow[ing an] announcement of an intention to change or adoption of a plan to work toward lawful behavior." 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3533.7 (3d ed. 2024). Here, Defendants have not just set out their plan to remove Paragraph 18(B) from future drafts, they have presented uncontroverted evidence that Paragraph 18(B) was not included with the intent to engage in the challenged conduct, explained that they believed the policy imposed no additional burdens on Plaintiffs,[18] and committed that he provision would not be applied to providers going forward. The possibility of Defendants implementing the same or a substantially similar policy to Paragraph 18(B) in

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[18] Originally, Plaintiffs represented that the Department interpreted Paragraph 18(B) consistent with the federal-law protections for religious organizations' employment decisions. *See* Odean Decl. ¶ 16, Trial Ex. 39. In a footnote in their Motion to Dismiss, Defendants indicated that, if a specific complaint were to arise, "the Department will of course need facts to determine whether a provider's employment decisions regarding its co-religionist employees and ministerial employees are protected by federal law." *See* Mot. to Dismiss at 16 n. 5, ECF No. 38. Plaintiffs claim it makes no sense for the Department to be able to investigate providers' employment decisions if it lacks the authority to enforce Paragraph 18(B). I am not persuaded that the Department would lack any investigatory authority. Regardless, however, related testimony was not elicited at trial, and the only evidence that was presented made clear that there would be no application or enforcement of Paragraph 18(B).

the future is a speculative contingency, and any determination regarding that speculative policy would necessarily be advisory. *See Rio Grande*, 601 F.3d at 1117.

Plaintiffs also take issue with the timing of Defendants' complete disavowal of Paragraph 18(B), highlighting the opportunities Defendants had to recognize their error and correct it even before this lawsuit was filed. *See* Pls.' Proposed FOFCOL at 60 n.13. While the timing of Defendants' representations is inconvenient, to put it mildly, such changes in governmental policy are not uncommon and can legitimately moot controversies. *See, e.g.*, 13C Federal Practice & Procedure § 3533.7 ("[S]elf-correction . . . provides a secure foundation for mootness so long as it seems genuine."). Without further corroboration, I am unwilling to accept a naked assertion of Defendants' bad faith or that the timing indicates an intent to rely on Paragraph 18(B) in the future.

Consequently, I treat Defendants' disavowal of Paragraph 18(B) as complete and sincere. Since Plaintiffs can point to no source of their alleged harm, determining the validity of Paragraph 18(B) will have no effect in the real world. *See Fleming*, 785 F.3d at 444–45. As a result, Plaintiffs' Claims Two and Three are found to be moot, as are the parts of Claims One, Four, and Six that rely on the application of Paragraph 18(B).

B. Claims One, Four, and Five

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S.

Const. Amend. I. The Amendment references "Congress," but "the Fourteenth Amendment—which references the entire 'State,' not just a legislature—makes the rights protected by the Amendment applicable to the States." *Fulton v. City of Phila.*, 593 U.S. 552, 565 n.27 (2021). Plaintiffs first, fourth, and fifth claims are brought under the Free Exercise Clause and allege that Defendants have precluded Plaintiffs from participating in the UPK Program because of Plaintiffs' religious beliefs. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' . . . ." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment)).[19] In addition to outright prohibitions, the Free Exercise Clause "protects against 'indirect coercion or penalties on the free exercise of religion." *Carson v. Makin*, 596 U.S. 767, 778 (2022) (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988)). For this reason, the Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.*[20]

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[19] I conclude Plaintiffs' beliefs as set forth in the Findings of Fact above are their sincerely held religious beliefs, *see Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989), as "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," *Employment Div., Dep't of Hum. Resources of Or. v. Smith*, 494 U.S. 872, 887 (1990) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)).

[20] *But see Lyng*, 485 U.S. at 450–51 ("This does not and cannot imply that incidental effects of government programs, which may

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879.[21] In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Court more specifically articulated the standard for reviewing claims brought under the Free Exercise Clause, stating: "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." 508 U.S. at 531. In contrast, as the Court in *Lukumi* instructed, a law that is not neutral or generally applicable must pass strict scrutiny, meaning it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

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make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring))).

[21] Although there has been a steady push to overturn *Smith*, in *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021), the Court recently declined to revisit the decision. *See also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 n.1 (2022).

Plaintiffs contend their inability to participate in the UPK Program triggers strict scrutiny under the Free Exercise Clause for at least four reasons:

> ***[F]irst***, because the exclusion is based solely on Plaintiff preschools' religious character and exercise in violation of the rule in *Carson* [*v. Makin*]; ***second***, because the Department recognizes categorical exceptions permitting other preschool providers to engage in similar conduct for secular reasons, violating the rule in *Tandon* [*v. Newsom*, 593 U.S. 61 (2021),] and *Kennedy* [*v. Bremerton School District*, 597 U.S. 507 (2022),]; ***third***, because the Department has reserved the authority to carve out, and has carved out, individualized exceptions from the [equal-opportunity requirement] in violation of the rule in *Fulton* [*v. City of Philadelphia*]; and ***fourth***, because the Department's implementation of UPK Colorado is not neutral, violating the rule in *Lukumi* and *Masterpiece* [*Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018)].

Pls.' Proposed FOFCOL at 31.[22]

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[22] Reviewing recent Supreme Court jurisprudence, it is unclear the extent to which courts must rely on the Nation's history and tradition in considering claims brought under the Free Exercise Clause. *See, e.g.*, *Kennedy*, 597 U.S. at 535-36 (explaining that, in interpreting the Establishment Clause, "'[t]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t]

1. Carson v. Makin: Claim One

Plaintiffs' first claim relies primarily on *Carson*. That case involved Maine's tuition-assistance program for parents who live in school districts that do not operate a secondary school. 596 U.S. at 771-73. Like the UPK Program challenged here, parents in those school districts designated the school they would like their child to attend, and the school received payments to help defray the costs of tuition. *Id.* at 772-74. Unlike the UPK Program, however, Maine's program explicitly allowed only "nonsectarian" schools to receive the payments. *Id.* at 773-75. Citing two other recently decided cases—*Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), the Supreme Court found that strict scrutiny applied because Maine "'effectively penalize[d] the free exercise' of religion" by "'disqualify[ing] some private schools' from funding 'solely because they are religious.'" *Carson*, 596 U.S. at 780 (first quoting *Trinity*

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the understanding of the Founding Fathers'" (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014))). Neither party presented related arguments, but to the extent the early understanding of the Free Exercise Clause must be taken into account, it seems free exercise rights did not require the granting of an exemption when the rights of others were involved. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1464 (May 1990) ("[A] believer has no license to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side. . . . Where the rights of others are not involved, however, the free exercise right prevails."). Here, there is a strong argument that children have the right not to face discriminatory barriers in using a government benefit and seeking a quality education.

Lutheran, 582 U.S. at 462; then quoting *Espinoza*, 591 U.S. at 487). The Court went on to hold that Maine could not satisfy strict scrutiny because its "interest in separating church and state more fiercely than the Federal Constitution [requires] . . . cannot qualify as compelling in the face of the infringement of free exercise." *Id.* at 781 (quoting *Espinoza*, 591 U.S. at 484-85).

Plaintiffs assert that the holding in *Carson* dictates the outcome here and that any consideration of *Smith* is unnecessary. Plaintiffs highlight that *Carson* relies on pre-*Smith* cases and contend that *Carson* is based on the "longstanding Free Exercise rule distinct from *Smith*" that "exclusion from a public benefit on account of one's religious exercise 'violates the Free Exercise Clause.'" Pls.' Proposed FOFCOL at 32 (rewording and quoting *Carson*, 596 U.S. at 778). I am not persuaded that *Carson* articulates a distinct rule. Although *Smith* considered the constitutionality of an Oregon statute criminalizing the use of peyote, it ultimately determined that "Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug." 494 U.S. at 890. Thus, *Smith* itself was a public-benefits case. As I previously noted, *Carson* fits into the *Smith* framework because it finds that Maine's tuition-assistance program was not neutral and then subjects the program to strict scrutiny. *See Carson*, 596 U.S. at 781 ("[T]here is nothing neutral about Maine's program."). While *Carson* does not cite *Smith* specifically, it cites *Trinity Lutheran* throughout, which contains a full analysis of *Smith*. *See Trinity Lutheran*, 582 U.S. at 460-61. Any breadcrumbs that may or may not have been dropped in

Carson are insufficient to slice public-benefits cases from the *Smith* framework.

Nonetheless, for the purposes of this case, whether *Carson* expounds on a distinct rule is not consequential. The rule gleaned from *Carson* is that a law that operates to "'disqualify some private schools' from funding 'solely because they are religious' . . . must be subjected to 'the strictest scrutiny.'" 596 U.S. at 780. Plaintiffs would like this rule to embrace what has been termed "substantive neutrality." In his concurrence in *Lukumi*, Justice Souter discussed the difference between "formal neutrality and substantive neutrality." *Lukumi*, 508 U.S. at 561-62 (Souter, J., concurring). "[F]ormal neutrality . . . would only bar laws with an object to discriminate against religion," while "substantive neutrality, . . . in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws."[23] Justice Souter explained that the dissent in *Smith* embraced substantive neutrality by "requir[ing] the government to justify *any* substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id.* at 562-63 (quoting *Smith*, 494 U.S. at 894). But the majority in *Carson* did not go so far. The Court's language in *Carson* made clear that Maine's program was not formally neutral since schools were excluded from

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[23] It is noteworthy that Plaintiffs cite to Justice Souter for his discussion of substantive neutrality since he dissented in *Zelman v. Simmons-Harris*, insisting that the use of tax money as vouchers to support religious schools and their missions violates the Establishment Clause. 536 U.S. 639, 686 (2002) (Souter, J. dissenting).

the public benefit "solely because of" their religious character. 596 U.S. at 780-81.[24]

As discussed further below in analyzing Plaintiffs' fifth claim, the equal-opportunity requirement does not exclude Plaintiffs from the UPK Program solely because of their religious status or exercise. The requirement applies to UPK providers, regardless of their religious or non-religious character. The purpose of the requirement is not to invade religious freedom but to further the implementation of a strongly embraced public value. *Carson*, *Espinoza*, and *Trinity Lutheran* are all distinguishable because each involved a program that "specifically carved out" religious organizations from those eligible to receive funding. *See Carson*, 596 U.S. at 780.

Plaintiffs assert that "[t]he Department has effectively imposed a special tax on religious preschools, whereby families who send their children to Catholic preschools continue to pay full freight, while families who send their children to over 2,000 other Colorado preschools receive 15 hours of free instruction per week." Pls.' Proposed FOFCOL at 34. That may well be the effect of the equal-opportunity requirement, but that is not its purpose. And, again, the Supreme Court, in *Carson*, did not hold that strict scrutiny is triggered

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[24] One sentence in *Carson* leaves out "solely" in "solely because of," reading: "A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." 596 U.S. at 781. The Court, however, emphasized that its holding was based on *Trinity Lutheran* and *Espinoza*, which both used the language "solely because of." *See id.* at 779 (quoting *Trinity Lutheran*, 582 U.S. at 462, and *Espinoza*, 591 U.S. at 476, 487).

by any condition on a government benefit that affects religious exercise.[25] Plaintiffs have failed to show that *Carson* applies to the equal-opportunity requirement, and thus, I conclude that their first claim lacks merit.

2. Neutral: Claim Five

Plaintiffs' fifth claim alleges the equal-opportunity requirement, as applied by Defendants, is not neutral under the *Smith* framework. If the requirement is not neutral, strict scrutiny would apply, and Plaintiffs contend Defendants cannot satisfy that stringent test.

A law is not neutral "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. In analyzing neutrality, I look at the relevant government action from multiple angles. First, I review the text of the equal-opportunity requirement as well as the historical background of its adoption and Defendants' decision in denying Plaintiff Preschools' an exemption from the requirement. *See id.* at 533 ("To determine the object of a law, we must begin with its text."); *id.* at 540 (instructing that the object may be determined

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[25] Plaintiffs note that I have previously written: "The government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . [,] even though the person has no right to the valuable government benefit[.]" Pls.' Proposed FOFCOL at 34 (quoting *Pryor v. School Dist. No. 1*, No. 22-cv-02886-JLK, 2022 WL 18145414, at *1 (D. Colo. Dec. 23, 2022)). The full quote includes the additional caveat that "the government may deny him the benefit for any number of reasons." *Pryor*, 2022 WL 18145414, at *1 (quoting *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996)). The point is that Plaintiffs must show their rights have been infringed, not just burdened. Otherwise, the benefit may be denied.

from evidence of "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body"). I investigate specifically whether Defendants have "proceed[ed] in a manner intolerant of religious beliefs." *Fulton*, 593 U.S. at 533. Then, I assess the real-world operation of the equal-opportunity requirement, asking whether it targets religion. *See Lukumi*, 508 U.S. at 535 ("[T]he effect of a law in its real operation is strong evidence of its object."). After moving through each of these considerations, I conclude, in accordance with my findings of fact, that the equal-opportunity requirement is neutral and has been applied to Plaintiffs in a neutral manner.

i. Text and Background

Nothing in the text of the statutory equal-opportunity requirement, or its inclusion in the UPK Agreement, indicates that religious discrimination is its object. Plaintiffs do not argue the contrary, nor do they present evidence that the requirement was adopted with the object of targeting religious beliefs or conduct. *Cf. id.*, 508 U.S. at 541 ("The minutes and taped excerpts of the . . . session [when enactments were initially passed], both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice."). Instead, Plaintiffs argue that Defendants, in denying their request for an exemption and litigating this case, have exhibited offensive and hostile opinions. I see

nothing of the sort and may neither assume nor manufacture facts. As such, I do not infer the existence of hostility where there is none. *See* Pls.' Mot. for Summ. J. at 36-37, ECF No. 61; Pls.' Proposed FOFCOL at 46-47.

"[T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop*, 584 U.S. at 638. "[E]ven 'subtle departures from neutrality' on matters of religion" are impermissible. *Id.* (citing *Lukumi*, 508 U.S. at 534).

First, Plaintiffs point to Dr. Roy's deposition testimony. When asked whether it would constitute discrimination against children if a faith-based provider were to give notice that a transgender child is not allowed to use the bathroom of the gender the child identifies with and the school will not use the requested pronouns, Dr. Roy responded "it would prove best to have a conversation with the family and decide what's best for the child based on the environment that the child was exposed to." Roy Dep. 29:20-30:9, Trial Ex. 27.[26] She emphasized that the Department does not "want any child to be harmed by being in a situation where they would be discriminated against" and commented that "[t]he law is there to protect, and thank goodness it does." *Id.* 30:9-13. Dr. Roy clarified that

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[26] To the extent Defendants object to this testimony as speculation and for lack of foundation, *see* Defs.' Objections to Pls.' Designated Dep. Testimony at 2, ECF No. 93, their objections are overruled.

she was responding from a child development perspective. *Id.* 30:3-5. With the plentiful evidence in the record of the harm that children may suffer when in environments that do not accept them or affirm their experiences, *see, e.g.*, Trial Tr. (Goldberg) 297:11-20 (explaining that, if children receive messages that something is wrong with them or their families, that can lead to negative self-views); Trial Tr. (Tishelman) 340:1418, 342:15-19, 343:17-19, 343:23-24, 345:21-23, 386:3-6, 48:10-18 (informing that discrimination is an adverse childhood experience that can lead to negative physical and mental health impacts and, if children are rejected or treated poorly because of their difference, it can create anxiety and low self-esteem), Dr. Roy's statements cannot be viewed as hostile.

Second, Plaintiffs take issue with the arguments made by Defendants' counsel analogizing the differential treatment of LGBTQ+ children and families to race discrimination. Plaintiffs also believe it is improper for Defendants' attorneys to characterize their "millennia-old religious beliefs as stigmatization and bullying." Pls.' Proposed FOFCOL at 46.[27] Defendants

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[27] Plaintiffs' citations to Ms. Odean's testimony for these contentions are entirely misleading. Ms. Odean testified that she was aware that her lawyers had compared the lawsuit to academies in the 1970s that were segregated based on race and that they had cited studies about the impacts of bullying and stigmatization in LGBTQ children. Trial Tr. (Odean) 260:5-9, 263:7-14. When asked specifically if she thought Plaintiff Preschools' enrollment policies were similar to segregationist academies in the 1970s, she stated:

> "[W]e need to consider what we have in the law that we're implementing, including the antidiscrimination provision, and ensure that if a child

have pursued only fair and reasonable legal arguments.

Starting with the comparison between race discrimination in education and denying LGBTQ+ children and families equal access to publicly funded preschool, the law is predicated on the application of general principles to the varying facts of individual cases. *See* Dan Hunter, *Reason is Too Large: Analogy and Precedent in the Law*, 50 Emory L.J. 1197, 1202 (2001); Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* 4 (2d ed. 2016). Our Nation's history has produced countless landmark cases involving race discrimination. While the facts of those cases are not equivalent to the ones here,[28] the legal principles and considerations are similar. *See* Serena Mayeri, *"A*

> is in a preschool setting of a participating provider, that it's safe and healthy for them to be able to engage, and that it isn't—that safe and healthy isn't compromised by discrimination.

Id. 261:21-262:12.

[28] It undoubtedly does a disservice to all historically subaltern groups to literally equate their struggles. The history of race-based discrimination and the means in which it has been and is perpetrated are distinct. That recognition, however, should not imply that members of the LGBTQ+ community have not been and are not the victims of invidious prejudice nor that they do not deserve the dignity and protections the laws ensure. *See, e.g.*, *Griffith v. El Paso Cnty., Colorado*, No. 21-cv-00387-CMA-NRN, 2023 WL 2242503, at *10 (D. Colo. Feb. 27, 2023), *report and recommendation adopted*, No. 21-cv-00387-CMA-NRN, 2023 WL 3099625 (D. Colo. Mar. 27, 2023) ("[O]ne would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people.") (quoting *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018))).

Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 Yale L.J. 1045, 1053 (2001) ("Analogical reasoning may go beyond direct parallels between various forms of inequality to engage in more nuanced comparisons that recognize differences as well as similarities and attempt to determine their moral and legal significance."). The effects of differential treatment in education—along with the invocation of the Free Exercise Clause to justify such treatment—are similarities making comparisons in this case apt. Drawing attention in legal briefing to these similarities does not evince animus to religion. To suggest that it does fundamentally misunderstands the role of analogy in legal reasoning.[29]

The arguments advanced by Defendants' attorneys are wholly distinguishable from the facts in *Masterpiece Cakeshop*, where the Supreme Court found the initial decisionmaking body exhibited hostility to religion because members of it "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain," mentioned the religious justifications for slavery and the Holocaust, and referred to religious beliefs as "one of the most despicable pieces of rhetoric that people can use . . . to hurt others." 584 U.S. at 634635. Defendants' legal arguments are limited to relevant and applicable precedent and venture nowhere near attempts to divorce religion from early childhood education or denigrate religious beliefs.

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[29] Indeed, the very essence of common law analytic methodology is analogical inference to precedent which differs from the continental law's analytic basis in deduction from code principles.

Defendants' attorneys have not vilified Plaintiffs nor accused them of having actually caused harm to children. Counsel have presented persuasive evidence from qualified experts on the harm that children experience when they encounter environments that do not accept them or affirm their experiences. Although Plaintiffs may disagree with the science or may view any impact as minimal or hypothetical, they did not present any contrary evidence, and expert testimony is often framed in hypotheticals.[30]

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[30] Plaintiffs filed a Notice of Supplemental Authority (ECF No. 114), submitting the recently issued Tenth Circuit opinion in *Does 1-11 v. Board of Regents of University of Colorado*, No. 211414, 2024 WL 2012317 (10th Cir. May 7, 2024). In that case, the court held that "the specific series of events leading to" the later-adopted policy "demonstrated that the [p]olicy was not neutral toward religion." *Id.* at *18. Plaintiffs contend the same is true here, where Defendants' latest definition of "congregation" for the congregation preference "appears to be an (unsuccessful) effort to respond to Plaintiffs' litigation arguments and fortify their exclusion of Plaintiffs from [the UPK Program]" and "confirms non-neutrality." Notice of Suppl. Authority at 3, ECF No. 114. Plaintiffs' argument is hyperbole, based on assumptions that are not supported by the record. If anything, by broadening the definition of congregation, Defendants have worked to include more faith-based providers. The comparison to *Does 1-11* is not fitting. There, the Administration adopted a new policy after the litigation was filed, but it did not reevaluate all employees' requests for an exemption under the new policy for almost three months. *Id.* at *18. When the Administration did reevaluate the employees, it used similar criteria as it did under its prior, problematic policy and reached the same results. *Id.* at *18-19. Defendants here have ostensibly extended the congregation preference to, as I conclude below, permit faith-based providers, including Plaintiff Preschools, to discriminate on the basis of religious affiliation even more flexibly, as Plaintiff Preschools have sought to do.

The record contains no evidence that Defendants have passed judgment on or presupposed the illegitimacy of Plaintiffs' religious beliefs and practices. The evidence instead shows the Department committed to the idea of mixed delivery and engaged with representatives from faith-based providers. The result is that forty faith-based preschools currently participate in the UPK Program, including the Catholic Charities schools overseen by the Archdiocese. Trial Tr. (Odean) 234:8, 23-25. Neither the text of the equal-opportunity requirement nor the circumstances surrounding its enactment and implementation reveal any basis for finding that the requirement is not neutral.

ii. Real-World Operation

The operation of the equal-opportunity requirement similarly does not show that its object is to restrict practices because of their religious motivation. "[An] adverse impact will not always lead to a finding of impermissible targeting." *Lukumi*, 508 U.S. at 535; *see also Tingley v. Ferguson*, 47 F.4th 1055, 1087 (9th Cir. 2022) (explaining "that a particular group, motivated by religion, may be more likely to engage in the proscribed conduct does not amount to a free exercise violation" (internal quotation marks and citation omitted)). "[A] social harm may [be] a legitimate concern of government for reasons quite apart from [religious] discrimination." *Lukumi*, 508 U.S. at 535 (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

Plaintiffs argue that "Defendants cannot rewrite unambiguous state-law commands to gerrymander Plaintiffs out." Pls.' Proposed FOFCOL at 42. With the enactment of the UPK Act the State prioritized the inclusion of diverse preschool providers, *see* Colo. Rev. Stat. §§ 26.5-4202(1)(b) & (1)(a)(VI), 26.5-4-203(12),

and faith-based providers were always "envisioned to be part of the mixed-delivery model." Trial Tr. (Cooke) 160:16-17. The Department's "goal in the mixed delivery program was to recruit and engage providers . . . of all types, school districts, center-based, home-based, [and] faith-based . . . ." *Id.* 147:23-148:2. Defendants worked with religious providers to accommodate them, establishing a task force and developing the congregation exception. *Id.* 152:8-20, 154:21-25, 157:17-24. The participation of the Catholic Charities preschools in the UPK Program substantiates that Defendants have not excluded Catholic providers. Defendants have not gerrymandered Plaintiffs out of the UPK Program, intentionally or otherwise. They apply the equal-opportunity requirement "in spite of" Plaintiffs' religious beliefs, not because of them. *Cf. Lukumi*, 508 U.S. at 540.

In sum, Plaintiffs have not established that the equal-opportunity requirement, on its face or as applied by Defendants, is not neutral.

3. Generally Applicable: Claims Four and Five

Plaintiffs' fourth and fifth claims allege that the algorithm preferences and individual provider preferences permitted by Defendants demonstrate that the equal-opportunity requirement is not generally applicable as applied to Plaintiffs. "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). Additionally, a law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534; *see also Lukumi*,

508 U.S. at 543 ("A law is not generally applicable if it, 'in a selective manner [,] impose[s] burdens only on conduct motivated by religious belief.'"). I begin by examining whether there is a mechanism for individualized exemptions to the equal-opportunity requirement such that the Department is invited to consider the particular reasons for providers' conduct. After that analysis, I consider whether the application of the equal-opportunity requirement selectively imposes burdens on religious conduct.

i. Any Mechanism for Granting Individualized Exceptions to the Equal-Opportunity Requirement

Plaintiffs put forward three theories to establish the existence of a mechanism for individualized exemptions to the equal-opportunity requirement. First, Plaintiffs argue the temporary waiver provision in the UPK Statute authorizes the Department to grant exemptions to the requirement in its discretion. Second, Plaintiffs contend the individual provider preferences permitted by the Department substantiate that the Department has sufficient discretion to grant individual exemptions to the equal-opportunity requirement. And, third, they contend that Defendants have exhibited such discretion by permitting Darren Patterson Christian Academy, a provider with similar beliefs, to participate in the Program.

Statutory Waiver Provision

The temporary waiver provision of the UPK Statute does not authorize a waiver of any aspect of the equal-opportunity requirement. The provision states: "if necessary to ensure the availability of a mixed delivery system within a community, the [D]epartment

may allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance with the quality standards." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II). Significantly, however, the statute requires "each preschool provider [to] meet all quality standards relating to health and safety." *Id.* Defendants contend the statutory equal-opportunity requirement cannot be waived under this provision because it is a quality standard that relates to health and safety. Plaintiffs respond that "this interpretation flies in the face of common sense, contradicts the text of the Department's own contracts, and appears to have been invented during this litigation." Pls.' Proposed FOFCOL at 6. I conclude Defendants' view of the waiver provision is consistent with the plain language and the purpose of the statute.

The terms "health" and "safety" are broad and general concepts. Health is defined as "the condition of being sound in body, mind, or spirit." *Health*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/health (last visited June 1, 2024). Similarly, safety is "the condition of being safe from undergoing or causing hurt, injury, or loss." *Safety*, https://www.merriam-webster.com/dictionary/safety (last visited June 1, 2024). From these definitions, it is clear the General Assembly did not intend to allow the Department to waive any standard that would have potentially caused physical or mental harm to preschool children.

The evidence in this case establishes that the statutory equal-opportunity requirement was included in the UPK Statute so that eligible children would not experience discrimination on the bases identified in

the statute and so that they can grow to their maximum ability and not be placed in an unsafe or unhealthy environment. *See* Trial Tr. (Cooke) 142:25-143:3; Trial Tr. (Odean) 197:17-198:9, 199:15-24. The expert testimony Defendants presented at trial supports that discrimination can be harmful, both mentally and physically, for LGBTQ+ children and children from LGBTQ+ families. *See, e.g.*, Trial Tr. (Goldberg) 297:11-20; Trial Tr. (Tishelman) 340:14-18, 342:15-19, 343:17-19, 343:23-24, 345:21-23, 386:3-6, 48:10-18. Plaintiffs argue that, "in ordinary usage, 'health and safety' surely refers to regulations of the *conditions at the preschool* for students who are already there, rather than regulations that limit a school's discretion to decide who can become part of the school community." Pls.' Proposed FOFCOL at 45. Plaintiffs miss the point that the regulations limit a school's discretion to deny equal access to eligible children because doing so potentially threatens the health and safety of preschoolers. Furthermore, there is no basis for speculating that the General Assembly envisioned the temporary waiver provision as applying to the equal-opportunity requirement given that it is unlikely any provider would need to violate the requirement for a limited time while working toward compliance.

Since the Department's interpretation of the equal-opportunity requirement and waiver provision is "consistent with the statute's purpose, language, structure, and legislative history," it weighs in favor of my conclusion. *Nieto v. Clark's Market*, 488 P.3d 1140, 1149 (Colo. 2021). Plaintiffs suspect that the Department must have originally interpreted the statute differently since, in the UPK Agreement, it listed the

equal-opportunity requirement and "[q]uality standards relating to health and safety" as two different types of "quality standards." Pls.' Proposed FOFCOL at 45 (quoting Agreement at 2, Trial Ex. 13). This redundancy is easily explained by the significance of the equal-opportunity requirement. It was set out in the UPK Statute, and the Department is obligated to ensure providers comply with it. *See* Colo. Rev. Stat. § 26.5-4205(1)(b)(I) & (2). There is no reason to believe the Department's present interpretation of the equal-opportunity requirement and temporary waiver is a post-hoc justification. The Department has not yet had to apply the temporary waiver provision and so cannot be expected to have previously articulated and documented its interpretation. The equal-opportunity requirement is a quality standard related to health and safety that cannot be waived under the UPK Statute.

Consequently, I conclude that the UPK Statute does not give the Department any discretion to grant exemptions from the equal-opportunity requirement—the Department must adopt the equal-opportunity requirement as part of its quality standards and must ensure that each preschool provider that participates in the UPK Program meets that standard. Colo. Rev. Stat. § 26.5-4-205(1)(b)(I) & (2). The Department has no discretion to deviate from this directive. *See* Roy Letter at 1 (explaining that the Department lacked the authority to create an exemption and avoiding any consideration of the particular reasons for the exemp-

tion request). Accordingly, the statutory equal-opportunity requirement itself is neutral and generally applicable.[31]

Individual Provider Preferences

The Department allows providers to request individual preferences through an online form and has let providers exercise many of the requested preferences such that the providers have not been required to admit all children who match with them. Trial Tr. (Odean) 256:1-14; 257:9-23. Examples of individual preferences the Department has approved are requests to admit only fully vaccinated children and to prioritize subdivision residents. UPK Individual Preference Response Data at 82-83, Trial Ex. 34. The online form also includes as illustrative preferences providers that only serve teen moms enrolled at a neighboring high school or that only serve children with specific disabilities. UPK Process for Preferences at 55, Trial Ex. 31.

Plaintiffs claim "it is undisputed that Defendants have discretion to make individualized exceptions from the requirement that providers accept the children [who] are matched with them." Pls.' Proposed FOFCOL at 43. There is no requirement that providers accept all children who are matched with them. The at-issue requirement demands that participating preschools provide equal opportunity regardless of certain characteristics of a child or family. Plaintiffs assert that "the mere discretion to grant these excep-

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[31] I note that this theory of Plaintiffs' claims resembles a facial challenge to the statute, and for that reason, I reach this conclusion.

tions . . .—even if not exercised—triggers strict scrutiny." *Id.* at 44. That would be true if there were evidence in the record that Defendants had the discretion to grant any individual preferences that would exempt providers from the equal-opportunity requirement, but there is none. The Department's case-by-case determinations relate to how it can include providers in the UPK Program, not whether it should grant providers an exemption from the equal-opportunity requirement. The Department may consider whether a request would violate the requirement, and if it concludes that a request would, the request would not be granted. *See, e.g.*, Trial Tr. (Odean) 278:23-280:5. Plaintiffs contend the example given by the Department of a provider serving only teen moms shows Defendants could grant an exemption permitting a provider to deny equal opportunity to families on the basis of sex. *See* Pls.' Proposed FOFCOL at 44. It is not clear that such an admissions preference would violate the equal-opportunity requirement. And, again, if the requested preference did deny equal opportunity based on one of the characteristics enumerated in the equal-opportunity requirement, the evidence shows the Department would have no authority to grant and has not granted such an individual preference to a provider.

Plaintiffs rely primarily on the Supreme Court's analysis in *Fulton* to support their argument that the equal-opportunity requirement is not generally applicable because the Department has "reserved the authority to carve out, and has carved out, individualized exceptions from the [equal-opportunity requirement]." *Id.* at 31. In *Fulton*, the City of Philadelphia stopped referring children to a Catholic foster care agency after the City discovered that the agency would not certify

same-sex couples to be foster parents, and the agency sued alleging, as relevant here, violations of the Free Exercise Clause. 593 U.S. at 526-28, 530-531. The City's decision to discontinue its referrals to the foster care agency was based on its foster care contract, which included a nondiscrimination provision. *Id.* at 530-31, 534-35. The Supreme Court found that the provision was not generally applicable because it "incorporate[d] a system of individual exemptions, made available . . . at the 'sole discretion' of the Commissioner [of the Department of Human Services]." *Id.* at 534-35. Consequently, the Court applied strict scrutiny and held that "the refusal of [the City] to contract with [the foster care agency] for the provision of foster care services unless it agree[d] to certify same-sex couples as foster parents [could]not survive strict scrutiny, and violate[d] the First Amendment." *Id.* at 540-42.

Fulton is fully distinguished from this case throughout the rest of the analysis of Plaintiffs' fourth and fifth claims. For now, I resolve that Defendants' exercise of discretion differs from the City's in *Fulton* because Defendants are bound by a statutory requirement which does not authorize them to grant any exemptions. The contract at issue in *Fulton*, in contrast, specifically authorized the Commissioner of the Department of Human Services to grant individual exemptions *to the nondiscrimination provision* in his or her sole discretion. 593 U.S. at 534-35. Here, there is no mechanism of individualized exemptions to the equal-opportunity requirement.

Darren Patterson Christian Academy

Plaintiffs' last argument regarding a mechanism of individualized exemptions pertains to a case currently

pending before my colleague Judge Domenico—*Darren Patterson Christian Academy v. Roy*, in which the constitutionality of the UPK Program's equal-opportunity requirement and Paragraph 18(B) of the Agreement are similarly challenged. No. 23-cv-1557DDD-STV, 2023 WL 7270874 (D. Colo. Oct. 20, 2023). The plaintiff in that case, Darren Patterson Christian Academy ("Darren Patterson"), has signed the UPK Agreement and has participated in the Program, *id.* at *3, unlike Plaintiff Preschools in this case.[32] Darren Patterson moved for a preliminary injunction, and the defendants in that case, the same ones as here, moved to dismiss Darren Patterson's claims for lack of jurisdiction. *Id.* at *4. The defendants filed a response to Darren Patterson's preliminary-injunction motion but did not respond to its merits. *Id.* at *1, *4, *13-14. Without the benefit of the defendants' merits arguments, Judge Domenico granted a narrow preliminary injunction prohibiting the defendants from "expelling, punishing, withholding funds from, or otherwise disciplining" Darren Patterson under the UPK Program based on the school's policies violating the "statutory or contractual antidiscrimination provisions." *Id.* at *19. The defendants chose not to appeal that decision. As a result, Darren Patterson currently is participating in the UPK Program without having to conform its

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[32] Notably, Darren Patterson does not seek to exclude children and families from its school but, instead, intends to "limit[] employment to those who share its beliefs and to align[] its policies about bathroom usage, dress codes, pronouns, and student lodging with its religious beliefs about sexuality and gender." Mot. for Prelim. Inj. at 2, *Darren Patterson*, No. 23-cv-01557-DDD-STV, ECF No. 14. As such, the policies and conduct at issue in the two cases differ materially.

policies to Paragraph 18(B) of the Agreement or the equal-opportunity requirement.

Plaintiffs here argue that, by allowing Darren Patterson to participate in the UPK Program, Defendants have permitted the same exemption from the equal-opportunity requirement that they seek such that the requirement cannot be generally applicable. First, while Defendants permitted Darren Patterson to sign the UPK Agreement, that action, in and of itself, did not grant an exception to the equal-opportunity requirement. A school's discriminatory policies do not on their own necessarily violate the equal-opportunity requirement because, unless and until they are implemented, they do not prevent eligible children from having an equal opportunity to enroll and receive preschool services. *Cf. id.* at *6 ("The terms of the statute and contract [including Paragraph 18(B)] 'arguably' cover merely having discriminatory policies even if there are no instances of those policies being applied to someone who would feel aggrieved."). Or at least, Defendants may view the equal-opportunity requirement in such a way when reviewing and approving UPK providers. Second, Defendants' strategy in another case is irrelevant here and is not evidence that Defendants have granted an exemption from the equal-opportunity requirement, especially when they continue to litigate Darren Patterson's claims on the merits and are bound by a court order.

ii. Any Prohibition of Religious Conduct While Permitting Secular Conduct

In determining whether the equal-opportunity requirement is generally applicable, I must also consider whether it "treats *any* comparable secular activity

more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). If it does, strict scrutiny is triggered. *Id.* "[W]hether two activities are comparable for the purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* "Comparability is concerned with the risks various activities pose . . . ." *Id.*

The equal-opportunity requirement mandates that participating preschools provide eligible children with an equal opportunity "regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability." Colo. Rev. Stat. § 26.5-4-205(2)(b). Plaintiffs' claims target three of these protected characteristics: religious affiliation, sexual orientation, and gender identity.

As explained above, the asserted State interests are eliminating discriminatory barriers to publicly funded preschool education and protecting the well-being of children. Plaintiffs claim that Defendants permit providers to select algorithm preferences that pose a risk to Defendants' asserted interests that are identical to the one posed by granting Plaintiffs their requested exemption. Specifically, Plaintiffs allege that, despite the equal-opportunity requirement, the algorithm preferences Defendants have developed allow:

- Head Start providers to screen applicants based on "income level";
- Providers to serve only children with disabilities or to have related programs for specific needs;
- Providers to limit enrollment to children of color from historically underserved areas;

- Providers to limit enrollment to gender-nonconforming children or the LGBTQ community; and
- Faith-based providers to reserve seats for members of their congregation.

Pls.' Proposed FOFCOL at 37.

Although Plaintiffs assert—without support—that it "is *not* legally required," *id.* at 38, each of the characteristics enumerated in the equal-opportunity requirement must be analyzed independently. I understand Plaintiffs' suggestion that, if Defendants have the discretion to grant any exception allowing discrimination in contravention of a single aspect of the equal opportunity requirement, they necessarily have discretion to grant any exception to the requirement. I have touched on that argument in discussing the individual provider preferences the Department permits and address it below in relation to the algorithm preferences. First, however, I consider the alleged exceptions to each of the characteristics covered by the equal opportunity requirement separately. This is because, instead of enacting a generic nondiscrimination provision, the General Assembly specifically enumerated each characteristic. In *Fulton*, the formal mechanism for providing exceptions was universal, relating to the entire nondiscrimination provision. 593 U.S. at 534-37 (determining that the nondiscrimination provision in the contract, which included the language: "unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion," was not generally applicable). Here, no universal discretion has been authorized or exercised.

Moreover, the specific State interests in eliminating discriminatory barriers for children and families and protecting children from discrimination are distinct depending on the basis for the discrimination. For instance, there was significant testimony in this case on the specific barriers LGBTQ+ children and families face in obtaining preschool services. These circumstances would differ for barriers based on religious affiliation, disability, sex, or race.[33] And, if exemptions from the equal-opportunity requirement are permitted, there would be separate considerations for allowing the exceptions with respect to each characteristic. In other words, all discrimination is not the same. Plaintiffs make this point in arguing that treating members of the LGBTQ+ community differently is not equivalent to race discrimination. *See* Pls.' Proposed FOFCOL at 46, 63.[34]

In arguing that Defendants treat secular conduct more favorably than religious exercise, Plaintiffs rely on *Fellowship of Christian Athletes v. San Jose Unified School District*, a case in which a divided Ninth Circuit held that a school district's revocation of a religious student organization's status as an official student

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[33] While I independently consider most of the characteristics covered by the equal-opportunity requirement, much of my analysis regarding sexual orientation and gender identity overlaps on account of Plaintiffs' related arguments and the evidence presented in this case.

[34] Furthermore, it would be illogical to find that, if Defendants violate Plaintiffs' constitutional rights with the implementation of a single aspect of the equal-opportunity requirement, then Plaintiffs automatically should not be bound by any aspect of the requirement, leaving children and families with the other characteristics less protected.

club likely violated the organization's free exercise rights. 82 F.4th 664, 671-72, 695-96 (9th Cir. 2023) (en banc). The school district adopted an "All-Comers Policy" that prevented student clubs from enacting discriminatory membership and leadership criteria but "carved out several exceptions." *Id.* at 678. The majority found that "[d]espite the All-Comers-Policy, schools in the District were allowed to maintain—or even themselves sponsor—clubs with facially discriminatory membership requirements," including a club for "seniors who identify as female" and a club "prioritiz[ing] acceptance of [S]outh Asian students." *Id.* at 678, 688. As a result, the majority concluded that the policies were not generally applicable and thus were subject to strict scrutiny. *Id.* 689-90. This case is neither binding nor applicable. The policy at issue there required clubs "to permit any student to become a member or leader, if they meet nondiscriminatory criteria." *Id.* at 678. It did not specify the characteristics that could be or were prohibited from being considered. *See id.* ("[T]he guidelines do not define what constitutes "non-discriminatory criteria."). And the majority assumed that, by permitting discrimination based on any characteristic, the school district was allowing secular activity that was comparable to the differential treatment of LGBTQ+ individuals by the religious student organization. The facts in this case, including the discretion involved, are dissimilar, and consequently the analysis is different.

Preferences Involving Disability, Income, and Race

The disability and income aspects of the equal-opportunity requirement are unique and warrant independent consideration. As I already concluded, the UPK Statute does not authorize the Department to

grant any exception to the equal-opportunity requirement. Now, I further conclude that the equal-opportunity requirement incorporates its own exceptions for children in low-income families or who meet at least one qualifying factor as well as those with disabilities who "must be offered preschool services in accordance with the child's individualized education program" under the Individuals with Disabilities Education Act and Exceptional Children's Educational Act. Colo. Rev. Stat. §§ 26.5-4-204(3).[35] Thus, the allowance for special programming to serve the identified children with disabilities and those in low-income families does not violate the equal-opportunity requirement,[36] and the Department's treatment of related programs is not discretionary and does not involve favoring secular activity over religious exercise.[37]

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[35] This understanding of the UPK Statute is bolstered by the statute's specific naming of these providers and identification as purposes of the program to provide access to preschool services for children with disabilities and those in low-income families. Colo. Rev. Stat. § 26.5-4-202(1) & (4).

[36] I continue to question whether the equal-opportunity requirement, on its face, applies to individuals without a disability, as the language obligates participating preschools to provide an equal opportunity "regardless of . . . disability." Colo. Rev. Stat. § 26.5-4-205(2)(b). It does not guarantee individuals without a disability equal opportunity. Additionally, as Ms. Odean described the special programs for specific needs, school-district based providers have such programs aligned to their federal mandate" at one location within multiple in a school district and would still provide services to other children apart from that program. Odean Dep. 99:4-7, 19-23, Trial Ex. 26

[37] Plaintiffs argue, in passing and for the first time in their Proposed Findings of Fact and Conclusions of Law, that "there is

Just as importantly, even if the existence of specific programs that serve children with disabilities and

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simply no neutral, compelling basis to distinguish between children and families whose need for a unique educational environment is driven by their (say) disability and those for whom it is driven by their faith." Pls.' Proposed FOFCOL at 41. It is unnecessary to explain all the reasons this argument fails, but suffice it to say, there are statutory imperatives that necessitate certain special treatment on the basis of disability, imperatives that go beyond what is required by the Free Exercise Clause. *See, e.g.*, 20 U.S.C. § 1400 *et seq.*; 42 U.S.C. § 12132. These, and other laws, reflect the nuanced realities of education, permitting special programming in specific cases for specific children. Yet, "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(A). In arguing that there is no basis for funding distinct education programs for children with a disability but not for religiously adherent children, Plaintiffs cite *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, in which the Third Circuit held that the Newark Police Department's no-beard policy violated the Free Exercise Clause because the Department made exemptions for medical reasons and offered no substantial justification for refusing to provide similar exemptions for officers who are required to wear beards for religious reasons. 170 F.3d 359, 360 (3d Cir. 1999). In that case, however, the permitted medical exemptions and denied religious exemptions were to the same no-beard policy, and the difference in outcomes was a result of the City's belief that it needed to comply with the Americans with Disabilities Act while it ignored the required accommodation for religion in Title VII of the Civil Rights Act of 1964. *Id.* at 365. Here, there are no analogous obligations for the State to fund separate education for religiously adherent children.

those in low-income families violated the equal-opportunity requirement and even if Defendants were conferred the discretion to grant exceptions to the requirement to allow for those programs, that discretion would not lead to the conclusion that Defendants could also grant exceptions that would permit providers to deny equal access to LGBTQ+ children and families. There are distinct reasons, including statutory mandates, that Defendants might be authorized to permit special access for children with disabilities and those in low-income families. These same justifications likely would not apply to denying equal access on the basis of sexual orientation or gender identity. Accordingly, any differential treatment of children based on disability or income is not indicative that the equal-opportunity requirement, in its entirety or any other aspect of it, is not generally applicable.

Plaintiffs claim that "while Defendants are willing to interpret the [equal-opportunity requirement] flexibly to accommodate . . . providers [serving low-income children and those with disabilities], they insist on a rigid interpretation of that [requirement] to exclude Plaintiff preschools." Pls.' Proposed FOFCOL at 40. Not only is prioritizing low-income children and children with disabilities permissible under the equal-opportunity requirement, there is no evidence that it implicates the State's interest in protecting children from the harm they might suffer from discrimination.

Plaintiffs also claim that the Department could grant an exception to the equal-opportunity requirement that would permit a provider to limit enrollment to children of color from historically underserved areas. Plaintiffs cite to Ms. Odean's testimony at trial. Trial Tr. (Odean) 245:25-246:3 ("Could a school under

this preference prioritize children of color from historically underserved areas? Yes."). However, later in her testimony, Ms. Odean clarified that she had never received such a request to limit enrollment to children of color and had not thought about the possibility of such a request. *Id.* 277:23-25, 278:23-279:2, 279:13-15. She indicated that she does not have sole authority to approve such a request, and the Department would carefully review any request for a preference with the advice of legal counsel and would not grant any request if the preference violated the equal-opportunity requirement. *Id.* at 245:3-24, 278:1-8, 279:16-280:5. Ms. Odean's testimony confirms that the Department does not have the authority to grant any exemption from the equal-opportunity requirement.

Preferences Involving Sexual Orientation and Gender Identity

Similar to their arguments regarding the equal-opportunity requirement and race, Plaintiffs point to Ms. Odean's testimony as proof the Department could grant an exception allowing a preschool to limit enrollment to gender-nonconforming children or members of the LGBTQ community. *See id.* 244:15-25, 245:13-24, 246:4-8. Here, too, Ms. Odean qualified her testimony, responding that the Department would look into a school for gender-nonconforming children and would accept the request as long as there was no discrimination under the equal opportunity requirement. *Id.* 245:19-24; *see also id.* 278:1-8, 279:16-280:5. Apart from this testimony, Plaintiffs identify no evidence that Defendants have been given or have exercised the authority to grant an exemption from the sexual-orientation and gender-identity aspects of the equal-op-

portunity requirement. I cannot conclude that Defendants have the discretion to grant such exemptions based merely on hypotheticals and speculation when nothing in the UPK Statute or official documents from the Department supports that it does.

The Department has made decisions to promote mixed-delivery that do not run afoul of the equal-opportunity requirement. These decisions do not devalue religious beliefs or make such beliefs any less important than nonreligious justifications. The differential treatment of children and families on the basis of disability and income is permitted by the UPK Statute, and specifically the equal-opportunity requirement. Defendants do not have the discretion to grant any exemptions to the equal-opportunity requirement. At most, they would be authorized to grant exemptions to the disability and income aspects of the equal-opportunity requirement, and in that case, it would not lead to the conclusion that they have similar discretion to grant exemptions to the sexual-orientation and gender-identity aspects of the requirement. Defendants have not exercised discretion to grant exemptions to the disability, income, race, sexual-orientation, or gender-identity aspects of the requirement. *Cf. Fellowship of Christian Athletes*, 82 F.4th at 688 (finding that the school district exercised discretion to allow discrimination in violation of the at issue policy). The algorithm preferences the Department allows providers to exercise do not pose a similar risk to the asserted interests as would permitting Plaintiff Preschools to deny LGBTQ+ children and families equal access to publicly funded preschool services. Therefore, Plaintiffs have failed to show Defendants treat any comparable secular activity violating the sexual-orientation and gender-identity aspects—as well as the disability, income,

and race aspects—of the equal-opportunity requirement more favorably than Plaintiffs' religious exercise.

Preferences Involving Religious Affiliation

For the religious affiliation aspect of the equal-opportunity requirement, the conclusion is the opposite. The congregation preference permitted by Defendants is a clear exception to that aspect of the requirement, as it unequivocally permits faith-based providers to prioritize access to their services for members of their congregation, however they choose to define that term. Thus, a preschool that exercises the preference does not have to provide an equal opportunity to children and families "regardless of . . . religious affiliation." Colo. Rev. Stat. § 26.5-4-205(2)(b). The testimony here from Ms. Odean is explicit: the congregation preference would allow a Catholic provider to reserve seats for "Catholics" and allow a Lutheran provider to reserve seats for "Lutherans", and the Catholic provider "wouldn't have to provide an opportunity to enroll Lutherans." Trial Tr. (Odean) 239:3-240:17. Ms. Odean did not later qualify this testimony. This exception to the religious-affiliation aspect of the equal-opportunity requirement mandates the conclusion that the particular aspect is not generally applicable.

Defendants disagree with this conclusion and insist that the congregation preference does not allow providers to discriminate on the basis of religious affiliation. *Id.* 276:7-22; Trial Tr. (Cook) 154:14-18. Ms. Odean testified that the Department would investigate if it learned that a provider was utilizing the congregation preference to discriminate. Trial Tr. (Odean) 276:7-22.

Defendants justify the congregation preference by explaining that its purpose is to sustain ongoing relationships with specific provider communities. *Id.* 276:10-15 ("It is about an inclusive community, and being able to ensure that providers can continue to serve the communities they have served, and families can continue to participate."). According to Defendants, the term congregation does not need to be understood in religious terms. But the preference is specifically available to "faith-based providers." Defendants claim providers could define congregation to include individuals who attend services and activities but do not share the same religion. Defs.' Proposed FOFCOL at 47. Applied in this way, the preference would still be based on affiliation with the faith-based provider, i.e., religious affiliation.

Defendants' most salient argument is that "even if the congregation preference were understood to permit faith-based providers to discriminate on the basis of religion, that need not trigger strict scrutiny for Free Exercise Clause purposes because such a preference does not 'prohibit religious conduct while permitting *secular* conduct that undermines the government's asserted interests in a similar way.'" *Id.* at 48 (quoting *Fulton*, 593 U.S. at 534 (emphasis added)). Defendants cannot have it both ways, though. They cannot contend that the congregation preference does not apply to conduct that is necessarily religious, *see id.* at 47, while also arguing that the preference "is available only to religious providers," *see id.* at 49. Under their own theory, Defendants allow discrimination on the basis of religious affiliation for secular reasons (e.g., maintaining community relationships) but not religious ones (e.g., sharing the same faith). Defendants, in effect, contend the latter would violate the

equal-opportunity requirement, while the former would not. This amounts to favoring secular activity over religious exercise.

Additionally, under these unique circumstances, the congregation preference singles out faith-based providers and requires them to navigate an untenable situation. The congregation preference invites them to reserve seats for members of their "congregation" such that they are, in effect, denying equal access on the basis of religious affiliation. Faith-based providers cannot tread carefully enough to both take advantage of that preference and also be confident that they will not be investigated for discriminating on the basis of religious affiliation. *See* Trial Tr. (Odean) 276:7-22 (advising that providers may be investigated if they use the congregation preference to discriminate).

In the end, Plaintiffs have established that the religious-affiliation aspect of the equal-opportunity requirement is not generally applicable as the Department has applied it and thus that strict scrutiny is triggered for that government policy. As for the other challenged aspects of the equal-opportunity requirement—those related to sexual orientation and gender identity, I conclude that they are neutral and generally applicable and that Defendants must only show that they are rationally related to a legitimate government end. *See United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002).

4. Strict Scrutiny

Although I have concluded the sexual-orientation and gender-identity aspects of the equal-opportunity requirement should not be subjected to strict scrutiny, I find that even if strict scrutiny applied, it would be

satisfied. With that considerably higher threshold met, Defendants easily overcome rational basis review. On the other hand, regardless of whether it could satisfy rational basis review, the religious-affiliation aspect of the equal-opportunity requirement triggers strict scrutiny. For this specific aspect of the equal-opportunity requirement, and based on the record before me, Defendants' conduct is not justified under such an exacting review.

To satisfy strict scrutiny, Defendants must demonstrate their "course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 597 U.S. at 525 (citing *Lukumi*, 508 U.S. at 546). "Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" *Fulton*, 593 U.S. at 541 (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546.

Defendants have consistently claimed that the UPK Statute does not permit them to grant any exemption from the equal-opportunity requirement. *See* Trial Tr. (Cooke) 159:23-160:7, 173:18-20; Roy Letter at 1, Trial Ex. 12. I have already determined that Defendants are correct— under the UPK Statute, the Department lacks the authority to grant any exemption from the equal-opportunity requirement. Because that is the case, it is appropriate to consider the State's underlying interests and whether Defendants' actions further those interests. Defendants assert that their

conduct—in denying Plaintiff Preschools an exemption from the equal-opportunity requirement—is justified by two compelling State interests: (1) ensuring eligible children and their families do not face discriminatory barriers to publicly funded preschool and (2) protecting children from discrimination.

Plaintiffs contend the interests Defendants assert are "after-the-fact justifications" and cannot be attributed to the Legislature. Pls.' Proposed FOFCOL at 49. Uncontroverted testimony at trial, however, established that the statutory equal-opportunity requirement was included in the UPK Statute so that eligible children would have access to preschool programs of their choosing and that best fit their family's needs without experiencing discrimination on the bases identified in the statute and so that eligible children can grow to their maximum ability and are not put in an unsafe or unhealthy environment. *See* Trial Tr. (Cooke) 142:25-143:3; Trial Tr. (Odean) 197:17-198:9, 199:15-25. The asserted State interests are not factitious, hypothesized, or invented post hoc. *Cf. Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (finding that the legislative history and state court interpretation were contrary to the asserted interest); *Kennedy*, 597 U.S. at 543 n.8 (noting that the school district did not raise concerns related to the state interest in its correspondence with the plaintiff and the interest was not addressed by the lower courts).

i. Sexual Orientation and Gender Identity

I consider first whether the asserted State interests are compelling and narrowly tailored as they relate to Defendants' denial of an exemption from the

sexual-orientation and gender-identity aspects of the equal-opportunity requirement. Because I find that the first State interest Defendants identify—ensuring eligible children and their families do not face discriminatory barriers—is compelling and that Defendants' conduct was narrowly tailored in pursuit of that interest, I do not assess whether the second State interest—protecting children from discrimination—likewise satisfies strict scrutiny.

Plaintiffs argue that Defendants must establish there is an "actual problem" in need of solving and have failed to do so. Pls.' Proposed FOFCOL at 51 (quoting *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011)). The case Plaintiffs cite for that requirement, *Brown v. Entertainment Merchants Association*, involved content-based restrictions on speech, which are not at issue in this case. In *Brown*, the Court found that the State of California could not show that the challenged legislation's labeling requirements and prohibition on the sale or rental of video games to minors met "a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so." 546 U.S. at 789, 803. As I detail below, Defendants here have shown that there is a substantial need for LGBTQ+ children and families in Colorado to have equal access to publicly funded, quality preschool services. *Cf. Awad v. Ziriax*, 670 F.3d 1111, 1129-30 (10th Cir. 2012) (in a challenge to an amendment to the Oklahoma Constitution that would have prevented state courts from considering or using Sharia law, finding that Oklahoma officials could not show an actual problem the amendment sought to address when they admitted they were unaware of "a single instance where an Oklahoma court had applied Sharia law or used the legal precepts of other nations

or cultures"). Plaintiffs point out that, although Plaintiff Preschools are licensed by the State and have participated in other government-funded preschool programs, no formal complaints have previously been filed with the State alleging that they have engaged in discrimination against LGBTQ+ children or families. Trial Tr. (Odean) 264:1-265:3. Plaintiffs believe this shows that any potential harm to LGBTQ+ students or families is merely speculative and insufficient to establish a compelling interest. *See* Pls.' Proposed FOFCOL at 50-51. I disagree. The scope of the UPK program is much more extensive than the prior preschool programs, and it provides opportunities for students who may not have sought out religious preschool services before. It cannot be assumed that a lack of formal complaints in the past equates to discrimination not having occurred or evinces it is unlikely to occur in the future.[38]

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[38] Both sides have played fast and loose in claiming that Catholic schools in Denver have not historically denied access to LGBTQ+ children and families. For example, Plaintiffs' counsel argued to the Court that "not one of the Archdiocese's 36 preschools has any history of a complaint from a LGBTQ family or other person alleging LGBTQ-based discrimination." Trial Tr. (Openings) 9:21-25. I give counsel the benefit of the doubt that, technically speaking, perhaps no formal complaint with the State or in court has been filed against any of the Archdiocese's preschools. Although not part of the evidentiary record, however, it cannot be said that there is no history of any of the Archdiocese's preschools denying equal access to a family based on sexual orientation. *See, e.g.*, Archbishop Charles J. Chaput, *Catholic schools: Partners in faith with parents*, Denver Catholic Register (Mar. 10, 2010), *accessed at* https://web.archive.org/web/20110119221141/http://www.archden.org/index.cfm/ID/3560 (describing how one

The compelling nature of the State's interest in ensuring LGBTQ+ children and their families do not face discriminatory barriers is supported by the evidence in the record. The testimony at trial established the positive impact preschool attendance, and in particular quality preschool services, can have on students and their families. Preschool prepares children for school, educationally and emotionally. Trial Tr. (Holguín) 427:12-14, 431:16-21. Preschool attendance is associated with positive outcomes, such as access to college or higher education, whereas non-attendance corresponds with negative outcomes, such as a lack of success academically, socially, and emotionally. *Id.* 430:4-10, 430:19-431:5. Preschool "is a key element for children to be able to succeed, and an equalizer for many children that don't have the opportunity to be in a place where they can acquire those skills." *Id.* 430:15-18.

The testimony likewise established that LGBTQ+ families often have fewer options when looking for early childhood education. Trial Tr. (Goldberg) 287:19-25, 289:18-23, 324:25-325:2. LGBTQ+ parents are about twice as likely to live in poverty, which may affect a family's options for transportation. Trial Tr. (Goldberg) 287:15-17, 324:4-17. The fact that LGBTQ+ families are more likely to live in poverty and have

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of the Archdiocese's schools had decided that a lesbian couple's child who was enrolled in preschool would be able to finish out that year but not continue at the school to kindergarten). Regardless, Ms. Coats testified that, just last year, Wellspring Catholic Academy declined to enroll a fifth grader with same-sex parents. Trial Tr. (Coats) 113:5-114:13, 125:25-126:10. There is no reason to believe that same-sex parents of preschoolers would not likewise seek to enroll their children in Plaintiff Preschools.

fewer options for preschools ultimately puts them at risk for inadequate outcomes. *Id.* 288:10-14. This evidence substantiates that the State's interest in ensuring LGBTQ+ children and families do not experience discriminatory barriers to publicly funded preschool is compelling.

Plaintiffs contend that denying Plaintiff Preschools an exemption does not advance the State's interest because "[a]llowing Plaintiff preschools to participate would not take away a single . . . option[] for LGBTQ families" and instead would add to the list of providers. Pls.' Proposed FOFCOL at 48 (emphasis removed). Plaintiffs misunderstand the State's interest. If Defendants claimed the State's interest were simply increasing the number of available preschool spots, Plaintiffs' argument might have merit. But Defendants identify the State's interest as ensuring that children and families do not face discriminatory barriers when enrolling and receiving publicly funded preschool services. The purpose is to avoid these children and families being denied access to the publicly funded preschool programs that best fit their family's needs and to avoid putting them at risk for inadequate outcomes. Simply adding to the list of UPK providers does not address this purpose.

The State's interest here differs significantly from the City's in *Fulton*. There, the City's relevant asserted interests were "maximizing the number of foster parents . . . and ensuring equal treatment of prospective foster parents and foster children." *Fulton*, 593 U.S. at 541. The Court observed that including the Catholic foster care agency "seem[ed] likely to increase, not reduce, the number of available foster par-

ents." *Id.* at 542. And, it found that, while equal treatment was a weighty interest, the City's "creation of a system of exceptions under the contract undermine[d] [its] contention that its non-discrimination policies [could] brook no departures." *Id.* As I just explained, the State's interest identified by Defendants is not simply to increase the number of preschool spots available. Moreover, as I have already found, the Department has not created a formal mechanism for exceptions to the sexual-orientation and gender-identity aspects of the equal-opportunity requirement.[39]

Plaintiffs insist Defendants' evidence in actuality confirms that a compelling interest is lacking. Plaintiffs note that Defendants' experts could not point to any research "demonstrating that excluding preschools (much less Catholic preschools specifically) from UPK Colorado would advance the Department's alleged interests in removing discriminatory barriers to preschool." Pls.' Proposed FOFCOL at 51. And, specifically, Plaintiffs highlight that Dr. Goldberg provided "no evidence lesbian or gay families in Denver would be unable to access affirming preschools as a result of Plaintiff[Preschools'] policies." *Id.* at 52.

Once again, Plaintiffs skew the identified State interest. The interest is not that LGBTQ+ children and their families are able to access some preschool services somewhere. It is clear from the evidence that

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[39] Using the same type of logic the Court employed in *Fulton*, it seems that if public money is not being disbursed to schools that discriminate in a manner contrary to the equal-opportunity requirement, then more money should be available for schools that do not discriminate in such a way, perhaps creating additional opportunities for children and families that might experience discrimination on the bases specified in the requirement.

such a limited interest would not constitute equity or equal opportunity as envisioned. The asserted State interest is in removing discriminatory barriers so that these children and families may have access to the publicly funded, quality preschool programs of their choosing and that best fit their family's needs. As the expert testimony illustrated, removing discriminatory barriers prevents the burden of discrimination from continuing to be placed on these children and families by, for example, requiring them to find another preschool provider or to travel a greater distance to receive preschool services.

Additionally, the State's interest is focused on ensuring access to publicly funded, *quality* preschool services so that eligible children can grow to their maximum potential. The Brief of Amici Curiae informs that "religious schools often provide the best academic experience for students." Br. of Amici Curiae at 6. The Brief cites to a meta-analysis that ostensibly concludes "students who attend religious schools perform better than their counterparts who are in public schools[,] . . . both in terms of academic and behavioral outcomes." William H. Jeynes, *A Meta Analysis on the Effects and Contributions of Public, Public Charter, and Religious Schools on Student Outcomes*, 87 Peabody J. of Educ. 305, 324 (2012).[40] On Colorado's rating system for early childhood education providers, both Plaintiff Preschools have earned four out of five stars. Trial Tr. (Seul) 71:19-72:1; Trial Tr. (Coats) 104:22-23; *see also*

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[40] Amici also emphasize the value of the mixed-delivery program and its ability to offer students and families options. *See, e.g.*, Br. of Amici Curiae at 1. They miss, however, the irony in valuing choice for religious schools and their students—but not for LGBTQ+ children and families.

Trial Tr. (Holguín) 428:11-15. If religious schools in fact provide the best academic experience, the State's interest in removing discriminatory barriers for publicly funded preschool education is even more significant. The children who could be denied preschool services if Plaintiff Preschools were granted an exemption would lose out not only on receiving services from their preferred preschool but perhaps would also be forced to forgo "the best academic experience." When the State is footing the bill, it has a compelling interest in deciding that children may not be denied this experience based on specified discriminatory factors. "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). If LGBTQ+ children and their families do not have access to the best academic experience, they may be denied the opportunity to achieve their maximum potential, to the detriment of all.

More generally, it would be unreasonable to require Defendants to present the evidence Plaintiffs claim is necessary. Defendants cannot be expected to determine which preschool programs best fit each family's needs and then to evaluate how each child or family might be subject to inappropriate discrimination under the equal-opportunity requirement. Nor can courts demand research that addresses the exact circumstances.[41] Inferences based on reliable, circumstantial evidence and the exercise of common sense suffice.

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[41] Undoubtedly, if such research were presented, Plaintiffs would contend it is irrelevant because it was not considered by the General Assembly in enacting the UPK Act. *See, e.g.*, Pls.'

Defendants have established a compelling interest in denying an exemption from the sexual-orientation and gender-identity aspects of the equal-opportunity requirement for Plaintiff Preschools specifically. I note as well, however, that the Department's interest goes beyond denying the exemption for Plaintiff Preschools. If Defendants granted Plaintiff Preschools an exemption, they would likely have to grant exemptions to many other religious providers. In this case, the Archdiocese sought an exemption for its 34 other preschools in addition to Plaintiff Preschools, and Amici advocate on behalf of numerous other religious preschools desiring similar exemptions. Upon the granting of an exemption from any preschool, other religious providers would surely argue that the Department has permitted its interests to be undermined and, consequently, that its interests are not compelling. Indeed, Plaintiffs make this exact argument regarding Defendants' decision not to appeal the preliminary injunction granted in *Darren Patterson*. *See, e.g.*, Pls.' Mot. for Summ. J.

Mot. to Exclude Expert Testimony at 3, ECF No. 73 ("[T]here is no evidence that the Colorado Legislature or the Department of Early Childhood reviewed and considered *any* of the studies or research relied on by either expert . . . in making the decisions to exclude Plaintiffs."). In effect, Plaintiffs argue that, for evidence to be relevant, it must be related only to the decision to deny Plaintiff Preschools an exemption and also that it must have been considered by the General Assembly and the Department before denying the exemption. Under these circumstances, it would be impossible to provide any such research. The Department did not seek out or review any research because it believed it did not—and in reality did not—have the authority to grant Plaintiff Preschools an exemption. And the General Assembly could not have predicted each provider that might request an exemption and commissioned research related to that provider. Plaintiffs' arguments, viewed together, are unreasonable.

at 39, ECF No. 61 ("[I]f the Department is fine with the *Darren Patterson* school's participation . . . then it's difficult to see why the Department here has a 'compelling' interest in stopping the Archdiocese from doing the same."). If one exemption is granted, others would necessarily follow and the number of preschools denying equal access to LGBTQ+ children and families would quickly grow.[42] The State's interest in eliminating discriminatory barriers, therefore, relates not just to the consequences that would result from granting Plaintiff Preschools an exemption.

"Ensuring equal opportunity for students to attend publicly supported schools . . . comports with public policy that has been widely adopted in the United States for the last thirty years or more." Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 977 (2003) writing twenty years ago). The Supreme Court has recognized the prerogative of states to refuse to fund private discrimination.[43] And granting even one exemption undermines this public policy.

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[42] If religious preschools across the State must be permitted to deny LGBTQ+ children and families equal access, those children and families in rural areas will be impacted to an even greater extent and could be denied access to preschool services altogether. *See* Trial Tr. (Goldberg) 287:4-9, 325:3-14 (discussing how options for early childhood education are fewer in number and more spread out in rural areas and how sometimes the only option available for LGBTQ parents is a religious provider).

[43] *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 468–69 (1973) ("There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be

For Defendants to satisfy strict scrutiny, they must show the means of pursuing the compelling interest they have demonstrated are narrowly tailored, or in other words that the means are "closely fitted" to that compelling interest. *See Kennedy*, 597 U.S. at 525; *Awad*, 670 F.3d at 1129. Plaintiffs contend the "means" Defendants have chosen do not "fit" their asserted interest because there is no connection between excluding Plaintiff Preschools and the State interest in removing discriminatory barriers to publicly funded preschool. *See* Pls.' Proposed FOFCOL at 57. I addressed this argument above and restate that adding preschools does not remove the discriminatory barriers the General Assembly chose to prioritize and does not provide equal access to the children and families who might be subjected to the discriminatory treatment.

Plaintiffs suggest that, instead of applying the equal-opportunity requirement, Defendants could include a disclaimer for Plaintiff Preschools in the UPK portal, informing that they do not provide services to LGBTQ+ students or families. In no way would such a disclaimer achieve the State's interest in removing discriminatory barriers. On the contrary, it would appear to reenforce those barriers, even if an added disclaimer is provided to explain the "obvious point" that the schools' positions are not attributable to the Department. *See id.* at 56 n.12.

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communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.").

I conclude, therefore, that the State interest in removing discriminatory barriers for LGBTQ+ children and families is compelling and the means for pursuing that interest are narrowly tailored. If strict scrutiny were triggered for Plaintiffs' first, fourth, or fifth claim in relation to the sexual-orientation or gender-identity aspects of the equal-opportunity requirement, Defendants would have overcome it.[44]

ii. Religious Affiliation

In sharp contrast to the evidence Defendants presented to establish a compelling interest with respect to the sexual-orientation and gender-identity aspects of the equal-opportunity requirement, Defendants did not offer any evidence relating to discrimination on the basis of religious affiliation. The evidence in the record supports the determination that quality preschool services are beneficial for children and thus that children should not be denied equal access to such publicly funded preschool services based on factors unrelated to the needs of the children or their families. This evidence is insufficient to find Defendants' conduct in denying Plaintiffs an exemption from the religious-affiliation aspect of the equal-opportunity requirement is justified by a compelling interest. Moreover, any State interest in ensuring children and families do not

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[44] This conclusion does not contradict the application of strict scrutiny in *Darren Patterson* because, at the time the limited preliminary injunction was issued in that case, "the state ha[d] not really attempted to proffer a compelling interest of the highest order, nor ha[d] it shown that it narrowly tailored its policies to pursue any interest." 2023 WL 7270874, at *16. Here, Defendants asserted and argued the State interests in multiple filings and at the trial, where relevant expert testimony was presented.

experience discrimination because of their religious affiliation, or lack thereof, is undermined by Defendants' creation of the congregation exception, which unquestionably permits such discrimination. Defendants have failed to establish a compelling interest justifying their denial of an exemption from the religious-affiliation aspect of the equal-opportunity requirement for Plaintiff Preschools. Thus, because strict scrutiny was triggered and is not satisfied, Plaintiffs' free exercise rights have been violated in this regard.

The UPK Program is an innovative endeavor, and the Department's implementation is occurring as the relationship between church and state continues to undergo a legal transformation. "[T]hose who must make practical decisions about how and where we educate our children . . . and how we care for the least fortunate among us, do not enjoy [the luxury of watching and waiting as new principles emerge and work themselves pure]. They face formidable challenges in reconciling those concerns with appropriate limits on state power in dealing with religious entities." Lupu & Tuttle, *supra*, at 994. In their attempts to include and accommodate faith-based providers, Defendants have created an unworkable scheme that breaches the appropriate limits on state power. Defendants enable faith-based providers to effectively discriminate on the basis of religious affiliation in their admission of preschoolers but, at the same time, deny Plaintiff Preschools an explicit exemption from the related aspect of the equal-opportunity requirement. Defendants have provided no compelling interest for their course of conduct. As a result, Plaintiff Preschools succeed on the merits of their fifth claim with respect to the reli-

gious-affiliation aspect of the equal-opportunity requirement. Plaintiffs otherwise fall short on their first, fourth, and fifth claims.

C. Claim Seven

Plaintiffs' seventh claim is brought under the Establishment Clause for "denominational favoritism." Plaintiffs allege Defendants' policies favor other religious denominations because they allow faith-based preschools to prioritize their congregation members, but Plaintiff Preschools would like to give admissions preference to the children of all members of the Catholic Church and believe they are unable to do so. I concluded above that Defendants' creation and implementation of the congregation exception violates Plaintiffs' free-exercise rights. Since I grant a related preliminary injunction and award nominal damages below, the only additional relief Plaintiffs seek under this claim is a declaration, which I need not provide. Though I am doubtful of Plaintiffs' expansive reading of *Larson v. Valente*, 456 U.S. 228, 245 (1982), *see, e.g.*, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) ("[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions 'without discrimination or preference' . . . ." (quoting New York Constitution of 1777, art. XXXVIII, reprinted in 5 The Founders' Constitution, at 75)), I decline to exercise my discretion to consider whether Defendants have violated the Establishment Clause.

D. Claim Six

Plaintiff Preschools' sixth claim asserts a violation of their free-speech rights based on two theories: that

the Universal Preschool Program forces them to accept members who oppose the purposes of their group (expressive association) and thus compels them to speak messages against their will (compelled speech). While similar and both grounded in the First Amendment—and some consider compelled speech a corollate to the right to expressive association—their analyses are slightly different. Because the determination regarding expressive association generally is more complex, I begin there.

1. Plaintiffs' Arguments

The U.S. Supreme Court has determined that expressive association is an indispensable right, which secures other speech rights. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). Plaintiff Preschools maintain that, like the Boy Scouts of America in *Boy Scouts of America v. Dale*,[45] their association is expressive, and Defendants should not be able to require

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[45] Plaintiffs also refer to *Slattery v. Hochul*, which held that a crisis pregnancy center stated a plausible claim that a New York "statute unconstitutionally burdens its right to freedom of expressive association—as guaranteed by the First and Fourteenth Amendments—by preventing it from disassociating itself from employees who, among other things, seek abortions." 61 F.4th 278, 283 (2d Cir. 2023). Even if this precedent were binding, it is inapposite for at least one of the same reasons as *Dale*, which is that no benefit is being conditionally offered by the government. Second and relatedly, *Slattery* did not involve a non-discrimination policy that, among other things, was engineered to ensure

them to admit LGBTQ+ children and families as a condition of participating in the UPK Program because the presence of those children and families would undermine the expressive message Plaintiffs intend to convey. *See* 530 U.S. 640 (2000). I agree with Plaintiffs that, based on Supreme Court precedent, their association likely is expressive. *See id.* at 641 (observing that plaintiff organization engages in expressive association "when its adult leaders inculcate its youth members with its value system"). But my agreement ends there. The rest of Plaintiff Preschools' argument poses significant problems, including that the facts and laws implicated in *Dale* do not align with those in the instant litigation.

In *Dale*, the Boy Scouts of America revoked the membership of a former Eagle Scout and an assistant scoutmaster, James Dale, after he publicly disclosed his sexual orientation as homosexual and promoted gay rights. *Id.* at 644. The Boy Scouts justified Dale's expulsion on the grounds that it "is a private, not-for-profit organization engaged in instilling its system of values in young people" and "homosexual conduct is inconsistent with the values it seeks to instill." *Id.* James Dale filed suit, seeking readmission to the Boy Scouts of America under the theory that his removal violated New Jersey's public accommodation laws. The Boy Scouts of America petitioned for certiorari after the New Jersey Supreme Court held that the organization had to readmit Dale. The United States Supreme Court accepted the case and reversed, holding

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equal opportunity regardless of membership in certain protected classes.

that compelling Dale's admission violated the expressive associational rights guaranteed by the First Amendment to the Constitution. *Id.* at 656.

The circumstances here are entirely different.[46] First and most importantly, the state of New Jersey sought only to enforce its public accommodations law in *Dale*, 530 U.S. at 644. Here, the government is conferring a benefit on the schools themselves and attaching conditions for receipt of that benefit.

Second, admission to private clubs, such as the Boy Scouts of America is entirely elective with no encouragement of participation from the state. Education of Colorado's youth, by contrast, is strongly promoted by

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[46] Initially, I question whether the equal-opportunity requirement targets expressive activity at all. Precedent prescribes a case-specific assessment of the regulated activity in determining whether the implicated regulation affects speech or affects conduct that, in turn, indirectly impacts speech. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986) (determining whether speech rights apply first requires finding whether the conduct with a "significant expressive element" drew the legal remedy or the regulation "has the inevitable effect of singling out those engaged in expressive activity"). Were it not the case that Plaintiff Preschools engage in substantially the same activity as in *Dale* —youth instruction involving organizational value, I likely would find the equal-opportunity requirement does not target expressive activity at all. Indeed, the legal analysis in *Dale* is so brief and all-encompassing, "[i]t is hard to imagine an association that is not expressive under Dale's criteria." Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 Cardozo L. Rev. 1819, 1822 (2002). When a bar on discrimination is a restriction that predominantly targets conduct, speech rights are not relevant unless the conduct itself is inherently expressive. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62, 65-66 (2006).

the State at the preschool stage—the program is literally intended to be "universal"—and thereafter is compulsory.[47]

Third, the Boy Scouts of America sought to determine who would be providing instruction to youth members.[48] James Dale was "the copresident of a gay and lesbian organization at college and remains a gay rights activist." *See id.* at 653. Here, the members the organization seeks to exclude, people whose presence allegedly would impair Plaintiffs' associative expression, are children. Preschool children are not (yet) group leaders, holding authority within the organization itself, and the First Amendment does not apply the same for children as for adults generally, particularly "in light of the special characteristics of the school environment." *See Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 187 (2021) (quoting *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266, (1988)). While Plaintiff Preschools may also associate with parents in educating their children, parents' conduct or beliefs cannot be attributed to the children Plaintiff Preschools seek to exclude. To withhold a benefit for children on a parent's status (or even the parent's actions) is typically offensive to the Constitution. *Cf. Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (holding, in the context of equal

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[47] Colorado mandates school attendance, but only for children above the age of six. *See* Colo. Rev. Stat. § 22-33-104.

[48] As explained above, the only policy that would impact Plaintiff schools' employment decisions for teachers and other staff is contained in Paragraph 18(B), which Defendants have indicated was included by accident and would not be enforced. *See* Trial Tr. (Odean) 231:8-232:2; Trial Tr. (Cooke) 148:7-12. Thus, I have found this portion of Plaintiffs' sixth claim to be moot.

protection jurisprudence, "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage[, b]ut visiting this condemnation on the head of an infant is illogical and unjust").

Fourth, the rights of gender diverse individuals were not considered in *Dale*. It has become clearer that transgender members of the LGBTQ+ community constitute a "discrete and insular minority," warranting basic protections. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *as amended* (Aug. 28, 2020) ("We agree with the Seventh and now Eleventh Circuits that when a 'School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate,' the policy necessarily rests on a sex classification.") (quoting *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)); *Griffith*, 2023 WL 2242503, at *9 ("This Court has little trouble stating that the Tenth Circuit needs to revisit its holding in *Brown v. Zavaras*[, 63 F.3d 967 (10th Cir. 1995)]," which, after applying rational basis review, rejected a transgender female inmate's claim that, by withholding estrogen treatment, her equal protection rights were violated.).[49] Based on

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[49] Another point that should be considered is the changing legal landscape and social acceptance for LGBTQ+ rights. The recognition and acceptance of same sex relationships alluded to in the *Dale* dissent has been more fully realized than Justice Stevens could have predicted in the year 2000. *Dale*, 530 U.S. at 699-700 (listing examples of acceptance of homosexual people and disapproval of discrimination against them) (Stevens, J., dissenting). Indeed, the present-day Boy Scouts of America "welcome all eli-

these distinctions it is clear *Dale* cannot and should not be extended to the facts of this case.

Plaintiffs second and related argument—that the limitation on their ability to associate with whom they please forces them to convey a particular message with which they disagree— ties in another factually dissimilar case, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). Like *Dale*, *303 Creative* evaluated the application of a public accommodations law, not the extension of material state benefits. Additionally, the regulation at issue in *303 Creative* was determined to restrict "pure speech," a position the Tenth Circuit Court of Appeals found the State of Colorado had conceded. 600 U.S. at 583. Assuming the preschool admissions process implicates speech, the equal-opportunity requirement still cannot reasonably be said to apply to "pure speech," as in *303 Creative*.

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gible youth, regardless of race, ethnic background, *gender or orientation*, who are willing to accept Scouting's values and meet any other requirements of membership" and declare "[p]rejudice, intolerance and unlawful discrimination are unacceptable within the ranks of the Boy Scouts of America." Membership Policy, About the BSA, THE BOY SCOUTS OF AMERICA, https://www.scouting.org/about/membership-policy/. This was not the case when *Bowers v. Hardwick* was good law. 478 U.S. 186, 192 (1986) (upholding criminal statute outlawing sodomy because a "fundamental right to homosexuals to engage in acts of consensual sodomy" was neither "implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and traditions"), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). Eventually, however, our jurisprudence acknowledged the legitimacy of same sex marriage and that "[w]ithout the recognition, stability, and predictability marriage offers, . . . children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser." *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015).

I distinguished the expressive association at issue in *Dale* on the grounds that associating with LGBTQ+ children and the children of LGBTQ+ parents is not likely to send the same message as "an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform" in *Dale*. 530 U.S. at 655-56. This case is similarly distinguishable from *303 Creative* with regard to compelled speech because it is not clear here how Plaintiff Preschools' preferred message would be impaired. To the extent that any message is being forcibly expressed, it does not conflict with the preschools' preferred message.[50] Having these children at the school, even if the school has ideological or otherwise substantive criticisms of the status of the children or their parents, does not, in and of itself, convey agreement with that particular status. This is very different from the circumstances of the plaintiff in *303 Creative*, who sought to make websites to celebrate the marriages of only couples whose union she personally endorsed. *303 Creative*, 600 U.S. at 581. If providing a service to someone can express endorsement of that person's views, in terms of the message and degree of implicit support of that message conveyed via association, the plaintiff in *303 Creative* is in a fundamentally different position than the Plaintiff Preschools. One cannot reasonably dispute that a website made by a sole member-owned LLC that exists only to positively describe a union between a woman and another

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[50] I recognize that religious dogma is inscrutable within our courts, and it is beyond the role and ability of the federal judiciary to interpret religious doctrine or determine its legitimacy or centrality to religious exercise. *See supra* note 19. Accordingly, I focus my analysis on the contours of the potential message sent by agreeing to and complying with the equal-opportunity requirement.

woman is much more likely to express a message of LGBTQ+ acceptance than having a preschool child present on a school campus who may or may not be a member of the LGBTQ+ community or *be a part of a family with a member in that community*.

This point is further supported by the fact that the implicit message conveyed here is not that Plaintiff Preschools support tolerance of the LGBTQ+ community, but rather that participating provider schools receive money under a program that supports giving every child "an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability." Colo. Rev. Stat. § 26.5-4-205(2)(b). Again, the message is not that Plaintiff Preschools necessarily endorse this policy. There are a number of reasons why a school may opt to accept the benefit and any one of those offer a competing message that, per Plaintiffs' expansive theory of compelled speech, could be reasonably understood by someone else to be the transmitted message. Plaintiff Preschools' signing of the UPK Agreement and compliance with the equal-opportunity requirement would not directly conflict or otherwise contravene the Plaintiffs' preferred messages.

2. The Equal-Opportunity Requirement as a Condition on Benefits

Properly viewed, the equal-opportunity requirement is a constitutionally permissible condition on a

State benefit.[51] Ordinarily, the state is granted tremendous leeway to determine how to allot funding or other assistance and, to further the promotion of specific values, may choose to fund one project over another. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 192, 196-200 (1991) (explaining that "the Government 'may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds'" (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977))). It may similarly condition receipt of benefits on a recipient's willingness to comply with certain regulations. *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985) (recognizing the state's right "to preserve the property under its control for the use to which it is lawfully dedicated"). These regulations may restrict First Amendment freedoms. *See Healy v. James*, 408 U.S. 169, 189 (1972) (noting that a club at a state college may access facilities and other resources to engage in "[a]ssociational activities [except] where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education"); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("As

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[51] As discussed above, recent Supreme Court precedent applying the Free Exercise Clause has shown that denying benefits to organizations that are religious in nature while providing such benefits to their secular counterparts, does not pass muster without a state interest of the "highest order." *See Trinity Lutheran*, 582 U.S. at 458 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)); *see also Carson*, 596 U.S. at 789; *Espinoza*, 591 U.S. at 484. The Court in these cases did not assess whether a condition like the equal-opportunity requirement on a state benefit constitutes an improper restriction on the right to expressive association.

a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights.").

However, such regulations may at times prove unduly restrictive or otherwise run afoul of the Constitution. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 518 (1958) (holding that a California regulation conditioning a property tax exemption on the recipient affirming not to advocate for forcibly overthrowing the government was an unconstitutional restriction on speech since "[t]o deny [a tax] exemption to claimants who engage in speech is in effect to penalize them for such speech"). Conditions tied to government benefits are reviewed more critically if the conditions restrict speech as opposed to general conduct not otherwise shielded by the Constitution. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[R]estrictions on protected expression are distinct from restrictions . . . on nonexpressive conduct. . . . [T]he First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech.").

"Compelled speech" generally may be anathema to the First Amendment, but the government may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995). "[T]he distinction that has emerged from [the Supreme Court's] cases is between conditions that define the limits of the Government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to

regulate speech outside the contours of the program itself." *See Agency for Int'l Dev.*, 570 U.S. at 214-15.

Assuming that the equal-opportunity requirement is a restriction that limits speech or inherently expressive conduct, *see supra* note 46, I must assess how this restrictive condition relates to the purpose and function of the program at issue. As I explained above, the UPK program was implemented in furtherance of the Department's aim to "[p]rovide high-quality, voluntary, affordable early childhood opportunities for all children in Colorado." Colo. Rev. Stat. § 26.5-1-102(1)(d). The UPK statute was developed and enacted with the recognition that it was important "that all families had . . . equitable access to preschool programs of their choosing, and [that they] would not be discriminated against based on any of the factors" in the equal-opportunity requirement. Trial Tr. (Cooke) 142:25-143:3. The requirement serves Defendants' interests of ensuring eligible children and their families do not face discriminatory barriers to publicly funded preschool education and protecting children from discrimination.

The equal-opportunity requirement is tied logically and closely to the interests the UPK Program serves. It is limited to preschool services only and does not seek to impact participating providers' admissions policies outside of the preschool context. Defendants even put on evidence that the Department does not have any intention of interfering with the curriculum of faith-based providers. *See* Trial Tr. (Odean) 232:25-233:3. Significantly, the equal-opportunity requirement was neither contemplated nor implemented because Plaintiff Preschools engage in speech. Far from

suggesting Defendants harbored religious animus toward Plaintiff, there is no indication in the record that the equal-opportunity requirement was intended to suppress any ideas or speech generally.

This case bears some similarities to (and key differences from) a recent case involving a Maryland school voucher program, *Bethel Ministries, Inc. v. Salmon*. No. CV SAG-19-1853, 2022 WL 111164, at *7 (D. Md. Jan. 12, 2022). There, when the plaintiff school reapplied for the voucher program, its application was denied because its handbook was found to violate the program's nondiscrimination requirement against LGBTQ+ students. *Id.* The court found the defendants' actions constituted an unconstitutional viewpoint-based restriction on speech. *Id*. Here, while Plaintiff Preschools possess a handbook that expresses its views regarding marriage and gender identity, Defendants' implementation and enforcement of the equal-opportunity requirement is not responsive to any of Plaintiff Preschools' speech. Even if speech from schools somehow did inform the incorporation of the equal-opportunity requirement, the equal-opportunity requirement has not been applied to Plaintiff Preschools for their specific speech, making the regulation viewpoint neutral. Consequently, Plaintiff Preschools' related activity is subject to regulation. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) ("Where the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.")

I conclude Plaintiffs' arguments that the equal-opportunity requirement unconstitutionally interferes with their expressive association and compels them to

send a disfavored message are without merit. When a community, via government, elects to confer a benefit on a school, the values that community holds, such as preventing the exclusion of certain historically disfavored groups, may—and in some cases must—be placed as a limited condition on receiving the related benefit. The equal-opportunity requirement, including Defendants' implementation of it, does not seek to limit speech whatsoever and is confined to the UPK program itself. Under the Free Speech Clause, the requirement constitutes a constitutional condition on a government benefit.

E. Relief

As described above, Plaintiffs seek three types of relief: declaratory judgment, a permanent injunction, and nominal damages. I find all three, including a limited permanent injunction, are warranted based on Plaintiffs' partial success on their fifth claim.

1. Declaratory Judgment

Pursuant to 28 U.S.C. § 2201(a), this Court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Plaintiffs are entitled to a declaration that Defendants' application of the religious affiliation aspect of the equal-opportunity requirement has violated their rights guaranteed by the Free Exercise Clause of the First Amendment.

2. Injunctive Relief

"For a party to obtain a permanent injunction, it must prove: '(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the

threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.'" *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (quoting *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003)). Although the permanent injunction sought by Plaintiffs mentions the Sheleys, it relates only to demands Defendants may not place on Plaintiff Preschools. *See* Pls.' Proposed FOFCOL at 69-70 (prohibiting Defendants from conditioning participation on agreeing to provide or providing an equal opportunity for children to enroll and receive preschool services, agreeing not to discriminate, and agreeing not to violate or violating their religious exercise in student admission and retention decisions and school operations). Because the proposed injunction involves Defendants' actions targeted at Plaintiff Preschools, I review these factors as they apply to Plaintiff Preschools principally.

I have concluded that Plaintiffs have succeeded on their fifth claim in part—they have established that the religious-affiliation aspect of the equal-opportunity requirement is not generally applicable and does not satisfy strict scrutiny. I have also concluded that Plaintiffs have not succeeded on any other aspect of their claims. "In the First Amendment context, 'success on the merits will often be the determinative factor' because of the seminal importance of the interests at stake." *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th

Cir. 2016) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013)).[52] And that is the case here.

i. Irreparable Harm

Generally, "[a] plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Awad*, 670 F.3d at 1131 (quoting *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2001)). Plaintiffs contend that, since the inception of the UPK Program, they have suffered and continue to suffer irreparable injury because they have been unable "to participate in an otherwise-available government program without having to forswear their religious exercise." Pls.' Proposed FOFCOL at 66-67. I have found Defendants violated Plaintiffs' constitutional rights by exercising discretion to grant exemptions from the religious-affiliation aspect of the equal-opportunity requirement but refusing to grant Plaintiff Preschools a similar exemption. The record indicates that, if an injunction is not granted, Plaintiff Preschools will not participate in the UPK Program and will not receive the associated benefits.[53] The ben-

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[52] The Tenth Circuit has articulated this parallel as part of the standard for preliminary injunctions. In this case, however, I see no reason why the analysis would differ for a permanent injunction.

[53] While it is not clear whether the limited injunction I grant here will result in Plaintiff Preschools' participation in the UPK Program, the injunction remedies the specific constitutional violation found and eliminates at least one barrier to Plaintiff Preschools' participation.

efits that Plaintiff Preschools will lose could be estimated, but it would be difficult to ascertain an adequate amount, as there was evidence that their nonparticipation in the UPK Program has dissuaded additional children from enrolling and prevents the preschools from competing with other providers. Consequently, Plaintiff Preschools have shown they are likely to suffer irreparable injury from their nonparticipation in the Program if an injunction is not granted.[54]

Defendants contend Plaintiff Preschools cannot show irreparable harm because they "are unaware of ever having enrolled an LGBTQ+ preschooler, of ever having received an inquiry about preschool enrollment from an LGBTQ+ family, or of ever having been the subject of a complaint from an LGBTQ+ student or family." Defs.' Proposed FOFCOL at 62. But the harm established by Plaintiff Preschools—for their fifth claim at least—is their nonparticipation in the

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[54] Because the harm at issue here involves a monetary government benefit, I am not convinced the determination that Plaintiffs' rights have been violated mandates a finding of irreparable harm. Similarly, I am not certain irreparable harm should be a given conclusion when there is no evidence that Plaintiffs experienced any coercive effect on their religious exercise. I recognize, however, that the Tenth Circuit has, in recent history, used broad language presuming irreparable harm when any constitutional violation is found. *See Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019) ("What makes an injury 'irreparable' is the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial. Any deprivation of any constitutional right fits that bill." (citing *Awad*, 670 F.3d at 1131)). I do not analyze how this language would or should apply here because I find Plaintiff Preschools have otherwise shown irreparable injury.

UPK Program, not that they may potentially face some future enforcement action by the Department. That they will miss out on the benefit of participating in the UPK Program is sufficient to establish irreparable injury in this case.

ii. Balance of Harms and Public Interest

The last two factors to be considered in determining whether a permanent injunction should issue are the threatened injury to the Plaintiff Preschools weighed against the harm the injunction might cause Defendants and any adverse effect the injunction might cause to the public interest. When the government is a party in the case and opposes the injunction, the government's interest and the public interest are assumed to align such that the third and fourth permanent-injunction factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

As discussed above, Defendants did not present any evidence of the harm the Department or the public would experience if Plaintiff Preschools are not obligated to comply with the religious-affiliation aspect of the equal-opportunity requirement. Considering Defendants' failure and the corresponding violation of Plaintiffs' free exercise rights, the last two permanent injunction factors weigh in favor of issuing a limited injunction exempting Plaintiffs from the religious-affiliation aspect of the equal-opportunity requirement. *See Free the Nipple*, 916 F.3d at 807 ("[I]t's always in the public interest to prevent the violation of a party's constitutional rights." (internal quotation marks and citation omitted)). Plaintiffs' lack of success on their remaining theories and claims prevents the full injunction they seek from being granted, as does the fact

that the public policy backed by the State would be undermined and the State's compelling interest would suffer.

While I generally agree with Defendants that "the legislature and voters are in a better position than Plaintiffs or this Court to determine the public interest," Resp. to Mot. for Summ. J. at 37, ECF No. 77 (citing *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016)), the constitutional violation found here involves unelected government employees misconstruing a generally applicable statute. This is to say that, whatever democratic support might ordinarily bolster the perception that the government's actions reflect public sentiment, such support is diluted in this specific context. Consequently, I conclude it is appropriate to issue the permanent injunction set out in the final section of this Order.

3. Nominal Damages

The Tenth Circuit also requires an award of nominal damages upon a finding of a constitutional violation. *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) ("[T]he rule seems to be that an award of nominal damages is mandatory upon a finding of a constitutional violation . . . ."). Plaintiffs are, therefore, entitled to nominal damages in the amount of $1.

III. Order

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED:

- Plaintiffs' Claims Two and Three and the part of Claims One, Four, and Six that rely on the application of Paragraph 18(B) are DISMISSED AS MOOT.

- Judgment SHALL ENTER in favor of Plaintiffs and against Defendants on Plaintiffs' fifth claim with respect to only the religious-affiliation aspect of the equal-opportunity requirement.
- It is DECLARED that:

  The application by Defendants Lisa Roy and Dawn Odean, acting in their official capacities on behalf of the Colorado Department of Early Childhood, of the religious affiliation aspect of the equal-opportunity requirement set out in Colorado Revised Statute § 26.5-4-205(2)(b) and in the Colorado Universal Preschool Program Service Agreement violates Plaintiffs' rights secured by the Free Exercise Clause of the First Amendment to the U.S. Constitution.
- Additionally, the following permanent injunction is ISSUED:

  The Court immediately and permanently enjoins Defendants Lisa Roy and Dawn Odean, acting in their official capacities on behalf of the Colorado Department of Early Childhood, from requiring, as a condition for participation in the Colorado Universal Preschool Program, that the preschools operated by Plaintiffs St. Mary Catholic Parish in Littleton and St. Bernadette Catholic Parish in Lakewood agree to provide or provide eligible children an equal opportunity to enroll and receive preschool services regardless of religious affiliation for as long as Defendants allow exceptions from the religious affiliation aspect of the equal-op-

portunity requirement set out in Colorado Revised Statute § 26.5-4-205(2)(b) and in the Colorado Universal Preschool Program Service Agreement.

- Defendants SHALL PAY Plaintiffs $1 in nominal damages.
- On all other issues and claims brought in this case, Judgment SHALL ENTER in favor of Defendants and against Plaintiffs.

DATED this 4th day of June, 2024.

/s/ John L. Kane
JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-02079-JLK

ST. MARY CATHOLIC PARISH IN LITTLETON; ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD; DANIEL SHELEY; LISA SHELEY; and THE ARCHDIOCESE OF DENVER,

Plaintiffs,

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood; and DAWN ODEAN, in her official capacity as Director of Colorado's Universal Preschool Program,

Defendants.

ORDER ON THE PARTIES' JOINT STATUS REPORT (ECF NO. 65)

Kane, J.

Plaintiffs in this case—the Archdiocese of Denver, two Catholic parishes that operate preschools, and two Catholic parents of a preschool-aged child—bring assorted claims under the First Amendment to the U.S. Constitution challenging the application of the Colorado Universal Preschool Program's nondiscrimination requirements to them specifically. Shortly after filing their Complaint, Plaintiffs filed a Motion for Preliminary Injunction (ECF No. 32), requesting that the Court "preliminarily enjoin Defendants from denying Plaintiffs participation in [the Colorado Universal Preschool Program ("UPK Colorado")], based on their religious beliefs, character, and exercise, including:

(i) prioritizing Catholic families in admission;

(ii) requiring employees to abide by and uphold Catholic teachings, including on life, marriage, gender, and human sexuality;

(iii) considering for purposes of admission or retention whether a family or child seeking placement abides by and upholds Catholic teachings; and

(iv) operating their schools in accordance with Catholic teachings."

Mot. for Prelim. Inj. at 8, ECF No. 32. Plaintiffs later filed an Amended Complaint that seeks similar injunctive relief on a permanent basis, as well as declarations that UPK Colorado's nondiscrimination requirements "violate the First Amendment to the United States Constitution as applied to Plaintiffs' religious exercise." Am. Compl. at 35-36.

After the case was assigned to me, I held a status conference to explore with the parties whether consideration of the preliminary injunction Motion could be consolidated with the determination of the final merits. *See* Fed. R. Civ. P. 65(a)(2). The parties agreed at that time to engage in limited initial discovery and then to propose how to move forward with the case.

Pursuant to that plan, I ordered the parties to submit a joint status report on or before November 16, 2023. *See* Order Re: Initial Discovery at 2, ECF No. 36. In the status report, the parties were to address:

> (1) whether the parties believe[d] additional discovery [would] be necessary beyond the December 1 cutoff date, the scope of any such discovery, and desired deadlines; (2) whether Plaintiffs intend[ed] to file a supplement to their Motion for Preliminary Injunction or intend[ed] to convert that Motion to a Motion for Summary Judgment, which would result in the Motion for Preliminary Injunction being withdrawn; (3) a briefing schedule for Plaintiffs' Motion (either for Preliminary Injunction or for Summary Judgment) that would result in the Motion being fully briefed by December 14, 2023; and (4) whether the set hearing [would] be for a preliminary injunction or on the final merits.

Id.

The parties filed a Joint Status Report (ECF No. 56) by the deadline. It was stricken, however, because Plaintiffs submitted a version of the document that Defendants had not seen, indicating the parties had not fully conferred on the relevant issues. *See* 11/21/2023 Minute Order, ECF No. 59. Three days ago, the parties submitted a revised Joint Status Report (ECF No. 62) that reveals the parties' additional efforts to come to an agreement. Nevertheless, the parties continue to disagree on the appropriate path forward.

Plaintiffs contend that no additional discovery is necessary and filed a Motion for Summary Judgment or, in the Alternative, for a Preliminary Injunction (ECF No. 61). Plaintiffs insist that "the material facts necessary to resolve [their] claims are not in dispute."

Joint Status Report II at 13, ECF No. 62. If the Court disagrees, however, Plaintiffs request that a bench trial be conducted during the previously scheduled setting on December 19, 20, and 21, 2023. *Id.* at 13-14.

In significant respects, Defendants' proposal aligns with Plaintiffs'—Both parties agree that a final merits determination, at least in part, may occur by the end of the year. Allegations in the Amended Complaint have caused Defendants to believe that it is necessary to conduct broad discovery on all the preschools operated by parishes within the Archdiocese. "The Archdiocese oversees, guides, and supports 36 preschools," including those operated by the parishes named as Plaintiffs in this case (the "Named Preschools") and those operated by other parishes within the Archdiocese (the "Unnamed Preschools"). Am. Compl. ¶¶ 67, 99, ECF No. 30. "Each parish within the Archdiocese is a separately incorporated legal entity under Colorado law, subject to the control and direction of its pastor." Joint Status Report II at 4. Yet, the Amended Complaint alleges that the Archdiocese "speaks for and advances the interests of all of [its] Catholic schools and preschools." *Id.* ¶ 100. Its use of the collective "Plaintiffs" and description of the Archdiocese's conduct also appears to indicate that the Archdiocese is representing the interests of the Unnamed Preschools in this case.

Defendants consequently propose that the merits determination on the claims of the Named Preschools be bifurcated from a determination on the Archdiocese's claims involving the Unnamed Preschools. Defendants urge the Court to put off deciding the final merits of the latter claims until mid-2024 so that sufficient discovery can be completed.

Plaintiffs assert that Defendants' proposal "fundamentally misunderstands Plaintiffs' claims." Joint Status Report II at 2. According to Plaintiffs:

> The Archdiocese, as a result of the UPK Colorado non-discrimination provisions it challenged, has been required to direct its 36 Archdiocesan preschools not to participate in UPK Colorado. The Archdiocese therefore seeks a ruling from this Court that would allow it to withdraw that prohibition, allowing any Archdiocesan preschool that would like to participate in UPK Colorado to be able to do so.

Id. at 2-3 (citation omitted). The parties' positions highlight that the interests represented by the Archdiocese in this case are unclear and must be defined for the case to proceed.

In the Joint Status Report, the parties also disagree on whether expert testimony should be allowed. Defendants seek to "present expert testimony to place sexual orientation and gender identity protections in their proper context . . . and [to] unpack[] the State's interest in preventing the pain and loss and long-term trauma suffered by families when schools (or governments) intrude into this sensitive space." *Id.* at 11. Plaintiffs argue that expert testimony is unnecessary and that Defendants did not disclose their expert in time for Plaintiffs to depose the witness or challenge the admissibility of the witness's opinions. *Id.* at 7.

Accordingly, there are four distinct matters that I must address to provide a plan for how this case will move forward: (1) the timing of future proceedings, (2) the scope of the litigation, (3) the propriety of expert

testimony, and (4) whether a bench trial should be held or the case should be decided applying the summary judgment standard.

Timing of Proceedings

My prior Order on the initial discovery in this case indicated that if Plaintiffs chose to convert their Motion for Preliminary Injunction to one for summary judgment, that "would result in the Motion for Preliminary Injunction being withdrawn." Order Re: Initial Discovery at 2. Plaintiffs have filed a 50-plus-page Motion for Summary Judgment that, in the alternative, seeks a preliminary injunction. Based on the filing of the Motion for Summary Judgment, the original Motion for Preliminary Injunction should be withdrawn. However, I will allow Plaintiffs to pursue relief as they see fit. While a request for a preliminary injunction ordinarily would receive priority on my docket, the time needed to adjudicate any matter is directly related to the materials submitted, including the plethora of citations contained in the parties' briefs and the work to be done before any ruling is possible. I am appalled at the effrontery of Plaintiffs' counsel in filing over 500 pages while at the same time asking for expedited decisions. I follow the law and the facts to the proper conclusion. Doing so demands that I review all the submissions, and I will not be rushed to judgment.

For this reason and the ones that follow, I vacate the setting presently scheduled for December 19, 20, and 21, 2023, and reset it for January 2, 3, and 4, 2024.

The Scope of the Litigation

As mentioned, the inclusion of the Archdiocese as a Plaintiff has muddied the boundaries of this litigation. Plaintiffs bring as-applied constitutional claims. *See*

Am. Compl. 35-36 (seeking declaratory and injunctive relief in relation to "Plaintiffs" only). The specific interests Plaintiffs represent thus dictate the scope of this litigation. Plaintiffs' filings in this case suggest both that the Archdiocese brings its claims on behalf of its own interests as well as those of the 36 preschools within the Archdiocese. To proceed with this case, I must assess the Archdiocese's specific claims and determine the extent to which the Archdiocese has standing to assert those claims.[1]

In the Amended Complaint, Plaintiffs do not explicitly articulate the basis for the Archdiocese's standing. And, in their Motion to Dismiss, Defendants do not present arguments focused on the Archdiocese. As noted above, however, Plaintiffs indicate in the revised Joint Status Report that the Archdiocese's claims arise from their allegation that it was "required to direct its 36 Archdiocesan preschools not to participate in UPK Colorado." Joint Status Report II at 2; *see also id.* at 6 (describing the Archdiocese's injury as "the fact that it had to issue a blanket instruction prohibiting all 36 of its schools from participating" in the Program). The Amended Complaint and Plaintiffs' other filings, however, suggest that the Archdiocese brings its claims as an agent or representative of the Unnamed Preschools. *See, e.g.*, Am. Compl. ¶ 100 (asserting that the Archdiocese "speaks for and advances the interests of all of [its] Catholic schools and preschools"); *id.* ¶¶ 171-72 (alleging the Archdiocese "provide[s] education" and "hire[s] teachers"); *id.* ¶ 173 (citing the interests of the

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[1] Defendants have filed a Motion to Dismiss (ECF No. 38) arguing that Plaintiffs do not have standing to bring their claims and that Defendants' claims are not ripe for adjudication. I intend to rule on that motion in full in a future order.

Archdiocese's preschools); *id.* ¶ 176 (stating "Plaintiffs" must agree to UPK Colorado's nondiscrimination requirements); *id.* ¶¶ 190-91 (suggesting the Archdiocese selects preschool teachers and administrators); *id.* ¶¶ 200-01 (implying that the Archdiocese operates preschools); *id.* ¶ 234 (indicating that the Archdiocese "admit[s] families and hire[s] faculty"); Mot. for Prelim. Inj. at 8 (requesting that the Court "preliminarily enjoin Defendants from denying Plaintiffs participation in [UPK Colorado]" even though the Archdiocese itself would not participate in the Program); Am. Compl. at 35-36 (seeking similar injunctive relief on a permanent basis and declarations that UPK Colorado's nondiscrimination requirements "violate the First Amendment to the United States Constitution as applied to Plaintiffs' religious exercise," despite the fact that there is no indication the Archdiocese is or would be subject to the requirements).

I am inclined to find the Archdiocese has not demonstrated it has standing to assert its claims as they are framed. Because of the parties' lack of precision, however, additional briefing would be beneficial. As such, I direct both parties to submit supplemental briefing on Defendants' Motion to Dismiss. In their briefing, the parties should discuss the Archdiocese's potential standing as an agent or representative of the Unnamed Preschools, any basis for it to independently have standing, and any prudential doctrine that might counsel against the exercise of jurisdiction. The plan I set out below assumes that the challenges brought in this case relate to UPK Colorado's nondiscrimination requirements as they are applied to the Named Preschools only. If the Archdiocese demonstrates that it has standing and that consideration should be given to

application of the requirements to the Unnamed Preschools, I will permit an additional period of discovery and a second bench trial on those merits.

Expert Witnesses

Regarding expert witnesses, I find the expert testimony described by Defendants is potentially relevant and helpful for determining the questions that must be resolved in this case. Besides the initial fact discovery deadline of December 1, 2023, no deadline was provided for expert witness disclosures. If Defendants provide an expert disclosure by December 5, 2023, it will be considered timely. Plaintiffs should be given the opportunity to respond to that disclosure in the manner they deem appropriate. As a result, Plaintiff is permitted to depose any expert outside the fact discovery period, may file a motion challenging any expert opinions on or before December 11, 2023, and will be subject to a rebuttal expert deadline of December 26, 2023.[2]

Bench Trial vs. Summary Judgment

Lastly, the January setting will be a bench trial limited to the claims asserted by the Named Preschools and Plaintiffs Daniel and Lisa Sheley. In the revised Joint Status Report, Defendants acquiesce to having the final merits of these claims resolved in short order. Plaintiffs contend I should decide the merits of the case on their Motion for Summary Judgment, without conducting a bench trial. From the evidence presently submitted, however, I believe that at least some material facts are in dispute. Consequently, I intend to conduct

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[2] Recent amendments to Federal Rule of Evidence 702 take effect tomorrow, December 1, 2023. The Court and counsel will be governed accordingly.

a bench trial and rule as a matter of law where appropriate. The parties should consult my Civil Pretrial and Trial Procedures Memorandum on the District of Colorado's website, including the section on the use of deposition testimony.[3]

Conclusion

This case will, therefore, proceed as follows: The parties will complete fact discovery this week, expert discovery will be permitted as stated above, and a bench trial on the final merits will be held on January 2, 3, and 4, 2024, beginning at 9:30 a.m. each day. Defendants are DIRECTED to file, on or before December 8, 2023, a supplemental brief to their Motion to Dismiss that specifically addresses the Archdiocese. Plaintiffs are DIRECTED to file a related supplemental brief on or before December 15, 2023. Defendants are further DIRECTED to file, on or before December 18, 2023, a Response to Plaintiffs' Motion for Summary Judgment, incorporating any trial brief, as well as any arguments under Federal Rule of Civil Procedure 12(b)(6) and any cross-motion for partial summary judgment.[4] Plaintiffs are further DIRECTED to file, on or before December 29, 2023, a Reply to Defendants' submission, incorporating any trial brief of their own.[5]

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[3] Since the timeline for the trial has been expedited, the parties should generally follow the deadlines provided in my Procedures Memorandum for hearings, unless I order otherwise.

[4] I am allowing the inclusion of motions in Defendants' Response as an exception to the Local Rules.

[5] In their future filings, the parties must refer to the claims in the Amended Complaint and the individual parties with specificity. Generic statements about "Plaintiffs" will not be permitted. The parties must clearly argue which party should or should not

Proposed Findings of Fact and Conclusions of Law will be due ten days after the conclusion of the bench trial. The previously scheduled setting for December 19, 20, and 21, 2023, is VACATED, and Plaintiffs' initial Motion for Preliminary Injunction (ECF No. 32) is DENIED AS MOOT.

DATED this 30th day of November, 2023.

/s/ John L. Kane
JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE

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succeed on which claim and on what basis. Additionally, any "incorporation by reference" of briefs, motions, or other nonpleadings into future filings will be stricken and not considered. *See* Fed. R. Civ. P. 7(a) & 10(c); *Atl. Richfield Co. v. NL Indus., Inc.*, 20-cv-00234-NYW-KLM, 2023 WL 3096809, at *4 (D. Colo. Apr. 26, 2023).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-02079-JLK

ST. MARY CATHOLIC PARISH IN LITTLETON; ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD; LISA SHELEY; and DANIEL SHELEY,

Plaintiffs,

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood; and DAWN ODEAN, in her official capacity as Director of Colorado's Universal Preschool Program,

Defendants.

FINAL JUDGMENT

The matter was tried on January 2, 2024, through January 4, 2024, before the Honorable John L. Kane, Judge, presiding.

The Bench Trial proceeded to conclusion and in accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Findings of Fact, Conclusion of Law, and Order For Entry of Judgment, (Doc. No 116) of Judge John L. Kane entered on June 4, 2024, it is

ORDERED that Judgment shall enter in favor of Plaintiffs and against Defendants on Plaintiffs' fifth claim with respect to only the religious-affiliation aspect of the equal-opportunity requirement. It is

FURTHER ORDERED that Plaintiff's claims two and three and the part of claims one, four, and six that rely on the application of Paragraph 18(B) are DISMISSED AS MOOT. It is

FURTHER DECLARED that the application by Defendants Lisa Roy and Dawn Odean, acting in their official capacities on behalf of the Colorado Department of Early Childhood, of the religious affiliation aspect of the equal-opportunity requirement set out in Colorado Revised Statute § 26.5-4-205(2)(b) and in the Colorado Universal Preschool Program Service Agreement violates Plaintiffs' rights secured by the Free Exercise Clause of the First Amendment to the U.S. Constitution. It is

FURTHER ORDERED that the following permanent injunction is issued:

The Court immediately and permanently enjoins Defendants Lisa Roy and Dawn Odean, acting in their official capacities on behalf of the Colorado Department of Early Childhood, from requiring, as a condition for participation in the Colorado Universal Preschool Program, that the preschools operated by Plaintiffs St. Mary Catholic Parish in Littleton and St. Bernadette Catholic Parish in Lakewood agree to provide or provide eligible children an equal opportunity to enroll and receive preschool services regardless of religious affiliation for as long as Defendants allow exceptions from the religious affiliation aspect of the equal-opportunity requirement set out in Colorado Revised Statute § 26.5-4-205(2)(b) and in the Colorado Universal Preschool Program Service Agreement. It is

FURTHER ORDERED that Defendants shall pay Plaintiffs $1 in nominal damages. It is

FURTHER ORDERED that on all other issues and claims brought in this case, Judgment shall enter in favor of Defendants and against Plaintiffs. It is

FURTHER ORDERED the post-judgment interest shall accrue on the amount awarded in this matter at the legal rate of 5.20% per annum from the date of entry of Judgment. It is

FURTHER ORDERED that this case is closed.

Dated at Denver, Colorado this 5th day of June, 2024.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ *B. Abiakam*
B. Abiakam
Deputy Clerk

Colorado Revised Statutes
§ 26.5-4-202. Legislative declaration

(1)(a) The general assembly finds and declares that:

(I) Colorado has prioritized early learning through its investments in the Colorado preschool program, established in 1988, and full-day kindergarten, adopted in 2019;

(II) Since establishing the Colorado preschool program, Colorado has steadily increased its investment in high-quality preschool programming, securing a significant return on investment by improving child outcomes year over year by expanding access to preschool for children in low-income families and those who are at risk of entering kindergarten without being prepared to learn;

(III) State and national research demonstrate the positive and long- and short-term impacts of high-quality preschool, includingimproved early literacy, reduced grade retention, decreased probability of developing a significant reading deficiency, improved performance on statewide standards-based assessments, and increased rate of high school graduation;

(IV) Research demonstrates that economically disadvantaged children derive greater benefits from preschool programs in states that offer universal programs than in states that offer preschool programs specifically for economically disadvantaged children;

(V) In the 2020 general election, the voters of Colorado approved proposition EE by a nearly two-to-one margin, establishing a dedicated source of funding for statewide, voluntary, universal preschool

programming for children in the year preceding kindergarten and for additional preschool programming for children in low-income families and children who are at risk of entering kindergarten without being prepared to learn. With the passage of this measure, Colorado voters in rural, urban, and suburban communities have demonstrated their strong commitment to expanding access to quality preschool for children regardless of their economic circumstances.

(VI) Creating a statewide mixed delivery system of preschool providers to make preschool programming universally available to children throughout Colorado compounds the benefits for children who are in low-income families and increases the ultimate social and economic benefits of high-quality preschool programming for the state as a whole.

(b) The general assembly finds, therefore, that it is in the best interests of the state and consistent with the will of the voters of Colorado to establish the Colorado universal preschool program to provide high-quality, voluntary preschool programming through a mixed delivery system for children throughout the state in the year preceding kindergarten enrollment and to provide for additional preschool services for children who are in low-income families or who meet identified qualifying factors.

(2)(a) The general assembly further finds and declares that:

(I) In 2000, the voters approved section 17 of article IX of the state constitution, which requires the general assembly to annually increase, by at least the rate of inflation, the statewide base per pupil funding,

as defined by article 54 of title 22, for public education from preschool through twelfth grade;

(II) In the 2001-02 fiscal year and in every fiscal year since, the increases to statewide base per pupil funding have automatically applied to funding for preschool services provided by school districts, because the funding for preschool services has been calculated through the school finance formula established in article 54 of title 22, which applies to funding for public elementary and secondary education;

(III) To effectively and efficiently provide preschool services through a mixed delivery system of school- and communitybased preschool providers, and to ensure that funding calculations account for the unique standards and features of preschool programs, state funding for preschool services, including preschool services for children with disabilities, must be appropriated and allocated separately from the funding for public elementary and secondary education, and, beginning in the 2023-24 fiscal year, the statewide base per pupil funding amount set annually for public elementary and secondary education will no longer apply to funding for preschool services;

(IV) To continue to meet the intent of section 17(1) of article IX of the state constitution with regard to funding for preschoolservices, it is appropriate for the department of early childhood to establish a per-child constitutional compliance rate for the 2023-24 fiscal year that equals the portion of the statewide base per pupil funding amount established for the 2023-24 fiscal year that applies to the number of hours of universal preschool services provided to an eligible

child, and to increase the perchild constitutional compliance rate annually by the rate of inflation.

(b) The general assembly, therefore, declares that, by establishing a per-child constitutional compliance rate and ensuring that the per-child rate that the department annually establishes for universal preschool services and for preschool services provided to children who are three years of age or younger meets or exceeds the per-child constitutional compliance rate, funding for the Colorado universal preschool program substantially complies with the requirements of section 17(1) of article IX of the state constitution.

(3)(a) The general assembly further finds and declares that:

(I) In approving proposition EE, the voters supported funding for ten hours of high-quality preschool programming for allColorado children in the year preceding kindergarten enrollment, as well as additional preschool programming for children who are at risk of entering kindergarten without being prepared to learn, including children in low-income families;

(II) Research demonstrates that participating in high-quality preschool programs helps to ensure that children in low-income families are able to enter kindergarten on par with their peers in higher-income families; and

(III) For the preschool program to serve children equitably, the state must invest in additional hours of preschool programming for children in low-income families, in addition to funding the ten hours of universal preschool services.

(b) The general assembly finds, therefore, that it is in the best interests of the state to allocate the amount appropriated for the Colorado universal preschool program to provide adequate funding for both a high-quality universal preschool program and additional preschool programming for children in low-income families.

(4) The general assembly recognizes the requirement of the federal "Individuals with Disabilities Education Act", 20 U.S.C. sec. 1400 et seq., as amended, to provide educational services to every three- or four-year-old child with a disability, in accordance with the child's individualized education program. The general assembly declares that, for purposes of section 17 of article IX of the state constitution, meeting the obligation of serving all three- and four-year-old children with disabilities through the Colorado universal preschool program is an important element of expanding the availability of preschool programs and may therefore receive funding from the state education fund created in section 17(4) of article IX of the state constitution.

Colorado Revised Statutes
§ 26.5-4-203. Definitions

As used in this part 2, unless the context otherwise requires:

(1) "Additional preschool services" means hours of preschool services provided to a child in the year preceding enrollment in kindergarten that are in addition to the universal preschool services the child receives.

(2) "Charter school" means a charter school that is:

(a) A district charter school authorized pursuant to part 1 of article 30.5 of title 22, an institute charter school authorized pursuant to part 5 of article 30.5 of title 22, or a charter school authorized by the Colorado school for the deaf and the blind pursuant to section 22-80-102(4)(b);

(b) Authorized in its charter contract to provide preschool services; and

(c) Licensed pursuant to part 3 of article 5 of this title 26.5 to operate as a preschool provider.

(3) "Children with disabilities" has the same meaning as provided in section 22-20-103.

(4) "Colorado universal preschool program" or "preschool program" means the program established within the department pursuant to section 26.5-4-204, and includes all participating preschool providers.

(5) "Community plan" means the community plan adopted by a local coordinating organization pursuant to section 26.5-2-104.

(6) "ECEA" means the "Exceptional Children's Educational Act", article 20 of title 22, and its implementing rules.

(7) "Eligible child" means a child who is eligible to receive preschool services as provided in section 26.5-4-204(3).

(8) "IDEA" means the federal "Individuals with Disabilities Education Act", 20 U.S.C. sec. 1400 et seq., as amended, and its implementing regulations.

(9) "Individualized education program" has the same meaning as provided in section 22-20-103.

(10) "Inflation" means the annual percentage change in the United States department of labor bureau of labor statistics consumer price index for Denver-Aurora-Lakewood for all items paid by all urban consumers, or its applicable successor index.

(11) "Local coordinating organization" means the entity selected by the department pursuant to section 26.5-2-103 to implement a community plan for early childhood and family support programs and services within a specified community.

(12) "Mixed delivery system" means a system for delivering preschool services through a combination of school- and community-based preschool providers, which include family child care homes, child care centers, and head start agencies, that are funded by a combination of public and private money.

(13) "Parent" has the same meaning as provided in section 22-20-103.

(14) "Preschool provider" means any of the following entities that are licensed pursuant to part 3 of article 5 of this title 26.5:

(a) A family child care home, as defined in section 26.5-5-303;

(b) A child care center, as defined in section 26.5-5-303;

(c) A school district licensed to operate as a public preschool provider;(d) A charter school licensed to operate as a public preschool provider; or (e) A head start program.

(15) "Qualifying factor" means a child or family circumstance, as identified by department rule pursuant to section 26.5-4-204(4) (a)(II), that may negatively impact a child's cognitive, academic, social, physical, or behavioral health or development.

(16) "School district" means a school district organized pursuant to article 30 of title 22 that provides preschool services and is licensed pursuant to part 3 of article 5 of this title 26.5 as a preschool provider; or a board of cooperative services organized pursuant to article 5 of title 22 that provides preschool services and is licensed pursuant to part 3 of article 5 of this title 26.5 as a preschool provider.

(17) "Universal preschool services" means ten hours of preschool services per week made available, at no charge, to children in the state during the school year preceding the school year in which a child is eligible to enroll in kindergarten.

Colorado Revised Statutes
§ 26.5-4-204. Colorado universal preschool program--created--eligibility--workforce development plan--program funding--rules

(1) There is created in the department the Colorado universal preschool program. The department shall administer the preschool program in accordance with this part 2 and shall ensure that, for the 2023-24 school year and school years thereafter, families may enroll their children in preschool providers that receive funding through the preschool program. The purposes of the preschool program are:

(a) To provide children in Colorado access to voluntary, high-quality, universal preschool services free of charge in the school year before a child enrolls in kindergarten;

(b) To provide access to additional preschool services in the school year before kindergarten eligibility for children in low income families and children who lack overall learning readiness due to qualifying factors;

(c) To provide access to preschool services for children who are three years of age, or in limited circumstances younger than three years of age, and are children with disabilities, are in low-income families, or lack overall learning readiness due to qualifying factors; and

(d) To establish quality standards for publicly funded preschool providers that promote children's early learning and development, school readiness, and healthy beginnings.

(2) For the 2023-24 school year and each school year thereafter, subject to the availability and enrollment capacity of preschool providers, parents throughout

the state may enroll their children, free of charge, in ten hours per week of publicly funded preschool services for the school year preceding the school year in which the children are eligible to enroll in kindergarten. The department, working with local coordinating organizations, shall identify and recruit preschool providers throughout the state to participate in the Colorado universal preschool program. In identifying and recruiting preschool providers, the department and local coordinating organizations shall, to the extent practicable, establish a mixed delivery system in communities throughout the state that enables parents to select preschool providers for their children from as broad a range as possible within their respective communities.

(3)(a) For the 2023-24 school year and for each school year thereafter:

(I) Subject to the availability and capacity of preschool providers, every child in the state may receive ten hours of preschool services per week, at no charge, during the school year preceding the school year in which the child is eligible to enroll in kindergarten.

(II)Pursuant to IDEA and ECEA, every child who is three or four years of age and is a child with disabilities must be offered preschool services in accordance with the child's individualized education program.

(III) Subject to available appropriations, a child who is three years of age, is not eligible to enroll in kindergarten in the next school year, and is in a low-income family or meets at least one qualifying factor may receive the number of hours of preschool services established by department rule.

(IV) Subject to available appropriations, a community in which a school district operated a district preschool program pursuant to article 28 of title 22, as it existed prior to July 1, 2023, with a waiver to serve children under three years of age, may continue to provide preschool services for the number of hours established by department rule for the same number of children under three years of age that received preschool services in the 2022-23 school year, so long as each child who receives the preschool services is in a low-income family or meets at least one qualifying factor.

(V) Subject to available appropriations, a child who is in a low-income family or who meets at least one qualifying factor may receive additional preschool services for the number of hours established by department rule in the school year preceding the school year in which the child is eligible to enroll in kindergarten.

(b) Notwithstanding any provision of subsection (3)(a) of this section to the contrary:

(I) The state shall provide to each three- or four-year-old child with a disability whose parent enrolls the child in the preschool program an educational program in accordance with IDEA and ECEA and the child's individualized education program; and

(II) For a school year in which federal money is provided to the state to fund preschool, other than federal money provided through IDEA, the executive director may allocate said funding to provide the number of hours of preschool services allowed under federal law for all children defined as eligible under federal law.

(4)(a) The executive director shall adopt rules to implement the preschool program, which must include:

(I) The level of income that identifies a family as being low-income for purposes of identifying children who are three years of age or younger and are eligible for preschool services and prioritizing funding for those additional preschool services. The executive director shall, to the extent practicable, ensure that the income eligibility requirements for other publicly funded child care programs are aligned with the income level set pursuant to this subsection (4)(a)(I).

(II)The qualifying factors that a child must meet to be eligible to receive additional preschool services. The executive director shall ensure that the qualifying factors are reviewed and, as necessary, revised at least every five years. The purpose of the qualifying factors is to identify children who are at risk of entering kindergarten without being ready for school. The qualifying factors must include identification as a dual-language learner or a child with disabilities and may include such other factors as the department may identify.

(III) The number of hours of preschool services that an eligible child may receive pursuant to subsection (3)(a)(III) or (3)(a)(IV) of this section; except that the number of hours for an eligible child who is a child with disabilities is determined in accordance with IDEA, ECEA, and the child's individualized education program;

(IV) The number of hours of additional preschool services that an eligible child may receive pursuant to subsection (3)(a)(V) of this section; except that the number of hours for an eligible child who is a child with disabilities is determined in accordance with IDEA, ECEA, and the child's individualized education program;

(V) Preschool quality standards, as provided in section 26.5-4-205;

(VI) The formulas for setting the per-child rates for universal preschool services, for preschool services for children with disabilities, for preschool services for eligible children who are three years of age or younger as described in subsections (3)(a) (III) and (3)(a)(IV) of this section, and for additional preschool services, as provided in section 26.5-4-208; and (VII) Such other rules as are required in this part 2 or as may be necessary to implement the preschool program.

(b) In adopting rules, the executive director shall, to the extent possible:

(I) Align all rules pertaining to funding and preschool provider requirements to facilitate combining and coordinating federal, state, preschool program, and child care funding to the greatest extent allowed under state and federal law and regulation; and

(II) Align preschool quality standards and requirements with the child care licensing requirements and licensing requirements for school district and charter school preschool programs, as provided in part 3 of article 5 of this title 26.5, to reduce conflicts and duplication.

(5) In developing a plan for recruiting, training, and retaining a well-compensated, well-prepared, high-quality statewide early childhood workforce pursuant to section 26.5-6-101, the department shall ensure that the plan specifically addresses strategies for building and supporting the preschool workforce, especially with respect to:

(a) Simplifying the process for attaining credentials, meeting qualifications, and demonstrating professional competencies;

(b) Minimizing regulatory and administrative barriers to entry, including barriers faced by individuals who speak languages other than English;

(c) Increasing diversity in the preschool workforce;

(d) Establishing goals for increasing the qualifications of preschool teachers over time, including strategies for achieving the goal of supporting increased attainment of baccalaureate degrees in early childhood or baccalaureate degrees with supplemental early learning credentials for lead teachers employed by preschool providers; and

(e) Recruiting, compensating, providing continuing professional development for, and retaining individuals in the preschool workforce, including strategies for achieving the goal of compensating those individuals at a living wage.

(6) To preserve the general assembly's historic commitment to preschool program funding, the general assembly shall appropriate to the department for the Colorado universal preschool program:

(a) For the 2023-24 fiscal year, an amount at least equal to the difference between the amount of the state share of total program calculated pursuant to article 54 of title 22 for the 2022-23 budget year, after application of the budget stabilization factor and after any mid-year adjustment, and the amount that the state share of total program, after application of the budget stabilization factor and after any mid-year adjust-

ment, would be for the 2022-23 budget year if calculated without including the statewide preschool program enrollment, as defined in section 22-54-103, for the 2022-23 budget year and the number of three- and four year-old pupils with disabilities receiving an educational program under the "Exceptional Children's Educational Act", article 20 of title 22, for the 2022-23 budget year.

(b) For the 2024-25 fiscal year, and each fiscal year thereafter, an amount at least equal to the amount described in subsection(6)(a) of this section increased annually by the rate of inflation.

Colorado Revised Statutes
§ 26.5-4-205. Quality standards--evaluation--support

(1)(a) The department shall develop and the executive director shall establish by rule the quality standards that each preschool provider must meet to receive funding through the Colorado universal preschool program. The quality standards must, at a minimum, address the issues specified in this section and must reflect national and community-informed best practices with regard to school readiness, academic and cognitive development, healthy environments, social-emotional learning, and child and family outcomes. The department and the executive director shall work with families, educators, and program administrators to review and, as necessary, revise the quality standards at least every five years to ensure the standards continue to reflect national best practices and meet the other requirements specified in this section. In developing, reviewing, revising, and adopting the quality standards, the department and the executive director shall consider, at a minimum:

(I) The quality standards established for preschool providers participating in the Colorado preschool program pursuant to article

28 of title 22, as it existed prior to July 1, 2023;

(II) Nationally accepted standards for preschool programs;

(III) The child care licensing requirements established pursuant to part 3 of article 5 of this title 26.5 with which preschool providers are required to comply; and

(IV) The need to ensure the availability of preschool services for eligible children throughout the state while maintaining the quality of the preschool providers.

(b)(I) Except as provided in subsection (1)(b)(II) of this section, the department shall ensure that each preschool provider that participates in the preschool program meets the quality standards established by rule in accordance with this section. The department may work with a local coordinating organization to ensure that a preschool provider meets the quality standards. The department may prohibit a preschool provider that fails to meet one or more of the quality standards from participating in the preschool program.

(II) If necessary to ensure the availability of a mixed delivery system within a community, the department may allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance with the quality standards; except that each preschool provider must meet all quality standards relating to health and safety as a condition of participating in the preschool program.

(2) At a minimum, the quality standards established in rule must include:

(a) The minimum numbers of contact hours of instructional services per school year for universal preschool services for preschool services provided to children three years of age and younger, and for additional preschool services. The minimum number of contact hours of instructional services established in rule for universal preschool services must not be less than three hundred sixty hours per school year.

(b) A requirement that each preschool provider provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family;

(c) The maximum allowable educator-to-child ratios and group sizes, aligned with national best practices. The department, by rule, may implement a waiver process to allow a preschool provider that implements a nationally recognized preschool program model to implement the educator-to-child ratios and group sizes that support the instructional practices of the model, so long as the preschool provider meets the national standards for the model or is accredited to provide the model.

(d) Qualifications for preschool teachers. The quality standards must not require preschool teachers to be licensed pursuant to article 60.5 of title 22 and must allow a preschool provider to employ a non licensed preschool teacher as long as the teacher meets other qualifications established in department rule. The department shall work with the department of education to ensure that a preschool educator may meet the qualifications for preschool educators by demonstrating compliance with the qualifications for an early childhood teaching license endorsement provided by the department of education.

(e) Requirements for continuing professional development for teachers employed by a preschool provider, which must be focused on improving teacher-child interactions and quality of instruction, including im-

proving fidelity in implementing evidence-based curricula and student outcomes, and may allow for training in developmentally appropriate early numeracy, language, and literacy development, and the science of reading that is appropriate for early childhood education and comparable to the training required for early grade teachers pursuant to the "Colorado READ Act", part 12 of article 7 of title 22. The department shall work with the department of education to allow, to the fullest extent possible, a teacher who is licensed by the department of education to use the professional development required to renew the teaching license to also meet the professional development requirements established by the department for teachers employed by a preschool provider.

(f) Standards for preschool services that, at a minimum, are aligned with the Colorado early learning and development guidelines across all early childhood domains approved by the early childhood leadership commission and with the Colorado academic standards adopted by the state board of education pursuant to section 22-7-1005, are culturally inclusive, and are supported by the department in implementation;

(g) Standards for instructional practice that, at a minimum, must ensure that the instructional practice implemented by preschool providers:

(I) Promotes learning through developmentally appropriate practices that include a mix of structured activities and play; and

(II) Increases and supports learning using instructional practices that build on previous learning and include a focus on age appropriate classroom environments and ongoing informal assessments of learning;

(h) Limitations on the use of, and required procedures for, out-of-school suspension and expulsion in accordance with section22-33-106.1. In addition, to reduce the use of exclusionary discipline, the standards must reflect best practices in early childhood mental health, including promoting access to early childhood mental health consultation.

(i) Standards for family and community engagement to ensure that the preschool provider engages with parents and neighborhood leaders in a formal and meaningful way, including seeking input for policy and programming decisions; (j) Requirements for serving children who are dual-language learners, which must, at a minimum, include:

(I) Identifying, screening, and assessing children in their home languages;

(II) Communicating with children's parents in their home languages; and

(III) Using teaching strategies that have been shown to meet the needs of children who are dual-language learners;

(k) Requirements for offering voluntary vision, hearing, dental, and health screenings, and, upon parent request, referrals to appropriate health providers for children who are enrolled by a preschool provider; and

(l) Requirements for providing voluntary developmental screenings, which must, at a minimum, include the use of valid and reliable screening tools that are developmentally, culturally, and linguistically appropriate.

(3)(a) Using the procedures specified in subsection (3)(b) of this section, the department shall create a resource bank of preschool curricula for use by preschool providers. The resource bank may include only curricula that, at a minimum:

(I) Are supported by evidence that use of the curricula improves student outcomes;

(II) Are developmentally appropriate, culturally relevant, and linguistically responsive to communities being served;

(III) Promote literacy, as developmentally appropriate, based on the science of reading by providing language development, including speech sounds, vocabulary, grammar, and use, and providing developmentally appropriate instruction to support children's success in early elementary grades when receiving instruction pursuant to the "Colorado READ Act", part 12 of article 7 of title 22, in the areas of phonemic awareness; phonics; vocabulary development; reading fluency, including oral skills; and reading comprehension;

(III.5) Promote developmentally appropriate early numeracy; and

(IV) Are aligned with the Colorado early learning and development guidelines approved by the early childhood leadership commission.

(b) The department shall develop and implement a procedure for identifying the curricula it includes in the resource bank of preschool curricula. At a minimum, the procedure must include:

(I) Soliciting through public notice, accepting, and promptly reviewing curricula from preschool providers and from publishers;

(II) Evaluating the curricula that the department identifies or receives, which evaluation is based on the criteria specified in subsection (3)(a) of this section and any additional criteria specified in department rule;

(III) Providing notice to preschool providers and publishers that submit curricula concerning whether the submitted curricula was included in the resource bank and, if excluded from the resource bank, the reasons for exclusion; and

(IV) Reviewing the resource bank at least every three years to update the resource bank and add curricula when appropriate. In reviewing and updating the resource bank, the department shall, at a minimum, comply with the procedures described in subsections (3)(b)(I) to (3)(b)(III) of this section.

(c) The department shall allow preschool providers and publishers to submit curricula to the department at any time to be reviewed and considered for inclusion in the resource bank, regardless of the schedule for reviewing the resource bank. The department shall review all submitted curricula in accordance with the adopted procedures described in subsection (3)(b) of this section.

(d) The department shall make the resource bank accessible to the public through the department website.

DEPARTMENT OF EARLY CHILDHOOD
Colorado Universal Preschool Program
UNIVERSAL PRESCHOOL PROGRAM RULES AND REGULATIONS
8 CCR 1404-1

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

* * *

4.109 PROVIDER MATCHING CRITERIA

A. Eligible preschool providers may utilize the following programmatic preferences to the deferred acceptance algorithm component of the matching process:

1. Cooperative preschool providers requiring participation in the cooperative;
2. School districts maintaining enrollment consistent with their established boundaries;
3. Participating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 (2004), or the Exceptional Children's Education Act, Article 20 of Title 22, C.R.S.;
4. Head Start programs' adhering to any applicable federal law requirements including eligibility requirements;

7. Participating preschool providers granting preference to an eligible child of one (1) of their employees;
6. Participating preschool providers granting preference to an eligible child to ensure continuity-of-care for that child;
7. Participating preschool providers granting preference to an eligible child to keep siblings similarly located;
8. Participating preschool providers granting preference to an eligible child who is multilingual, to ensure proper delivery of services to that child; and
9. Participating preschool providers may grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity. Participating preschool providers seeking to utilize this preference, must ensure:
    a. That the specific community, competencies or interests, relationship, public assistance benefit, or activity being required of children and/or families who attend, is a requirement of all participating children and/or families.
    b. That implementation of requiring the specific community, competencies or interests, relationship, public assistance benefit, or ac-

tivity does not conflict with any other provision of the Colorado Universal Preschool Program statutes at sections 26.5-4-201 through 26.5-4-211, C.R.S., nor with any other applicable law or regulation.

c. Examples of approved preferences include, but are not limited to: participating preschool providers who require a focus in a certain knowledge area (such as science, technology, engineering, and math ("STEM")); providers who serve families with a family member who works or attends school at a specific site(s) or location(s); providers who serve families within a specific geographical catchment area; providers who require a certain amount of volunteering or participation by the participating family; providers who require certain vaccinations for the health and safety of its staff and students; and providers who serve families who are receiving a specific public assistance benefit(s) such as housing assistance.

B. In utilizing these programmatic preferences, eligible preschool providers must still comply with rule section 4.110(B).

4.110 QUALITY STANDARDS - GENERAL REQUIREMENTS AND PROVISIONS

A. All eligible preschool providers must meet the following minimum requirements as a condition of participating in the Preschool Program:

1. The minimum number of planned teacher-pupil contact hours of instructional services sched-

uled to be delivered by an eligible preschool provider for all students enrolled in the Preschool Program shall not be less than three-hundred and sixty (360) hours per school year.

a. When fulfilling this requirement, eligible preschool providers may take into consideration the number of available teacher-pupil contact hours left in the school year based on when a child enrolls in the Preschool Program, and this requirement shall not be construed as requiring three-hundred and sixty (360) planned teacher-pupil contact hours of instructional services when a child is not enrolled in the Preschool Program for the entire school year.

B. Eligible preschool providers must ensure that children receive an equal opportunity to enroll and receive universal preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family.

C. Eligible preschool providers shall maintain educator-to-child ratios and group sizes in accordance with the applicable maximum staff-child ratios and group sizes determined in the "Rules Regulating Child Care Centers" located in 8 CCR 1402-1, rule section 2.217(A), or "Rules Regulating Family Child Care Homes" located in 8 CCR 1402-1, rule sections 2.305 through 2.310. Beginning on July 1, 2026, no classroom of an eligible preschool provider shall have an educator-to-child ratio that exceeds 1:11, or a maximum group size that exceeds twenty-two (22); and beginning July 1, 2027, no

classroom of an eligible preschool provider shall have an educator-to-child ratio that exceeds 1:10, or a maximum group size that exceeds twenty (20). The approved maximum educator-to-child ratios and group sizes of this rule shall not supersede the maximum staff-child ratios and group sizes allowed, based on a primary provider's license type for a family child care home, as determined in 8 CCR 1402-1, rule sections 2.305 through 3.310.

1. Exceptions to the maximum educator-to-child ratios and group sizes in this rule may be applied if an eligible preschool provider has a quality rating of four (4) or five (5) from the Department's Colorado Shines Quality Rating and Improvement System, and will be allowed to serve children up to the maximum staff-child ratio and group size as determined in 8 CCR 1402-1, rule section 2.217(A).
2. If an eligible preschool provider has a Department approved wavier pursuant to 8 CCR 1402-1, rule section 2.115, the eligible preschool provider is permitted to serve larger group sizes than allowed per rule section 4.110(C), provided the group sizes are in accordance with the terms of the waiver received, and all other requirements are met.
3. This rule section shall not restrict an eligible preschool provider from having multiple groups that are not separated from each other by permanent or portable dividers or walls, or limit any other conduct allowed in 8 CCR 1402-1 rule sections 2.217(A)(15)(a)-(f), provided all other requirements are met.

D. Qualifications for lead teachers.

1. Eligible preschool providers must ensure that all teachers, educators, or other employees are qualified in accordance with their applicable requirements identified in the "Rules Regulating Child Care Centers" located in 8 CCR 1402-1, rule section 2.216; or in accordance with the primary provider's license type for a Family Child Care Home, and the "Rules Regulating Family Child Care Homes" located in 8 CCR 1402-1, rule sections 2.311 through 2.315.

2. This rule section shall not prevent an eligible preschool provider from enacting additional requirements for their employees, provided the employee(s) meet all other qualifications as required by these rules.

E. Pursuant to section 22-33-106.1, C.R.S., all eligible preschool providers must abide by the limitations and procedures set forth regarding suspensions and expulsions for preschool through second (2nd) grade.

F. Educating Children with Disabilities.

1. All eligible preschool providers educating children with disabilities shall ensure full compliance with the "Standards for Placement of Preschoolers with IEPs in Educational Programs (June 24, 2024)", herein incorporated by reference. No later editions or amendments are incorporated. These standards are available at no cost from the Colorado Department of Education, 201 East Colfax Avenue, Denver, CO 80203; or at

https://www.cde.state.co.us/cdesped/appropriateedenvironments. These standards are also available for inspection and copying at the Colorado Department of Early Childhood, 710 S. Ash Street, Bldg. C, Denver, Colorado 80246, during regular business hours.

2. Eligible preschool providers educating children with disabilities shall ensure compliance with the applicable provisions of the "Individuals with Disabilities Education Act" (IDEA), as incorporated by reference in rule section 4.103(Z).

3. Eligible preschool providers educating children with disabilities shall ensure compliance with the "Exceptional Children's Educational Act" (ECEA) sections 22-20-101 through 2220-206, C.R.S., and applicable provisions of the "Rules for the Administration of the Exceptional Children's Educational Act" located in 1 CCR 301-8, herein incorporated by reference. No later editions or amendments are incorporated. These standards are available at https://www.coloradosos.gov/. These standards are also available for inspection and copying at the Colorado Department of Early Childhood, 710 S. Ash Street, Bldg. C, Denver, Colorado 80246, during regular business hours.

   a. This includes, but is not limited to, an eligible preschool provider's obligation to ensure children with disabilities are served in a manner which conforms to the training, certification, referral, identification, licensing, authorization, and dispute resolution requirements found in 1 CCR 301-8, rule section 3.02(3).

ARCHDIOCESE OF DENVER

Catholic School Community Beliefs and Commitments: Catholic School Presidents, Principals, Assistant Principals

We are excited to present you with the opportunity to be a member of our Catholic community and join us in our Catholic education mission for the 23-24 academic year. This statement and its acknowledgement on your Contract cover sheet shall confirm that you have accepted the role offered to you beginning July 1, 2023 and ending June 30, 2024. The terms, conditions, duties, and responsibilities for your role are all delineated in your Contract attached to this letter and the Contract cover sheet.

By joining our Catholic educational mission, you are committing to joining us in building up the Kingdom of God here on earth by contributing to the mission of our Catholic schools through partnering with parents in the education and formation of their children. As such, by agreeing to become an employee of a Catholic School in the Archdiocese of Denver, you are acknowledging your understanding that we are a Catholic community composed primarily of adherents to a religious faith. Further, you are acknowledging that the mission of the Catholic school is to bring the young men and women in our care to encounter Jesus Christ and the truths of our Catholic faith through their intellectual, spiritual, moral, and human formation.

Even employees who do not share our religious faith are important members of our community who have voluntarily committed themselves to service

within it. Unfortunately, the assumptions of the secular culture from which all members of our community, Catholic and non-Catholic alike, come from, are increasingly at odds with the teachings of our faith. Thus, it is important for all members of our community to be aware of this disconnect and ultimately, be committed to our community's worldview and beliefs.

- We believe that the sanctity of life from the moment of conception to natural death, and the givenness of our sexuality, in all its aspects as male and female created in God's image and likeness, is the basis for human dignity and identity. It is an essential means by which we come to know God, to understand our identity as his sons and daughters, to understand how we are to love and honor one another, and to understand the vocation for which he has created us. It provides the foundation for the education and formation of the human person.
- We believe that Catholic teachings on sexual identity, marriage, family, and parenting are inseparable from the way we live and interact. These teachings allow us to fully comprehend how to love God with our whole mind, heart, and soul, and our neighbors as ourselves. We believe that sexual expression contributes to human flourishing in as much as it is integrated with a view toward its natural ends: faithful, covenantal love between a man and a woman, and a self-gift ordered to procreation.
- We believe that far from being within the domain of mere opinion, a true understanding, expression, and living out of human sexuality is a foundational part of who we are and how we see the world. Given that our faith is lived out and transmitted in all aspects of our lives, it is important that all members

of our community, which includes Catholic school employees, share these beliefs especially when their work is in service of those who do not live by and share our beliefs.

In addition, to work in a Catholic school is a fundamentally different endeavor than working for a secular school institution. Catholic schools exist to be sanctuaries of education partnering with families so their children can come to encounter Jesus Christ, be transformed by a relationship with him, grow in wisdom and virtue, and discover their call for their lives as young men and women created in God's image and likeness. This understanding of our mission is vital if we are to truly live up to our missionary charge in a time where moral relativism has consumed our society and culture, and where to proclaim the truth is erroneously considered oppressive and bigoted. Knowing the truth leads to true human freedom and human flourishing because it leads to Jesus Christ, he who rescues us and gives us the fullness of abundant life.

Thus, this mission requires attention not merely to academic outcomes, but it requires that all students be given a formation rooted in our understanding of the dignity and vocation of the human person as male and female created for heaven. Among all the members of the school community, leaders as the lead teachers in their community, stand out as having a special responsibility for education. Through their leadership, as well as by bearing witness through their lives, they allow the Catholic school to realize its formative project. In a Catholic school in fact, the service of the school

leader is an ecclesiastical office.[1] Therefore, in our community, a leader must ensure:

- All aspects of the Catholic school program will be ordered to the highest aims of education: the cultivation of wisdom and virtue, and the formation of the supernatural man and woman who thinks, judges, and acts according to right reason illuminated by the fullness of the teachings and example of Jesus Christ and his Church (*Divini Illius Magistri, #98).*
- Catholic school faculty and staff take to heart the school's mission to guide and form young men and women in the fullness of truth as revealed by Jesus Christ and taught by the Church, not personal or worldly political preferences, ideologies, or agendas.
- Faculty and staff are faithful men and women who are "outstanding in correct doctrine and integrity of life,"[2] and who desire to grow in their love for Jesus Christ and his Church, joyfully giving witness to the truth of the Gospel.
- Non-Catholic, faculty, and staff understand the moral and ethical standards are for all employees and must respect our Catholic worldview, giving a joyful model of good character and maturity, and carrying out their duties in support of the school's

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[1] Dicastery for Catholic Education. *Instruction on the Identity of the Catholic School for a Culture of Dialogue*. January 25, 2022. #45

[2] Ibid #47

Catholic mission. They "have the obligation to recognize and respect the Catholic character of the school from the moment of their employment."[3]

- Catholic schools will be fully pro-life institutions, not merely recognizing the sanctity of human life from conception to natural death, but unabashedly defending it and forming students in the knowledge of the truth of the sanctity of life that they might be freed from the culture of death that pervades our world today.
- Catholic schools will provide and protect:
  - A joyful respect and proclamation of the good of the Christian family as a domestic Church in which children can first encounter their identity as beloved children of the Father.
  - A curriculum that encourages children to talk to their parents and siblings about what they are learning and understanding, that is, an education that seeks to strengthen the relationships in the family.
  - An understanding of History as the drama of our salvation by Jesus Christ from sin and death.
  - Instruction in math and science that allows students to come to know the logic and order of the genius behind creation.
  - Literature that forms a sacramental imagination and moral imagination in young men and

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[3] Ibid

women through grappling with the big questions of life in pursuit of what is true, good, and virtuous.

- Physical formation that trains students to be a gift of self to others.
- An immersion in art and music that seeks to form students in recognizing and loving beauty.
- Formation of the mind and heart which allows students to submit their identity, feelings, and desires to the Lordship of Jesus Christ.
- An environment that holds respect for the dignity of the human person, ensuring that all interactions by all members of the community towards each other and towards others outside of the school are grounded in the proper Christian charity and respect.
- An environment that addresses issues of race, gender, poverty, and inequality in a manner that is consistent with Church teaching and avoids the influence of secular, critical philosophies and theories that contradict Church teaching.

Therefore, at a minimum, all employees of the Catholic Schools in the Archdiocese of Denver and of Archdiocesan ecclesiastical entities must have a positive and supportive attitude toward the Catholic Church, her teachings, her work, and the mission of the Catholic school. They must refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the Parish, the School, and the Church in the Archdiocese of

Denver, or be considered in contradiction with Catholic doctrine or morals.

Additionally, for this position, it is required that the employee be a fully sacramentally initiated Catholic who not only shares our beliefs but is living by the tenant of our faith in the communion of the Catholic Church, and intentionally living out the five precepts of the Church (CCC 2041-2043).

To work for the Church in our Catholic Schools is truly more than a professional calling. It is a ministry in service of our mission so that in Jesus Christ all might be rescued and have abundant life for the glory of the Father. Your particular work as a minister of this mission, observing those things noted in this statement, will be critical to our school's success. As St. Paul VI said, "Modern man listens more willingly to witnesses than to teachers, and if he does listen to teachers, it is because they are witnesses." (*Evangelii Nuntiandi, #41*). We look forward to joining you on mission this academic year.

Catholic School Community
Beliefs and Commitments:
Catholic School Teachers and Formators

We are excited to present you with the opportunity to be a member of our Catholic community and join us in our Catholic education mission for the 23-24 academic year. This statement and its acknowledgement on your contract cover sheet shall confirm that you have accepted the role offered to you beginning and ending per the terms delineated in your Contract. The terms, conditions, duties, and responsibilities for your role are all delineated in your Contract attached to this letter and the Contract cover sheet.

By joining our Catholic educational mission, you are committing to joining us in building up the Kingdom of God here on earth by contributing to the mission of our Catholic schools through partnering with parents in the education and formation of their children. As such, by agreeing to become an employee of a Catholic School in the Archdiocese of Denver, you are acknowledging your understanding that we are a Catholic community composed primarily of adherents to a religious faith. Further, you are acknowledging that the mission of the Catholic school is to bring the young men and women in our care to encounter Jesus Christ and the truths of our Catholic faith through their intellectual, spiritual, moral, and human formation.

Even employees who do not share our religious faith are important members of our community who have voluntarily committed themselves to service within it. Unfortunately, the assumptions of the secular culture from which all members of our community, Catholic and non-Catholic alike, come from, are increasingly at odds with the teachings of our faith. Thus, it is important for all members of our community to be aware of this disconnect and ultimately, be committed to our community's worldview and beliefs.

- We believe that the sanctity of life from the moment of conception to natural death, and the givenness of our sexuality, in all its aspects as male and female created in God's image and likeness, is the basis for human dignity and identity. It is an essential means by which we come to know God, to understand our identity as his sons and daughters, to understand how we are to love and honor one another, and to understand the vocation for which

he has created us. It provides the foundation for the education and formation of the human person.

- We believe that Catholic teachings on sexual identity, marriage, family, and parenting are inseparable from the way we live and interact. These teachings allow us to fully comprehend how to love God with our whole mind, heart, and soul, and our neighbors as ourselves. We believe that sexual expression contributes to human flourishing in as much as it is integrated with a view toward its natural ends: faithful, covenantal love between a man and a woman, and a self-gift ordered to procreation.
- We believe that from being within the domain of mere opinion, a true understanding, expression, and living out of human sexuality is a foundational part of who we are and how we see the world. Given that our faith is lived out and transmitted in all aspects of our lives, it is important that all members of our community, which includes Catholic school employees, share these beliefs especially when their work is in service of those who do not live by and share our beliefs.

In addition, to work in a Catholic school is a fundamentally different endeavor than working for a secular school institution. Catholic schools exist to be sanctuaries of education partnering with families so their children can come to encounter Jesus Christ, be transformed by a relationship with him, grow in wisdom and virtue, and discover their call for their lives as young men and women created in God's image and likeness. This understanding of our mission is vital if we are to truly live up to our missionary charge in a time where moral relativism has consumed our society

and culture, and where to proclaim the truth is erroneously considered oppressive and bigoted. Knowing the truth leads to true human freedom and human flourishing because it leads to Jesus Christ, he who rescues us and gives us the fullness of abundant life.

Thus, this mission requires attention not merely to academic outcomes, but it requires that all students be given a formation rooted in our understanding of the dignity and vocation of the human person as male and female created for heaven. "Among all the members of the school community, teachers stand out as having a special responsibility for education. Through their teaching-pedagogical skills, as well as by bearing witness through their lives, they allow the Catholic school to realize its formative project. In a Catholic school in fact, the service of the teacher is an ecclesiastical office."[1] Therefore, in our community:

- All aspects of the Catholic school program must be ordered to the highest aims of education: the cultivation of wisdom and virtue, and the formation of the supernatural man and woman who thinks, judges, and acts according to right reason illuminated by the fullness of the teachings and example of Jesus Christ and his Church (*Divini Illius Magistri, #98).*
- Catholic School teachers must take to heart the school's mission to guide and form young men and women in the fullness of truth as revealed by Jesus Christ and taught by the Church, not personal or

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[1] Dicastery for Catholic Education. *Instruction on the Identity of the Catholic School for a Culture of Dialogue*. January 25, 2022. #45

worldly political preferences, ideologies, or agendas.

- Catholic School teachers must be men and women who are "outstanding in correct doctrine and integrity of life,"[2] and who desire to grow in their love for Jesus Christ and his Church, joyfully giving witness to the truth of the Gospel.
- Non-Catholic, faculty must understand the moral and ethical standards are for all employees and must respect our Catholic worldview, giving a joyful model of good character and maturity, and carrying out their duties in support of the school's Catholic mission. They "have the obligation to recognize and respect the Catholic character of the school from the moment of their employment."[3]
- Catholic schools must be fully pro-life institutions, not merely recognizing the sanctity of human life from conception to natural death, but unabashedly defending it and forming students in the knowledge of the truth of the sanctity of life that they might be freed from the culture of death that pervades our world today.
- Catholic schools must provide and protect:
  - A joyful respect and proclamation of the good of the Christian family as a domestic Church in which children can first encounter their identity as beloved children of the Father.
  - A curriculum that encourages children to talk to their parents and siblings about what they

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[2] Ibid #47

[3] Ibid

are learning and understanding, that is, an education that seeks to strengthen the relationships in the family.

- An understanding of History as the drama of our salvation by Jesus Christ from sin and death.
- Instruction in math and science that allows students to come to know the logic and order of the genius behind creation.
- Literature that forms a sacramental imagination and moral imagination in young men and women through grappling with the big questions of life in pursuit of what is true, good, and virtuous.
- Physical formation that trains students to be a gift of self to others.
- An immersion in art and music that seeks to form students in recognizing and loving beauty.
- Formation of the mind and heart which allows students to submit their identity, feelings, and desires to the Lordship of Jesus Christ.
- An environment that holds respect for the dignity of the human person, ensuring that all interactions by all members of the community towards each other and towards others outside of the school are grounded in the proper Christian charity and respect.
- An environment that addresses issues of race, gender, poverty, and inequality in a manner that is consistent with Church teaching and

avoids the influence of secular, critical philosophies and theories that contradict Church teaching.

Therefore, at a minimum, all employees of the Catholic Schools in the Archdiocese of Denver and of Archdiocesan ecclesiastical entities must have a positive and supportive attitude toward the Catholic Church, her teachings, her work, and the mission of the Catholic school. They must refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the Parish, the School, and the Church in the Archdiocese of Denver, or be considered in contradiction with Catholic doctrine or morals.

To work for the Church in our Catholic Schools is truly more than a professional calling. It is a ministry in service of our mission so that in Jesus Christ all might be rescued and have abundant life for the glory of the Father. Your particular work as a minister of this mission, observing those things noted in this statement, will be critical to our school's success. As St. Paul VI said, "Modern man listens more willingly to witnesses than to teachers, and if he does listen to teachers, it is because they are witnesses." (*Evangelii Nuntiandi, #41*).

We look forward to joining you on mission this academic year.

Catholic School Community Beliefs and Commitments Catholic School Staff

We are excited to present you with the opportunity to be a member of our Catholic community and join us in our Catholic education mission for the 23-24 academic year. This statement and its acknowledgement

on your At-Will Agreement cover sheet shall confirm that you have accepted the role offered to you beginning and ending per the terms delineated in your At-Will Agreement. The terms, conditions, duties, and responsibilities for your role are all delineated in your At-Will Agreement attached to this letter and the At-Will Agreement cover sheet.

By joining our Catholic educational mission, you are committing to joining us in building up the Kingdom of God here on earth by contributing to the mission of our Catholic schools through partnering with parents in the education and formation of their children. As such, by agreeing to become an employee of a Catholic School in the Archdiocese of Denver, you are acknowledging your understanding that we are a Catholic community composed primarily of adherents to a religious faith. Further, you are acknowledging that the mission of the Catholic school is to bring the young men and women in our care to encounter Jesus Christ and the truths of our Catholic faith through their intellectual, spiritual, moral, and human formation.

Even employees who do not share our religious faith are important members of our community who have voluntarily committed themselves to service within it. Unfortunately, the assumptions of the secular culture from which all members of our community, Catholic and non-Catholic alike, come from, are increasingly at odds with the teachings of our faith. Thus, it is important for all members of our community to be aware of this disconnect and ultimately, be committed to our community's worldview and beliefs.

- ❖ We believe that the sanctity of life from the moment of conception to natural death, and the

givenness of our sexuality, in all its aspects as male and female created in God's image and likeness, is the basis for human dignity and identity. It is an essential means by which we come to know God, to understand our identity as his sons and daughters, to understand how we are to love and honor one another, and to understand the vocation for which he has created us. It provides the foundation for the education and formation of the human person.

- We believe that Catholic teachings on sexual identity, marriage, family, and parenting are inseparable from the way we live and interact. These teachings allow us to fully comprehend how to love God with our whole mind, heart, and soul, and our neighbors as ourselves. We believe that sexual expression contributes to human flourishing in as much as it is integrated with a view toward its natural ends: faithful, covenantal love between a man and a woman, and a self-gift ordered to procreation.
- We believe that far from being within the domain of mere opinion, a true understanding, expression, and living out of human sexuality is a foundational part of who we are and how we see the world. Given that our faith is lived out and transmitted in all aspects of our lives, it is important that all members of our community, which includes Catholic school employees, share these beliefs especially when their work is in service of those who do not live by and share our beliefs.

In addition, to work in a Catholic school is a fundamentally different endeavor than working for a secular school institution. Catholic schools exist to be sanctuaries of education partnering with families so their

children can come to encounter Jesus Christ, be transformed by a relationship with him, grow in wisdom and virtue, and discover their call for their lives as young men and women created in God's image and likeness. This understanding of our mission is vital if we are to truly live up to our missionary charge in a time where moral relativism has consumed our society and culture, and where to proclaim the truth is erroneously considered oppressive and bigoted. Knowing the truth leads to true human freedom and human flourishing because it leads to Jesus Christ, he who rescues us and gives us the fullness of abundant life.

Thus, this mission requires attention not merely to academic outcomes, but it requires that all students be given a formation rooted in our understanding of the dignity and vocation of the human person as male and female created for heaven. Therefore, in our community:

- All aspects of the Catholic school program must be ordered to the highest aims of education: the cultivation of wisdom and virtue, and the formation of the supernatural man and woman who thinks, judges, and acts according to right reason illuminated by the fullness of the teachings and example of Jesus Christ and his Church (*Divini Illius Magistri, #98).*
- Catholic School employees must take to heart the school's mission to guide and form young men and women in the fullness of truth as revealed by Jesus Christ and taught by the Church, not personal or worldly political preferences, ideologies, or agendas.

- Catholic School employees must be men and women who are "outstanding in correct doctrine and integrity of life,"[1] and who desire to grow in their love for Jesus Christ and his Church, joyfully giving witness to the truth of the Gospel.
- Non-Catholic employees must understand the moral and ethical standards are for all employees and must respect our Catholic worldview, giving a joyful model of good character and maturity, and carrying out their duties in support of the school's Catholic mission. They "have the obligation to recognize and respect the Catholic character of the school from the moment of their employment."[2]
- Catholic schools must be fully pro-life institutions, not merely recognizing the sanctity of human life from conception to natural death, but unabashedly defending it and forming students in the knowledge of the truth of the sanctity of life that they might be freed from the culture of death that pervades our world today.
- Catholic schools must provide and protect:
    - A joyful respect and proclamation of the good of the Christian family as a domestic Church in which children can first encounter their identity as beloved children of the Father.

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[1] Dicastery for Catholic Education. *Instruction on the Identity of the Catholic School for a Culture of Dialogue*. January 25, 2022. #47

[2] Ibid

- A curriculum that encourages children to talk to their parents and siblings about what they are learning and understanding, that is, an education that seeks to strengthen the relationships in the family.
- An understanding of History as the drama of our salvation by Jesus Christ from sin and death.
- Instruction in math and science that allows students to come to know the logic and order of the genius behind creation.
- Literature that forms a sacramental imagination and moral imagination in young men and women through grappling with the big questions of life in pursuit of what is true, good, and virtuous.
- Physical formation that trains students to be a gift of self to others.
- An immersion in art and music that seeks to form students in recognizing and loving beauty.
- Formation of the mind and heart which allows students to submit their identity, feelings, and desires to the Lordship of Jesus Christ.
- An environment that holds respect for the dignity of the human person, ensuring that all interactions by all members of the community towards each other and towards others outside of the school are grounded in the proper Christian charity and respect.
- An environment that addresses issues of race, gender, poverty, and inequality in a manner that is consistent with Church teaching and

avoids the influence of secular, critical philosophies and theories that contradict Church teaching.

Therefore, at a minimum, all employees of the Catholic Schools in the Archdiocese of Denver and of Archdiocesan ecclesiastical entities must have a positive and supportive attitude toward the Catholic Church, her teachings, her work, and the mission of the Catholic school. They must refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the Parish, the School, and the Church in the Archdiocese of Denver, or be considered in contradiction with Catholic doctrine or morals.

To work for the Church in our Catholic Schools is truly more than a professional calling. It is a ministry in service of our mission so that in Jesus Christ all might be rescued and have abundant life for the glory of the Father. Your particular work as a minister of this mission, observing those things noted in this statement, will be critical to our school's success. As St. Paul VI said, "Modern man listens more willingly to witnesses than to teachers, and if he does listen to teachers, it is because they are witnesses." (*Evangelii Nuntiandi, #41*).

We look forward to joining you on mission this academic year.

Catholic School Community
Beliefs and Commitments:
Catholic School Parents and Guardians

By enrolling your child in our school, you are joining our Catholic educational mission in our school and

acknowledge that we are a Catholic community composed primarily of adherents to a religious faith. Further, you are acknowledging that the mission of the Catholic school is to bring your child to encounter Jesus Christ and the truths of our Catholic faith through their intellectual, spiritual, moral, and human formation.

The mission of a Catholic school is a fundamentally different endeavor than enrolling your children in a secular school institution. Catholic schools exist to be sanctuaries of education which serve your family, in order that our school might help you as you bring your children into an encounter with Jesus Christ. We desire to serve you as parents and support your desire for your children to be transformed by a relationship with Jesus Christ, grow in wisdom and virtue, and discover their call for their lives as young men and women created in God's image and likeness. This understanding of our mission is vital if we are to properly serve your family for the sake of your child's education and formation. Our schools do not function in our mission to help bring children to Jesus Christ if not for bringing them to Jesus Christ through your family.

We believe with the Church that you are the primary educators of your children, and the family is the first school of the faith. Your children have been given to you by God the creator. The mission of your family is to proclaim the Good News of the Gospel to your children. Part of this mission is to form a home in which your children can encounter Christ so that your children can grow in wisdom and virtue through everything they encounter in their homes with you. The mission of your family is also to joyfully proclaim the Good News to the world through your words and witness.

The school is considered an extension of the home. The best way for families to support our mission in the school is to live a happy, holy family life that shows children the riches of relationship, the Church's culture, and models of relationship with Jesus Christ himself. Even families who do not share our religious faith are important members of our community and are called to lives of virtue and truth.

Unfortunately, the assumptions of the secular culture from which all members of our community, Catholic and non-Catholic alike, come from are increasingly at odds with the teachings of our faith. Thus, it is important for all members of our community to be aware of this disconnect and ultimately, understand and accept our community's worldview and convictions.

- For our community, the sanctity of life from the moment of conception to natural death, and the givenness of our sexuality, in all its aspects as male and female created in God's image and likeness, is the basis for human dignity and identity. It is an essential means by which we come to know God, to understand our identity as his sons and daughters, to understand how we are to love and honor one another, and to understand the vocation for which he has created us. It provides the foundation for the education and formation of the human person.
- Catholic teachings on sexual identity, marriage, family, and parenting are inseparable from the way we live and interact. These teachings allow us to fully comprehend how to love God with our whole mind, heart, and soul, and our neighbors as ourselves. We believe that sexual expression contrib-

utes to human flourishing in as much as it is integrated with a view toward its natural ends: faithful, covenantal love between a man and a woman, and a self-gift ordered to procreation. "Willed by God in the very act of creation, marriage and the family are interiorly ordained to fulfillment in Christ and have need of His graces in order to be healed from the wounds of sin and restored to their 'beginning,' that is, to full understanding and the full realization of God's plan." (*Familiaris Consortio, 1981*).

- As a community we believe that, far from being within the domain of mere opinion, a true understanding, expression, and living out of human sexuality is a foundational part of who we are and how we see the world. Given that our faith is lived out and transmitted in all aspects of our lives, it is important that all members of our community, respect these beliefs.

Our mission requires attention not merely to academic outcomes, but it requires that all students be given an education and formation rooted in our understanding of the dignity and vocation of the human person as male and female created for heaven. Therefore, in our community you can be assured that:

- All aspects of our Catholic school program will be ordered to the highest aims of education: the cultivation of wisdom and virtue, and the formation of the supernatural man and woman who thinks, judges, and acts according to right reason illuminated by the fullness of the teachings and example of Jesus Christ and his Church (*Divini Illius Magistri, #98).*

- Our Catholic School faculty and staff take to heart the school's mission to partner with and support you to guide and form your children in the fullness of truth as revealed by Jesus Christ and taught by the Church, not personal or worldly political preferences, ideologies, or agendas.
- Our Catholic School faculty and staff will be men and women who are outstanding in correct doctrine and integrity of life and who desire to grow in their love for Jesus Christ and his Church, joyfully giving witness to the truth of the Gospel.
- Our Catholic schools will be fully pro-life institutions, not merely recognizing the sanctity of human life from conception to natural death, but unabashedly defending it and forming students in the knowledge of the truth of the sanctity of life that they might be freed from the culture of death that pervades our world today.
- Our Catholic School will provide and protect:
    - A joyful respect and proclamation of the good of the Christian family as a domestic Church in which children can first encounter their identity as beloved children of God, the Father.
    - A curriculum that encourages children to talk to their parents and siblings about what they are learning and understanding and an education that seeks to strengthen the relationships in your family through the joyful shared pursuit of truth, beauty, and goodness.

- An understanding of History as the drama of our salvation by Jesus Christ from sin and death, in the study of human lives.
- Instruction in math and science that allows students to come to know the logic and order of the genius behind creation.
- Literature that forms a sacramental imagination and moral imagination in young men and women through grappling with the big questions of life in pursuit of what is true, good, and virtuous.
- Physical formation that trains students to be a gift of self to others.
- An immersion in art and music that seeks to form your children in recognizing and loving beauty.
- Formation of the mind and heart which allows students to submit their identity, feelings, and desires to the Lordship of Jesus Christ.
- An environment that holds respect for the dignity of the human person, ensuring that all interactions by all members of the community towards each other and towards others outside of the school are grounded in the proper Christian charity and respect.
- An environment that addresses issues of race, gender, poverty, and inequality in a manner that is consistent with Church teaching and avoids the influence of secular, critical philosophies and theories that contradict Church teaching.

For our school to properly support you as the primary educators of your children and partner with you in the formation and education of your children, all Catholic school families must understand and display a positive and supportive attitude toward the Catholic Church, her teachings, her work, and the mission of the Catholic school. As the Church notes, "Everyone has the obligation to recognize, respect, and bear witness to the Catholic identity of the school," (*The Identity of the Catholic School for a Culture of Dialogue,* 2022). While this does not mean members of our community are expected to be perfect and sinless, for the good of our community, families must refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the School, and the Church in the Archdiocese of Denver, or be considered a counter-witness to Catholic doctrine or morals.

Lastly, it is necessary for parents to cooperate closely with the leadership, faculty, and staff. By enrolling your child in our school, you are committing to maintaining a relationship rooted in the trust and confidence that our school and its personnel are operating for the good of your family and your child's learning and formation. Our school and personnel at some point may need to bring attention to academic, behavioral, or social concerns with your child. It is in these moments where there may be conflicts or disagreements that arise between the school and the family. In these moments, you can expect our school to engage with you to address complex issues with great respect and love for you and your child. In turn, families are asked to engage with trust that the school is seeking the best for its mission and your child and thus, expected to cooperate fully and respectfully with our school and its

personnel to bring about the best resolution and outcome.

Thank you for partnering with us to support you in the mission of educating and forming your children. It is an honor to serve your family.

Guidance for Issues Concerning the Human Person and Sexual Identity

This document incorporates, with permission, specific language or substantial portions of "Catholic Schools and Gender Ideology: General Principles and Recommendations," a document co-authored by Theresa Farnan, PhD, Susan Selner-Wright, PhD, and Mary Rice Hasson, JD.

Terminology

Gender ideology redefines the human person. It is incompatible with Christian anthropology and can lead to profound confusion. In this section, we explain the intended meaning and use of key terms, *as employed by proponents of gender ideology*. Because these terms often contain built-in assumptions incompatible with Christian anthropology, these terms should not be used uncritically in our schools.

Gender ideology redefines the human person. It is incompatible with Christian anthropology and can lead to profound confusion. In this section, we explain the intended meaning and use of key terms, *as employed by proponents of gender ideology*. Because these terms often contain built-in assumptions incompatible with Christian anthropology, these terms should not be used uncritically in our schools.

- ***Gender*** "refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender-normative; behaviors that are viewed as incompatible with these expectations constitute

gender non-conformity" (Guidelines, in *Key Terms and Concepts in Understanding Gender Diversity and Sexual Orientation Among Students,* American Psychological Association [APA], 2015).

- ***Gender Identity:*** "A person's deeply-felt, inherent sense of being a boy, a man, or male; a girl, a woman, *or* female; or an alternative gender (e.g., genderqueer, gender non-conforming, boygirl, ladyboi) which may or may not correspond to a person's sex assigned at birth or to a person's primary or secondary sex characteristics. Since gender identity is internal, a person's gender identity is not necessarily visible to others. 'Affirmed gender identity' refers to a person's gender identity after coming out as transgender or gender non-conforming or undergoing a social and/or medical transition process" *(Key Terms and Concepts in Understanding Gender Diversity and Sexual Orientation Among Students,* APA, 2015).
- ***Sex*** "refers to a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia" *(Key Terms and Concepts in Understanding Gender Diversity and Sexual Orientation Among Students*, APA, 2015).
- ***Gender Dysphoria*** "refers to discomfort or distress that is associated with a discrepancy between a person's gender identity and that

person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics) ... Only some gender-nonconforming people experience gender dysphoria at some point in their lives" (*Key Terms and Concepts in Understanding Gender Diversity and Sexual Orientation Among Students,* APA, 2015, internal citations omitted).

- ***Transgender*** "is an umbrella term that incorporates differences in gender identity wherein one's assigned biological sex doesn't match their [sic] felt identity. This umbrella term includes persons who do not feel they fit into a dichotomous sex structure through which they are identified as male or female. Individuals In this category may feel as if they are in the wrong gender, but this perception may not correlate with a desire for surgical or hormonal reassignment" *(Key Terms and Concepts in Understanding Gender Diversity and Sexual Orientation Among Students,* APA, 2015, interna1 quotations omitted).

By contrast, the following terminology should be used by school leaders and faculty *in* our Catholic Schools:

- ***Sexual identity:*** Respect for the dignity of the person means recognizing each person as a child of God, called by God and formed in his image and likeness, and respecting persons in their integrity as embodied male or female from the moment of conception. For this reason, Catholic schools cannot recognize or facilitate a "gender transition," or grant any accommodation that recognizes or suggests a change in sexual identity. Schools may make some

accommodations for children who need additional privacy, as long as these accommodations do not involve recognizing or endorsing a change in sexual identity. For example, a child may be granted access to the nurse's bathroom for various reasons but should never be granted access to the restroom or changing facilities of the opposite sex. Other accommodations, such as wearing the uniform designated for the opposite sex or the use of preferred pronouns are impermissible, as they convey falsely to that child and his or her peers that there has been or could be a change in sexual identity.

- ***Sexual difference:*** Catholic schools must affirm the importance of sexual difference as the basis of marriage, and as essential to understanding sexual identity and the truth and meaning of human sexuality. For this reason, Catholic schools cannot facilitate or allow alliances or advocacy that rejects the truth that sexual difference is intrinsic to human sexuality and is the foundation of marriage and family.
- ***Marriage:*** Catholic schools at all times must uphold the nature and meaning of marriage as a covenantal relationship between one man and one woman that is marked by exclusivity, permanence, fidelity and openness to life. Catholic schools should take care not to convey any equivalence between same sex or transgender legal unions or relationships and marriage. Same sex or transgender romantic partners and children of these unions should always be treated with dignity and kindness. Catholic schools cannot recognize cohabitation as

equivalent to marriage. However, children born to cohabiting couples must always be treated with compassion and respect. The truth about marriage is accessible to everyone because it is grounded in the nature of the human person. Promoting and protecting marriage witnesses to the dignity of every person and serves the common good.

1. What is the goal of our Catholic Schools' policies?

The goal of policies established in a Catholic school should be to create and foster an environment in which children can grow in virtue and be formed according to the teachings of Christ, in accord with the school's Catholic mission. Therefore, school policies should reinforce Christian anthropology, including the reality of sexual difference and its relevance in certain spheres. Christian anthropology is unalterably opposed to many aspects of the gender ideology currently affecting the culture nationally and internationally. School (and diocesan) policies should explicitly state that they are written to conform to the teachings of the Catholic Church in all respects. Policies that are unequivocally rooted in Catholic teaching provide the best foundation for religious freedom claims or defenses against lawsuits or demands by parents, employees, activists, or government entities that seek to compel actions or responses incompatible with the teachings of the Catholic Church and the Catholic mission of the institutions. All staff (particularly new hires from public schools or secular schools of education) should understand that the policies of a Catholic school

necessarily differ, in substantial ways, from the policies of public or private secular schools.

What general principles might be helpful to Catholic schools as they address concerns related to gender ideology?

Integrate concrete circumstances with the moral law. Questions regarding gender ideology and Catholic schools may involve concrete situations related to a particular person or family, as well as conceptual and pastoral questions that apply to the school community as a whole.

Situations involving individuals should be addressed with pastoral care that is rooted in love and concern for the person; pastoral care recognizes God's call to every baptized person to share in his eternal life and to follow the moral law as the way to happiness. "A person's discomfort with his or her sex, or the desire to be identified as the other sex, is a complicated reality that needs to be addressed with sensitivity and truth. Each person deserves to be heard and treated with respect; it is our responsibility to respond to their concerns with compassion, mercy and honesty"(USCCB, 2017).

Pastoral care, then, works towards the integration of one's concrete circumstances with objective truth. "Acting is morally good when the choices of freedom are *in conformity with man's true good* and thus express the voluntary ordering of the person towards his ultimate end: God himself, the supreme good in whom man finds his full and perfect happiness" (*Veritatis Splendor,* no. 72). "Conscience thus formulates *moral obligation* in the light of the natural law: it is the obligation to do what the

individual, through the workings of his conscience, *knows* to be a good he is called to do *here and now" (Veritatis Splendor,* no. 59). Care for an individual also must take into account the potential impact on others, particularly the impact on conscience formation, fidelity to Catholic teachings, institutional identity and mission; the potential for scandal, and legal and other practical considerations.

Distinguish Christian anthropology from gender ideology; Christian anthropology and gender ideology are incompatible. Christian anthropology refers to the understanding of the person that is grounded in the Creation accounts in Genesis and supported by reason, and that has been developed in the writings of St. Augustine and St. Thomas Aquinas) among others. See *Catechesis and Gender Ideology* for a description of what gender ideology asserts and how it differs from Christian anthropology. (In this document we describe specific assertions of gender ideology as they bear on concrete questions faced by schools.) As gender ideology gains traction culturally, it is ever more important to understand how gender ideology differs from Christian anthropology, and how schools can help Catholics withstand the cultural current that threatens to unmoor us from our foundations.

While the spread of gender ideology presents a danger to the faith of Christians, it offers an even greater opportunity for the Church to present anew the Church's vision of the human person and the Gospel message.

We must:

- Begin by setting out a clear vision of the person, rooted in Christian anthropology.
- Be confident in the truth: Christian anthropology offers a vision of the person that not only is illuminated by faith but also resonates with experience and is rooted in science. It lays a foundation for human flourishing.
- Be prepared to explain clearly to parents (and older students) what gender ideology is, how it differs from Christian anthropology, and why the Church regards gender ideology as harmful not only to the individual but also to the culture at large.

Catholic schools in particular need to implement policies that are consonant with Christian anthropology's view of the person. Schools should avoid validating or affirming the premises of gender ideology, even indirectly, by silence or inaction.

In age-appropriate ways and in partnership with parents, schools should proactively counter gender ideology through periodic lessons, presentations, etc., as well as through unscripted conversations and teachable moments.

When should gender ideology be addressed in Catholic schools and religious education programs?

Catholic schools and religious education programs should present basic Christian anthropology to all children, in age-appropriate ways throughout the course of a child's education, in the context of teaching about the Catholic faith. Questions specifically related to gender ideology (gender

identity, transgender-identified persons, topics related to gender nonconformity) should be handled in various age-appropriate ways at appropriate stages of a child's education, always recognizing that parents are the primary educators of their children, with attendant rights and responsibilities.

All teachers should be trained and prepared, from a Catholic perspective, to field questions or comments about the concept of gender identity, peers who have "transitioned" or "come out" on social media, transgender-identified public figures, TV/Netflix shows (e.g., Caitlin Jenner, Jazz Jennings, *Transparent, Orange is the New Black, Roseanne,* etc.), and gender-related public policy issues (e.g. bathroom bills) that may arise in the context of other classroom discussions. Teachers should be equipped to take advantage of those "teachable moments" to affirm the reality of sexual difference, present Church teaching on the human person, and point out ways to show compassion and respect for the dignity of every person without approving of harmful personal decisions or public policies. In all situations, schools must be prudent in addressing these issues, taking care to address these issues in an age-appropriate way.

Practically speaking... Catholic schools and religious education programs [should] offer educational presentations on gender ideology for parents– and that schools strongly urge (or even require) all parents to attend. Presentations to parents should occur on a recurrent basis or be available by video link to ensure new parents can access this information. In grades K-6, parents should be informed about the pervasiveness of gender ideology in media and advertising

directed toward children, including, for example, shows produced by Netflix (featuring cartoons such as *Super Drags* and *Drag-tots)* and Disney (which features "out" characters, same sex couples, and same sex kisses in children's programming ranging from *Doc McStuffins, Star vs. the Forces of Evil,* to *Andi Mack)* and in *YouTube* videos. Parents should be equipped to handle questions regarding gender ideology in an age-appropriate way.

In addition, schools and religious education should address the topic with students directly, at appropriate ages, with notice to or permission from parents. In middle school (7th and 8th grades), gender ideology topics could be addressed proactively in the classroom, in the context of the religion and science curricula, or discussions of current events. If the curriculum provides for specialized classes in chastity or theology of the body for teens; gender ideology also can be addressed in those contexts. In high school (9th–12th, grades), teachers should address specific gender ideology topics within planned lessons on Christian anthropology (identifying the conflicts between gender ideology and Christian anthropology), in the context of biology and related sciences, In classes related to chastity, theology or the body, sexuality or marriage, and in discussions of current events.

May a Catholic school enroll a student who identifies as transgender?

To answer this question, it is important to understand more precisely the student's actual situation. We draw the following distinctions, based on likely situations school officials might encounter:

a) The student who rejects his or her sexual identity and asserts a gender identity at odds with his or her biological sex. This student *identifies* as transgender, queer, nonbinary, gender-fluid, genderqueer, gender nonconforming, or some other identity different from the student's given sexual identity as male or female. A student who rejects his or her given sexual identity might insist that he or she "is" a person of the opposite sex. or that he or she identifies as something other than male or female. Typically, a student who rejects his or her *given* sexual identity (male *or* female) will seek to have others affirm the student's *desired* identity (transgender, non-binary, queer, etc.). Affirmation might include calling the student by a new name or referring to the student by new pronouns, such as those associated with the opposite sex, invented pronouns such as "ze, zir," or the use of plural pronouns ("they, "them"). This student also might seek to adopt clothing, mannerisms, and interests that are perceived as "gender-neutral" or are stereotypically associated with the opposite sex. For example, a male student who identifies as transgender, might claim in all sincerity that he "is" a girl and demand that others *affirm* that he *is* female, perhaps by referring to him using female pronouns or a new feminine name, granting him access to female bathrooms or locker rooms or allowing him to wear the girls' school uniform or play on a girls' sports' team. Schools should be aware of the possibility that such a student or his or her parents might produce a letter requesting an accommodation plan, pursuant to

Section 504 of the Rehabilitation Act, that stipulates gender affirmation (e.g. desired names or pronouns, access to sex-segregated facilities, etc.) as necessary for the student's success in school. Questions regarding IEP (disability) or 504 plans are treated *in* a separate question below.

Recommendation:

A Catholic school cannot affirm a student's identity as transgender, gender nonconforming, non-binary, gender-fluid gender-queer, or any other term that *rejects the reality of the student's given male or female sexual identity;* any asserted identity that rejects the reality of biological sex is incompatible with Christian anthropology.

Practically speaking, when parents are relying on secular medical or psychological advice that stresses *parental affirmation* of the child's desired identity as the only way to support the child, then the situation will prove unworkable. Even if the parents and child express willingness to comply with relevant school rules in the short term, the situation is not workable because the family and the school are working from irreconcilable premises and moving towards incompatible goals, Accordingly, enrollment or re-enrollment of such a student at a Catholic school would not be appropriate. School administrators should communicate this decision to the student and his or her parents in the context of concern for the student's well-being; school officials might invite further discussions and express willingness to provide

additional guidance and support, short of enrollment. (When *both* the parents and the student are working towards integration of the student's identity and biological reality, and are willing to have the student comply with all relevant rules, the situation would be covered under paragraph "'b" below).

- Situations where the parents are divorced or divided over the question of whether or not to "affirm" the child's chosen gender identity are particularly problematic, and increasingly common. These situations require additional information, including questions about the influence of the "affirming" parent, the involvement of social services, medical or psychological professionals, possible custody arrangements or disputes, relevant court orders or legal agreements. It also requires sensitivity to the personal dynamics involved, especially the child's vulnerability in the face of parental discord over the child's identity.

- By enrolling a student who openly rejects his or her given sexual identity and seeks to be affirmed in his or her desired identity by peers and the school community, the school compromises *its* mission and identity in multiple ways: the school's decision is likely to be construed as endorsing the view that a person can be "born in the wrong body" or can "change gender" or sex--a view that contradicts Catholic teaching and is simply not true, by

validating the student's erroneous belief about him or herself, the school effectively lies to the student and hinders the student's search for the truth; by accepting the student's presentation of him or herself as "transgender" or any other identity at odds with the student's biological sex, the school is likely to confuse other students, staff, and families about the truth of the human person and the dangers of gender ideology, and to give scandal to the community at large. In actual practice, schools that accept a transitioned student or allow a student to transition typically end up downplaying or muting the relevant presentations of Catholic anthropology, theology, and moral teachings for the entire school, thus compromising the school's mission and hindering the education of other students as well.

b) The student who is struggling to accept his or her sexual identity: The struggling student is one who expresses confusion over identity, struggles to understand and accept his or her sexual identity (male or female), or has a diagnosis of gender dysphoria, **but nevertheless** *does not reject his or her sexual identity as male or female, does not assert an identity (transgender, non-binary, queer, etc.) at odds with his or her biological sex, and has not transitioned in any way.* (See the meaning of "transition" above.) In some but not all cases, the student who is struggling to accept his or her sexual identity also might show a preference for

the stereotypical clothing, mannerisms, and interests of the opposite sex.

Recommendation:

In general, a student who is confused about or struggling with his or her sexual identity or has a diagnosis of gender dysphoria, **but** who has **not** taken steps to transition, nor overtly rejected his or her given sexual identity or asserted an alternative "identity," does not present a situation incompatible with Christian anthropology. As such, enrollment or re-enrollment at a Catholic school may be appropriate for this student at the school's discretion, considering the fit between the school's mission and expectations and the family's situation. (A poor fit is likely to create turmoil and confusion for the child, and would not be to the child's benefit.) Discussions between school administrators and the parents should occur prior to enrollment or re-enrollment, with mutual commitments to transparency. The school should be explicit about the school's mission; the Church's teachings on the person and concerns about gender ideology; relevant school policies (dress codes, facility use, etc.); the expectation that the parents and child will work towards an integrated sexual identity (aligned with bodily reality); the expectation that the parents and the child will commit to abide by school policies (including social media use*) for the duration of the student's enrollment; and the specific support or accommodations the school might be able to provide for the child.

Parents should be transparent about their understanding of and openness to the Church's teachings on the person and the Church's concerns about gender ideology; the goals and methods of relevant individual or family therapy; the nature of any medical guidance they have received and their intentions regarding future medical treatment; the relationship between the parents and child; the duration and seriousness of the child's struggle with sexual identity; the parents' commitment to support the child's growth towards an integrated sexual identity; the child's level of understanding and willingness to work towards an integrated sexual identity; the child's overall degree of cooperation and compliance with relevant parental decisions and expected compliance with relevant school policies. The situation will likely require ongoing guidance and re-evaluation. (*The school should make clear that in addition to complying with the school's on-campus rules, the child also should not "come out" on social media, e.g., express a social media *identity* at odds with biological sex.)

c) ***The student with atypical expressions of masculinity or femininity:*** The student who is atypical in expressions of masculinity or femininity (e.g., the "tomboy") but *does not* express confusion about being male or female or assess an *identity* at odds with his or her biological sex (e.g. transgender, gender non-conforming, non-binary, etc.) does not present issues related to Christian anthropology or gender ideology and thus presents no obstacles to enrollment.

Gender ideology has spurred an unhealthy focus on stereotypes promoting the false idea that atypical interests, behaviors, and dress automatically should be interpreted as signs that a person's "authentic" identity might differ from his or her biological sex. A growing number of adolescents seem to be questioning their identities simply because their preferences differ from those stereotypically associated with same-sex peers (e.g., a boy who thinks he is a girl trapped in a boy's body because he likes pink and dislikes sports).

Recommendation:

Educators should be familiar with variances in child development, the uneven arrival and progression of pubertal development, and the broad range of personal interests, styles, and preferences among both boys and girls. Schools should allow for individual differences, within the limits of the school's chosen dress code or other relevant policies, while upholding standards that recognize sexual difference. Schools should *not* communicate acceptance of explicit "gender non-conforming" or "gender-bending" behaviors that *aim to communicate an identity message.* For example, a boy who wears feminizing makeup to class or wears a dress on a non-uniform day is perceived to be making an identity statement. A girl who plays kickball with the boys on the playground or prefers jeans and t-shirts to dresses is not.

Students naturally exhibit a wide range of developmental and personal growth, which may be reflected in the student's choice of attire,

interests, and activities. These situations present no obstacle for enrollment and should be distinguished from other situations that might suggest a student is struggling with sexual identity or has adopted an identity at odds with his or her biological sex. For example, an adolescent girl who displays a behavioral shift towards shape-concealing clothing or "gender-neutral" styles and haircuts, shows signs of depression or social withdrawal, chooses peers who identify as transgender, gender nonconforming, etc, or who spends significant time online may be at risk for developing "rapid onset gender dysphoria" or asserting an identity at odds with her biological sex. (Teen girls are particularly vulnerable to the phenomena of rapid onset gender dysphoria. See Resources for more information.) School staff should be aware that a student who adopts an atypical appearance at school because of an escalating internal struggle with sexual identity might "come out" as transgender, nonbinary, etc., to peers on social media before he or she begins to assert such an identity at school.

Educators who become concerned about whether a child is struggling with identity issues should discreetly communicate those concerns to school administrators, who should coordinate discreet and sensitive communication with the child's parents.

How should a Catholic school respond if an enrolled student asserts an identity at odds with the student's biological sex, e.g. identifies as transgender, gender nonconforming, or nonbinary, etc.?

School personnel should be aware that a student may begin to assert an identity at odds with their biological sex on social media even before doing so openly at school. The school's response should consider factors such as how consistently and openly the student is asserting the new identity, whether the student's asserted identity is common knowledge among the student's peers or others in the school community) the degree to which the parents are aware of the situation, whether the parents endorse the student's asserted identity, and whether the parents and student are willing to continue to comply with the school's relevant policies (e.g., uniform or dress code guidelines, as well as behavioral expectations according to his or her biological sex). The school should contact the parents as soon as the school learns of the situation--to ensure that the parents are aware of the situation, and to arrange a meeting. When the student's asserted identity is *not* public knowledge--for example, if the student or parents approach the school administration privately about the student's situation--and the student's parents do *not* endorse the student's asserted identity and *are* willing to abide by the school's sex-differentiated policies (e.g., uniforms, etc.), then the school should try to assist the family while allowing the child to remain an enrolled student

These situations warrant careful consideration of the circumstances surrounding the child's exploration of this new identity. Research suggests that in some

children underlying or unresolved issues may contribute to identity issues. Factors to consider include whether the child has experienced trauma or sexual abuse or is under psychological stress, struggles with poor peer relationships, has a history or symptoms of other body issues (such as anorexia nervosa), has previously been diagnosed with autism spectrum disorder (persons with autism experience sexual identity issues at higher rates than average), spends extensive time on social media, or has friends who are also struggling with identity issues.

The school should ensure that both parents and student are aware of the kinds of situations in which the student's continued enrollment would become untenable. For example: if the student or parents do not comply with the school's relevant policies (e.g. the student refuses to abide by the dress code or the parents insist that the student be allowed to use opposite sex bathrooms or be addressed by pronouns that match the new identity but are at odds with the student's biological sex); the student "comes out" or otherwise openly asserts a desired identity at odds with his or her biological sex, either on social media or within the school environment; or the parents endorse or publicize the student's asserted identity, either informally, on social media, or through media channels.

Catholic schools should be aware of a phenomenon referred to as "rapid onset gender dysphoria," in which students and their friends, who have not expressed a transgender identity previously, declare themselves to be transgender and seek to transition together or sequentially. Adolescent girls are particularly vulnerable to this phenomenon, which seems to be a form of social contagion. Rapid onset gender

dysphoria often occurs after a teen becomes immersed in trans-affirming social media (Reddit, Tumbler, and similar platforms) and the online community gradually replaces other friendships and family relationships. Catholic school policies typically set expectations regarding social media postings that may affect the school's reputation or the school community; while Catholic schools cannot be expected to police students' social media (parents bear primary responsibility for this), the schools should be aware that an individual student's assertion of a transgender identity on social media inevitably affects the school community.

When a student experiences distress or conflict over his/her sexual identity or receives a diagnosis of gender dysphoria, but continues to follow the school's policies while remaining within the school's parameters, the situation will require discretion, sensitivity, prudence, and prayer to discern the best response. *In no situation should the school recognize, encourage, endorse, or facilitate a student's "gender transition."* The school has discretion to make accommodations (e.g., providing access to a private bathroom) in order to address concerns about any student's safety or privacy, while taking steps to ensure that those accommodations are not perceived by other students as an endorsement of the student's asserted identity or of gender ideology's core idea -- that a person's "authentic" identity might differ from biological sex (e.g. that a biological boy, for example, could be a girl trapped in a boy's body).

How should a school respond if a student or the student's parents ask members of the school community to address the student using personal pronouns at odds with the student's biological sex?

The school must refuse this request. Personal pronouns refer to the *person* and correspond to the truth about the person's identity as male or female. A student who seeks to be called by personal pronouns that correspond to the opposite sex, or by invented pronouns (such as ze, zir), or plural pronouns (they; them, their) seeks to communicate an identity that rejects the student's biological sex. By asking others to use those pronouns, the student is asking others to affirm something (the asserted identity) that is not true. The school must insist that staff and students comply with the school's policy both officially and informally, for the sake of consistency, (In other words, a teacher must use the student's actual pronouns both inside the classroom and in less formal contexts (e.g., informal conversation or social events).

What if a student asks to be called by a new name or desires to change his or her name in school records?

Catholic schools enroll students under their legal names. It is not uncommon for students to ask to be called, informally, by a nickname, middle name, or family name that differs from the student's legal name. (For example, a student might ask teachers or coaches informally to refer to him or her by a different name in class or on the field.) Informal use of

a different name is not a problem in itself but might signal an emerging identity issue.

- In one high school, for example, a girl asked her teachers to begin calling her by a new, androgynous name ("Dale") that had no obvious connection to her real name. In the preceding months, the girl had cut her hair extremely short and had begun wearing androgynous-style clothing at school social events. (She wore the girls' school uniform at school.) Shortly after she began calling herself "Dale," the girl "came out" to friends on social media, but *not* at school, as lesbian. (Her parents and teachers were unaware.) Several months later, "Dale" came out again on social media, but this time as "trans." Her mother soon discovered "Dale" had been wearing a chest binder for months to flatten her breasts and now wanted male hormones to facilitate her transition. At this juncture, the school administration learned of the issue; by this time, many students already knew of the girl's transition through social media, so the administration needed to address the issue not only with the girl and her family, but with her peers as well. In hindsight, the school realized that the requested name change, in the context of other behavioral changes, had been a red flag signaling deeper issues.

If a student or student's parents ask for a formal name change in the school records, because the student already has changed his or her name legally, then the school must update the records to comply as long as the student remains enrolled. It is important for a school to understand why the student seeks a name

change. *If the name change is sought as part of the student's exploration of "gender" or as an assertion of a desired identity at odds with the student's biological sex, then the school needs further discussion with the student and his or her parents, to see whether the school is still a good fit (see question 4, above) or whether the school is unable to re-enroll the student.* The school should meet with the student and parents to clarify that the school cannot affirm an identity at odds with the student's biological sex, and will continue to treat the student as male or female, according to biological sex, regardless of the legal name change. In general, where a legal name change has occurred for the purposes of affirming a current student's desired identity (at odds with biological sex), the student's continued enrollment should be reassessed. The situation would seem unlikely to be a good fit, as parents who are willing to support a child's desire to legally change his or her name to facilitate a new identity at odds with bis or her biological sex, are unlikely to agree to the parameters recommended in 4(c) above.

ln situations where the student is asking to be called by a name that is not an obvious nickname or derivative of his or her legal name, the school always should consult with the parents, who are the primary educators of the child.

If a student asserts an identity at odds with biological sex (e.g. identifies as transgender, gender non-conforming, gender creative, or gender fluid, etc.) and requests to wear the uniform of the opposite sex because it matches his or her new identity, how should the school respond?

Schools should not permit a student to wear the uniform appropriate for the opposite sex. Students' choice of attire communicates something about themselves to others. A female student wearing the male uniform (and vice versa) is intended to convey that the person "is" or identifies with the opposite sex. A student who asserts an identity at odds with his or her biological sex may desire to wear the uniform of the opposite sex as a way to validate the student's feelings or desired identity. If the school consents to a uniform change, the school would be implicitly affirming the student's erroneous identity, and effectively encouraging the student to continue down a path that is harmful and unhealthy. It also will make it harder for the student to re-integrate his or her sexual identity with biological reality.

May a student use the bathroom or changing facility of the opposite sex, on the basis that it matches his or her desired or asserted identity?

No. Students must use changing or bathroom facilities in accord with their biological sex. Allowing male students to use female changing or bathroom facilities, or vice versa, violates other students' modesty and privacy. Allowing a student who asserts an identity at odds with biological sex to use facilities reserved for the opposite sex may create the impression that the school is validating the student's belief that he or she

has fundamentally changed "who" he or she is. In reality, a person's biological sex cannot change.

A note on Title IX (federal legislation, applicable to schools receiving federal funds, prohibiting sex discrimination): The Obama administration reinterpreted Title IX to say that the word "sex" includes "gender identity," even if the person's desired gender identity is the *opposite* of his or her biological sex. Under the Obama-era interpretation, a school engages in prohibited sex discrimination if it refuses to allow a student to use the same facilities used by other students of the same "gender identity." According to this argument, a male student who identifies as a transgender "girl" claims the same gender identity ("girl") as the biological females in the class, and thus has a Title IX right to use the same facilities the girls use, based on their shared gender identity. Although the Trump administration rescinded the Obama administration's Guidance Letter that instructed schools to re-interpret "sex" to include "gender identity," Title IX's protections are being litigated; several district courts have sided with the interpretation advanced under the Obama administration. Further complicating the situation, some states and municipalities have added "gender identity" protections to their anti-discrimination laws and regulations, and some state courts have interpreted state law or local human rights ordinances to prohibit discrimination on the basis of "gender identity." These gender identity protections typically permit access to opposite-sex restrooms and changing facilities in schools. In late 2018, the *New York Times* published a leaked memo from the U.S. Department of Health and Human Services showing the Trump Administration's plan to make the definition of "sex" uniform across federal agencies: "sex"

would be defined not as "gender identity" but as either male or female, biologically determined and unalterable.

Even where Title IX has been interpreted to protect gender identity, religious liberty laws and court rulings protect Catholic schools that are subject to Title IX from being forced to comply with gender identity regulations. However, Catholic schools should be aware that other private schools generally are following the practices of the public schools and complying with "gender identity" protections that grant transgender-identified students access to opposite-sex facilities and, often, opposite sex-athletic teams.

We would be remiss if we did not note that the religious liberty claim is strongest when the Catholic school ensures that all of its policies and practices are consistent with the teachings of the Catholic Church and openly conveys its intention to remain faithful to the teachings of the Magisterium.

What about clubs for LGBTQ-identified students or "gay-straight alliances"? May Catholic schools recognize these clubs? Is there Catholic alternative?

Not all groups or clubs that claim to support students who identify as lesbian, gay, bi-sexual, transgender, or queer ("LGBTQ") are faithful to the moral teachings of the Catholic Church. Catholic schools should not fund, support, permit, or grant official recognition to groups that: emphasize or encourage students to embrace an LGBTQ *identity* (rather than embracing their primary identity as a child of God); promote or support an unchaste lifestyle; view same-sex sexual relationships as analogous to or a form of marriage; encourage LGBTQ

activism in opposition to the teachings of the Church on marriage, human sexuality, and gender identity; affirm transgender gender nonconforming, gender creative, or bon-binary identities (or any other "identities" that reject an alignment with biological sex); or encourage students to "come out'; as LGBTQ. Ministry to students who experience same-sex attraction or gender confusion or are diagnosed with gender dysphoria, or to their families, should be carried out with charity and prudence, affirm God's unconditional love for the person, be faithful to Church teachings, show compassion, and help students integrate their self-understanding with the truth.

Almost all public high schools, many public middle schools, and many private schools sponsor "gay-straight alliances." These student-led, school-sponsored clubs meet on a regular basis to explore the challenges experienced by LGBTQ-identified students, to promote school-wide acceptance of LGBTQ identities to provide a "safe space" in which LGBTQ-identified students can discuss concerns related to their sexuality or gender identity, and to build friendships and "ally" relationships between LGBTQ-identified students and "straight" students. *Gay-straight alliances should not be permitted in Catholic schools because they erroneously promote students' acceptance and approval of LGBTQ identities and behaviors as healthy and moral.*

Catholic school administrators who are approached by students requesting to establish a "gay-straight alliance" or similar club for LGBTQ-identified individuals should recognize the opportunity to support and educate these students about the person, human sexuality, and faith. The appropriate response might be to

designate a chaplain or well-formed faculty member to meet with interested students on an indiv1dual or possibly a group basis, with an aim to foster the students' self-understanding, integrate the virtue of chastity, and help them embrace their primary identities as sons or daughters of God. A high school student group specifically for LGBTQ-identified students, even one that openly accepts Catholic teaching on sexual identity and chastity, may do more harm than good. Student and staff who are poorly catechized may perceive the group at the Catholic school as no different from the gay-straight alliances at public schools, which conveys the erroneous idea that these students should define themselves primarily by their sexual desires.

Courage is an apostolate intended to help Catholics who experience same-sex attraction find support and live a life of chastity in conformity with the teachings of the Catholic Church. A *Courage* chapter on a college campus can be a vital source of support for students who identify as LGBT. Courage chapters, however, do not allow minors to attend and do not establish high school chapters. The school can list the local Encourage chapter (a Courage-affiliated outreach that provides support for families of individuals with same-sex attraction or identity issues) among its resources for families.

May a Catholic school allow a same-sex couple to attend school dances as a couple?

No. *A Catholic school cannot validate a same-sex student "couple" without undermining its mission and identity.* Catholic schools limit school dance attendance in many ways, for many reasons. Prohibiting students from attending as a same-sex couple

is not "unjust discrimination" or exclusion but a commonsense rule that supports the school's mission and identity. Allowing same-sex couples to attend school dances as romantic partners sends the erroneous message that same-sex romantic relationships are "the same as" opposite-sex romantic relationships--it also normalizes those relationships, conveys approval or affirmation of those relationships, and undermines the school's ability to help students understand complementarity, which is at the foundation of marriage. School personnel should be aware of the "Love is Love" media campaigns and popular memes that saturate youth-oriented media, effectively teaching them that same-sex relationships are no different from male-female relationships. Some critics of Catholic school policies against same-sex couples argue that because chastity is expected of *every* student, it makes no sense to exclude same-sex couples, or to unfairly single them out as if they were presumed to be engaging in a sexual relationship. It is true that chastity is expected of every student, and that opposite-sex couples attending school dances might engage in immoral sexual activity. The issue with same-sex couples, however, cannot be reduced to a question of whether or not the pair agrees to be chaste. The *romantic relationship itself* is not *ordered* towards authentic sexuality, which is designed to be male-female in the context of marriage, and can never fulfill the God's design for romantic and sexual relationships. If students of the same sex who are "just friends" ask to attend the dance as a non-romantic couple (e.g. to take advantage of discounted ticket prices for couples), they should be instructed to purchase individual tickets. The school should be

consistent in limiting "couples only" activities to opposite-sex couples.

A related question that may arise is whether chaperones should allow persons of the same-sex to dance together at a dance. The answer depends on the context and intent. Women have danced with women, and men with men, throughout history in a variety of cultural contexts and traditions that are not morally problematic; these situations are not expressions of romantic or sexual interest or flirtations or a sign of same-sex coupling. Chaperones should be prepared to intervene in dance situations that involve persons of the same-sex behaving in flirtatious) romantic, or sexualized ways towards each other, just as they should be prepared to intervene if an opposite-sex couple engages in sexually provocative or intimate actions while dancing.

May a Catholic school enroll a child whose parent(s) or legal guardian(s) identify as gay or lesbian or who present themselves as part of a same-sex couple?

At times, a same-sex couple will approach a Catholic school seeking to enroll a child. In evaluating this request, the school must remain true to its mission of forming and educating all of its students in light of the teaching of the Catholic faith. In the wake of the Supreme Court decisions on marriage, same-sex couples approaching the school seeking to enroll a child may expect the Catholic school, like the general culture, to affirm their relationship (especially if they had a civil 'marriage' ceremony). The child or children in their household likely see the same-sex couple as a family like any other and two mommies or

two daddies as a normal parental relationship. Enrolling a child under these circumstances is likely to lead to intractable conflicts. *A Catholic school cannot treat a same-sex couple as a family equivalent to the natural family without compromising its mission and Catholic identity and causing confusion about the nature of marriage for all students enrolled.* If teachers and administrators were to treat a same-sex couple as if their relationship—and the situation of two mommies or two daddies— were no different from the mom and dad couples of other families, then it would not be surprising for other students to assume that same-sex couples *are* "just the same" as other couples and having two mommies or two daddies is *no* different from having a mother and a father.

Accordingly, the school should be attentive to situations that might cause confusion about the nature of marriage. In these situations, the school should seek guidance from the diocese, which can assist them in assessing the possibility of enrollment. For example, enrollment may be possible in a situation where one of the child's biological parents is living in a same-sex relationship, while the other biological parent is not and seeks a Catholic education for the child; enrollment also may be possible in the case of a single parent who has identified as lesbian or gay and seeks a Catholic education for his or her child. Under these circumstances, it is important for the school to have open and forthright conversations with the parent/guardian or couple to discern if enrollment is possible. The school needs to communicate clearly what the Church teaches about marriage and same-sex relationships, emphasize that the child would be receiving formation in light of those teachings, discuss expectations for the

parent/guardian/couple, and outline what accommodations the school may or may not be able to make.

If a child being raised by a same-sex couple is enrolled, the school must make every effort to ensure that the child is not bullied, or teased because of his or her family situation. The Catholic school has an important opportunity to convey the truth about human dignity and God's love by ensuring an atmosphere of respect and charity.

If a child of a same-sex couple is enrolled, the school should make clear that it can recognize a couple that is a mother and a father for the child, but cannot recognize "two mothers" or "two fathers" as a family structure. For purposes of registration, school directories, or other forms a same-sex couple should be instructed to list one mother (or one father). The other adult may be noted elsewhere as an additional emergency contact, but not listed as another parent. The school should seek a commitment from the couple that they will respect the identity and mission of school by avoiding public displays of affection at school functions and exercising discretion about their living situation. The school also should be clear that parents whose objective living situation contradicts the teachings of the faith might face some limitations on their involvement in the school.

The enrollment of a child being raised by a same-sex couple creates additional difficult issues. For example, schools are bound by federal privacy laws not to release a student's private information, such as family structure, to other families without permission. Situations such as a birthday party for the child of a same-sex couple or a class project on families may cause confusion for children who learn their classmate has two

"moms" or two "dads," and it may cause friction with other parents. Especially when their children are in younger grades, parents are likely to expect that other Catholic school parents share their moral views on marriage, or that they will be able to shield their children from certain situations. Parents may become upset with the school for not giving them prior notice of another student's living situation (thus preventing parents from addressing the situation ahead of time with their own child). Schools need to respond to all parents' concerns with understanding and without judgment.

What if a teacher or staff member at a Catholic school decides to transition?

As a condition of employment, schools should require teachers to sign statements agreeing that they will uphold Catholic moral teachings in word and deed. Schools must set expectations as well about social media, as postings that contradict Catholic teachings have the potential to undermine the school's mission and the employee's witness. An adult who decides to transition is acting contrary to the truth of Christian anthropology and thus is not suited to teach in a Catholic school or to carry out the school's mission in any capacity. His or her continued employment would cause significant confusion and give grave scandal to the school's students, and the rest of the Catholic community. Even so, the pastor, chaplain, or another member of the pastoral team should reach out to the person with kindness and compassion, while speaking the truth in love. If the person is willing, the pastoral team should strive to open a dialogue in hopes of assisting the person towards greater personal integration.

What if a teacher or staff member decides to go through a same-sex 'marriage' ceremony, or is openly living in a same-sex relationship?

In this situation, the teacher or staff member is openly engaging in behavior opposed to the teachings of the Catholic Church on marriage and human sexuality, and thus is unsuited for teaching or serving in the Catholic school. This situation should be covered by pre-employment agreements. Employees should be required to sign those agreements annually, thus acknowledging the expectation that they will uphold Catholic moral teachings in word and deed.

What if a teacher or staff member decides to become an LGBTQ ally or advocate?

The language of "ally" or "advocate" in this context has been co-opted to mean affirmation of an *identity* that is "LGBTQ" as well as support for gender ideology and the culture surrounding the LGBTQ movement. As a result, those terms should not be used in a Catholic school. If a staff member expresses a desire to become an ally or advocate, this presents an opportunity for a careful conversation about what those terms mean and the staff member's motivation. If the motivation is a desire to serve and emotionally support students who may be same-sex attracted or have gender dysphoria by helping them understand their feelings and experiences *in light of Catholic teaching,* then the school may be able to support this effort, depending on its proposed form. The ministry of Courage/Encourage is aligned with Church teaching and staff may be encouraged to draw on those resources as they discern a prudential outreach. Staff should be aware that secular

LGBTQ organizations and even some ostensibly Catholic organizations (such as Dignity, New Ways Ministry and Equally Blessed) actively oppose Church teaching regarding sexuality and marriage; secular or faith-based LGBTQ organizations that encourage people to be an "LGBTQ ally or advocate" actively encourage young people to embrace an identity based on sexual orientation or gender identity. Catholic school staff who intend to be allies or advocates along those lines are not aligned with the school's mission and identity, and a poor fit for teaching or serving in a Catholic school. The Catholic approach, in contrast, embraces one's identity as a son or daughter of God, with a given biological sex and sexual desires ordered to conjugal love. An authentic ally or advocate supports the Catholic approach.

Why does the Church still require its Catholic school employees to sign morality clauses, which govern aspects of an employee's private life?

Almost all employers ask their employees to abide by conditions of employment. The Catholic Church and Catholic schools often ask employees to sign pre-employment statements (or contracts that integrate these clauses) in which they acknowledge and agree to the Catholic institution's expectations that they will uphold Catholic moral teachings in word and deed. These are commonly known as "morality clauses." The Church and school are places of mission; employees' words and deeds that contradict or oppose Catholic teaching have the potential to undermine this mission. Pre-employment agreements are helpful in setting clear expectations, but they also provide an opportunity for evangelization. Agreements should include all situations that can be reasonably anticipated

where Catholic school employees, words or deeds have the potential to undermine the school's mission or objectively and gravely contradict the teachings of the Church. This includes social media postings, personal living situations, and the potential for serious private failings to become public.

Should schools be concerned about gender ideology making its way into textbooks or curriculum materials?

Yes. For example, Illinois, California and New Jersey state standards mandate that public schools teach LGBTQ history. The Illinois law, passed in 2019, requires schools to incorporate "the role and contributions of lesbian, gay, bisexual, and transgender people in the history of this country and this State" into textbooks and curriculum. Textbook companies have already begun incorporating this information into textbooks in order to be able to sell those texts in these large state markets. While state laws cannot require Catholic schools to teach LGBTQ history, textbooks provided by the state or sold independently to Catholic schools will include this content. In addition, the LGBTQ advocacy group GLSEN promotes "LGBTQ-inclusive" curricula (online, video, and other platforms) to schools in every state, with resources, books, and lesson plans for children as young as kindergarten. Teachers need to be cautioned against indiscriminate use of materials from secular educational websites, as these materials may undermine Christian anthropology and Catholic teachings. For example, materials from the Human Rights Campaign "Welcoming Schools" program, or materials from Southern Poverty Law Center's "Teaching Tolerance" website are not suitable for use in a Catholic school. In addition,

recently published young readers' biographies of famous people may include additional materials about the person's sexual orientation or gender identity. The LGBTQ community represents a number of historical figures as LGBTQ heroes, even though during the person's life little or nothing was public about the person's sexual orientation or identity. Catholic schools that use secular books, lesson plans, or supplementary materials should carefully screen those materials for content that promotes gender ideology—at every grade level, in every subject.

From: "Dollins, Very Rev. Randy" <Father.Dollins@archden.org>
Date: January 14, 2023 at 1:13:59 PM MST
To: All Priests <All_Priests@archden.org>
Subject: NOTICE: Direction for Parishes and Schools on "Universal (UPK) Pre-School Colorado"

Do not enter into any agreement with the state of Colorado for Universal Pre-School Colorado

A year ago, Governor Polis signed into law HB22-1295 which establishes that every child in the year before they are eligible for kindergarten is eligible for half-day (15 hours), state-funded, voluntary preschool beginning in the 2023-24 school year.

Families that meet additional qualifying factors are eligible to have an additional 15 hours funded top of the half-day programming. Three-year-olds with qualifying factors are eligible to have part-time (10 hours) preschool programming funded by the state.

Our Catholic preschools are eligible to become state approved Local Coordinating Organizations (LCOs) that can receive the funding to provide the preschool program service to families. To become state approved LCOs, preschool programs must register and sign a "UPK Program Service Agreement" with the state.

While this appears to be a great benefit for families and a great opportunity for access to funding for our Catholic preschool programs, in our review of the UPK statutes, with the help of our legal counsel, **we have found significant concerns with the following non-discrimination requirements:**

26. 5-4-205. Quality standards:

... b) A REQUIREMENT THAT EACH PRESCHOOL PROVIDER PROVIDE ELIGIBLE CHILDREN AN EQUAL OPPORTUNITY TO ENROLL AND RECEIVE PRESCHOOL SERVICES REGARDLESS OF RACE, ETHNICITY, RELIGIOUS AFFILIATION, SEXUAL ORIENTATION, GENDER IDENTITY, LACK OF HOUSING, INCOME LEVEL, OR DISABILITY, AS SUCH CHARACTERISTICS AND CIRCUMSTANCES APPLY TO THE CHILD OR THE CHILD'S FAMILY.

As you can see, there elements of the non-discrimination requirements that clearly run counter to Church teaching and the guidance we have provided to Catholic schools in the Archdiocese of Denver with respect to issues of sexual and gender identity. Unfortunately, **the statutes do not provide any type of exemption from the nondiscrimination requirement for religiously held beliefs.** The "UPK Program Service Agreement" contains this same non-discrimination language. If Catholic preschools were to participate at this time, the state would hold our programs in non-compliance for upholding Church teaching in our employment and admission practices and programs could incur penalties. Most notably though, participation at this time would be to cooperate with an ideology and agenda contrary to our beliefs on the human person, which would ultimately compromise the integrity of our Catholic schools' mission.

Therefore, due to the significant risk involved and until such a time as religious exemptions can be guaranteed by UPK, **parishes and their preschool**

programs are directed to not enter into any agreements with the state for UPK.

Brittany Vessely of the Colorado Catholic Conference is working with our Superintendent and school officials in the three dioceses of Colorado to identify a path to securing a religious exemption to the incongruous components of the nondiscrimination requirements. We ask you to pray for their efforts.

Again, at this time the direction is not a "no" into perpetuity, but simply a **"not yet"** until we can have the confidence that our parishes and schools will not be placed into a compromising situation that jeopardizes our Catholic mission.

We understand and recognize that parishes and schools may fear the loss of families who may choose to pursue a free or low-cost preschool education elsewhere as a result of this stance at this time. However, we trust that our families see the great benefit of a Catholic education, as many other families do when they elect to enroll their children in our schools over public schools. At the same time, our witness to truth and a proper human anthropology is necessary for the world to have. As such, let us not be afraid and trust that the Lord will bless our fidelity and that he will work for the good in this situation.

In Christ,
Fr. Dollins

Very Rev. R. Michael Dollins, V.G.
Vicar General
Archdiocese of Denver

* * *

* * *

Friday, February 17, 2023

Dear Governor Polis:

We write today as a statewide coalition of Colorado private schools, policy leaders, and scholarship-granting organizations to request that your office intervene in the implementation of Colorado's Universal Preschool Program (UPK) with regard to the participation of faith-based providers.

Our coalition greatly appreciates your office's support for private schools in Colorado through the GAENS Program in recent months. As organizations focused on serving Colorado children, we are also strongly supportive of UPK. Many of our schools are eager to serve as providers as the program rolls out statewide.

We believe that Colorado's young children will be best served by a broad, diverse selection of preschool providers, including faith-based private providers. Private providers are an important part of Colorado's early childhood ecosystem, and we hope to see them continue to serve these students under the new program.

However, we believe that certain requirements under UPK will severely restrict the ability of faith-based providers to participate in the program without compromising their sincerely held religious beliefs. Unfortunately, this determination means that many private providers have chosen not to participate in UPK at this time—thereby depriving Colorado parents of many high-quality ECE options. And because the program is closely intertwined with the Denver Preschool Program, some providers are also

having to reevaluate their longstanding participation in that program.

As you know, the UPK Program allows private schools—including faith-based private schools—to participate as preschool providers so long as they meet certain quality standards established in rule by the Colorado Department of Early Childhood. The governing statute mandates that those quality standards include a requirement that:

…EACH PRESCHOOL PROVIDER PROVIDE ELIGIBLE CHILDREN AN EQUAL OPPORTUNITY TO ENROLL AND RECEIVE PRESCHOOL SERVICES REGARDLESS OF RACE, ETHNICITY, RELIGIOUS AFFILIATION, SEXUAL ORIENTATION, GENDER IDENTITY, LACK OF HOUSING, INCOME LEVEL, OR DISABILITY, AS SUCH CHARACTERISTICS AND CIRCUMSTANCES APPLY TO THE CHILD OR THE CHILD'S FAMILY

Additionally, the law excludes "classes operated primarily for religious instruction," though it provides no specific definition or guidance on how that instruction is to be defined or identified.

These requirements go far beyond those found in federal law, and we believe some of them infringe upon the religious liberty of faith-based providers. These concerns have been raised by numerous schools with the Colorado Department of Early Childhood, and the department has discussed the possibility of exemptions for these providers in general terms. However, even as the program launches, we have received no clear guidance or information on if, how,

or under what circumstances such exemptions might be provided.

Our coalition believes strongly in the autonomy of Colorado private schools, including the religious freedoms established in the First Amendment of the United States Constitution and upheld by U.S. Supreme Court precedent in recent rulings.

In 2017, the U.S. Supreme Court unambiguously supported the religious liberty of schools in *Trinity Lutheran Church of Columbia, Inc. v Comer*, where the Court found that the exclusion of a faith-based preschool under a public benefit program was in violation of the First Amendment's Free Exercise Clause. In 2020, the Court further specified in *Espinoza v. Montana Department of Revenue* that programs providing educational options to parents may not discriminate against faith-based providers due to their status as religious organizations. And in 2022, the Court ended any remaining room for religious discrimination in such programs by clarifying in *Carson v. Makin* that states may not discriminate on the basis of either religious status or use of funds.

Due to these and other rulings, exemptions from similar requirements are routinely and automatically provided at the federal level. For instance, the U.S. Department of Agriculture announced in 2022 that religious schools would be provided automatic exemptions from broadened anti-discrimination rules under Title IX.

We believe that providing exemptions for faith-based religious providers from aspects of the UPK Program that those providers believe run counter to their

sincerely held beliefs will maintain the legal and constitutional integrity of the program while enhancing the number and variety of preschools from which Colorado parents can choose.

We respectfully request that your office and the Department of Early Childhood engage with key stakeholders on the issue of these exemptions as soon as possible. Our coalition is eager to collaborate with your office on this subject.

Thank you for your time and leadership.

Weston Kurz, Director
Colorado Association of Private Schools

Norton Rainey, Chief Executive Officer
ACE Scholarships

Deborah Hendrix, Executive Director
Parents Challenge

Mordechai Hoffman, Executive Director
Hillel Academy

Pam Benigno, Director
Independence Institute Education Policy Center

Dr. Sheila Whalen, Superintendent
Catholic Diocese of Colorado Springs

Elias Moo, Superintendent
Archdiocese of Denver

Rev. Paul Albers, Executive Director
Rocky Mountain District, Lutheran Church Missouri Synod

Philip Scott, Esq., Vice President for Legal Affairs
Association of Christian Schools International

Rabbi Yossi Kaplan, Director
Agudath Israel of Colorado

Brittany Vessely, Executive Director
Colorado Catholic Conference

Colorado Department of Early Childhood
February 28, 2023

Mr. Weston Kurz, Director, Colorado Association of Private Schools
Mr. Norton Rainey. Chief Executive Officer, ACE Scholarships
Ms. Deborah Hendrix, Executive Director, Parents Challenge
Mr. Mordechai Hoffman, Executive Director, Hillel Academy
Ms. Pam Benigno, Director, Independence Institute Education Policy Center
Or. Sheila Whalen, Superintendent, Catholic Diocese of Colorado Springs
Mr. Elias Moo, Superintendent, Archdiocese of Denver
Rev. Paul Albers, Executive Director, Rocky Mountain District, Lutheran Church Missouri Synod
Mr. Philip Scott, Esq., Vice President for Legal Affairs, Association of Christian Schools International
Rabbi Yossl Kaplan, Director, Agudath Israel of Colorado
Ms. Brittany Vessely, Executive Director, Colorado Catholic Conference

Re: Recent Communication

Dear Members of the Coalition:

Thank you for your letter, dated February 17, 2023, which was sent to Governor Jared Polis. We appreciate the time you have taken to provide us with your concerns about Universal Preschool (UPK) Colorado.

As you point out in your letter, state statute mandates that the Executive Director promulgate rules for quality standards for the UPK Program which must include: "[a] requirement that each preschool provider provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family." § 26.5-4-205(2)(b), C.R.S.

As Executive Director of the Colorado Department of Early Childhood (CDEC), I do not have the authority to create an exemption that excludes faith-based providers from the above statute. Additionally, an exemption would be inconsistent with statute and therefore void under the State Administrative Procedure Act. § 24-4-103(8)(a), C.R.S. Only the legislature has authority to make statutory changes.

While CDEC is aware of your concerns, faith-based providers can, and are encouraged to, participate in the UPK program. To that end, we created an interfaith working group, which meets weekly, to problem solve issues as they arise from within the faith-based community and facilitate participation.

Additionally, faith-based providers that participate in the UPK Program may give preference to members of their congregation. Unlike most other UPK providers, faith-based providers can reserve all or a portion of their seats for their members, and decline a match from a family that is not part of the congregation. However, no provider may

discriminate against children or families in violation of state statute.

Finally, you noted that "because the program is closely intertwined with the Denver Preschool Program, some providers are also having to reevaluate their longstanding participation in that program." Provider agreements for the Denver Preschool Program also require that "Provider shall not discriminate against any person on the basis of race, color, religion, national origin, gender, age (except as to the age of children qualifying for Tuition Credits), military status, sexual orientation, gender variance, marital status, or physical or mental disability (except as such disability may materially and adversely impact proper administration of the preschool program)."

I hope this helps you to understand CDEC's authority and current efforts to include faith-based providers in the UPK Program. Please feel free to reach out if you have additional questions.

Sincerely,

/s/ Lisa R. Roy, Ed.D.
Dr. Lisa Roy
Executive Director

Universal Preschool (UPK) Colorado
Program Service Agreement

This Universal Preschool (UPK) Colorado Program Service Agreement (Agreement) is entered into by and between the Colorado Department of Early Childhood (CDEC) and _____ (Provider), located at _____.

The Agreement Includes Exhibit A - Universal Preschool (UPK) Colorado Program Service Agreement Terms and Conditions, and Exhibit 8 - HIPAA Business Associate Agreement, hyperlinked below. The term (Term) of the Agreement, as defined in Section 2 of Exhibit A, begins July 1, 2023 (Effective Date) and ends June 30, 2024 (Expiration Date.).

Provider agrees to provide preschool services in conjunction with UPK Colorado, a program financed and governed by CDEC, during the 2023-2024 school year. Provider agrees to provide these services in compliance with Part 2 of the Colorado Universal Preschool Program Act, §26.5-4-201, C.R.S., et seq., and regulations promulgated at 8 C.C.R. 1404-1 ("Universal Preschool Program").

Provider agrees to provide each student eligible for UPK Colorado with a minimum of part-time, tuition-free, high-quality preschool programming per school year. Provider may provide eligible students with additional hours up to and including full-day preschool services. These services must adhere to Provider's licensed ratio. Provider agrees to serve eligible children during the 2023-2024 school year. Provider shall comply with all requirements of UPK Colorado, including, without limitation, the following:

Program Requirements

- Provider must be licensed by CDEC to deliver preschool program services to eligible children. Provider will adhere to the requirements of its license at all times.
- Provider must have eligible children enrolled in its preschool program to qualify as a participating Provider.
- Provider must agree to guarantee families at least the minimum number of hours defined in 8 C.C.R. 1404-1 for the rate that is provided.
- Provider will deliver a preschool program for eligible children in substantially the same form as advertised to parents, including but not limited to physical location and facilities, staff and hours. Any substantial program change must be approved in writing by CDEC.
- Provider agrees that its director(s) or delegate(s) will participate in meetings conducted by CDEC to review policies and procedures, or other matters of importance to UPK Colorado. CDEC will work with Provider to ensure that attendance at meetings does not disrupt UPK Colorado or other preschool or child care programs offered by Provider.
- Provider is encouraged to offer CDEC feedback on how CDEC and Local Coordinating Organizations (LCOs) can better support UPK Colorado.
- Provider understands that the allocation of slots may be amended on a quarterly basis in conjunction with Provider payments if the

number of awarded slots is not filled or if a greater number of slots is needed, provided funds are available.

Attendance and Reimbursement

- Provider will ensure that accurate enrollment and attendance records are kept for each child.
- Provider agrees to post preschool tuition costs on the Provider's page in the Universal Preschool Colorado Application Portal (Application Portal).
- Provider shall not charge a family participating in UPK Colorado tuition that exceeds the amount that is charged to families of preschool-aged children that do not participate in UPK Colorado.
- Provider must ensure that funding from UPK Colorado does not supplant funding from other sources used to support other services provided by Provider.
- Provider agrees to adhere to all deadlines and submit documents as required by CDEC. Attendance records, annual calendars, bell schedules, hours of operation, tuition schedules, and detailed expense reports, must be retained for verification and payment authorization, and must be provided to CDEC upon request.
- Should a student cease enrollment or otherwise withdraw, Provider must notify the LCO within the same week of such withdrawal through the Application Portal.
- CDEC will pay Provider in accordance with the adopted provider rate on a per-slot quarterly

(August-May) basis for students that applied and were approved through the Application Portal. CDEC may make adjustments quarterly to ensure provider capacity and family access across the State.

- Provider will ensure that individual children are not counted or claimed for reimbursement for full-day care by more than one funding source.

Quality Assurance

- Provider agrees to adhere to the quality standards identified in §26.5-4-205, C.R.S.,, which will be developed with UPK Colorado providers and adopted into CDEC's rules prior to the 2023-2024 launch of UPK Colorado. At a minimum, quality standards must include:
    - Child care licensing requirements with which preschool providers are required to comply.
    - Quality standards relating to health and safety as a condition of participating in UPK Colorado.
    - Minimum numbers of contact hours of instructional services established in rule for universal preschool services, which must not be less than 360 hours per school year.
    - Requirement that each preschool provider provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income

level, or disability, as such characteristics and circumstances apply to the child or the child's family.

- Maximum allowable educator-to-child ratios and group sizes.
- Qualifications for preschool teachers, which must not require preschool teachers to be licensed and must allow preschool providers to employ a non-licensed preschool teacher as long as the teacher meets other qualifications established by CDEC rules.
- Standards for preschool services that, at a minimum, are aligned with the Colorado early learning and development guidelines across all early childhood domains approved by the Early Childhood Leadership Commission and with the Colorado Academic Standards adopted by the State Board of Education.
- Limitations on the use of, and required procedures for, out-of-school suspensions and expulsions.
- Standards for family and community engagement to ensure that the preschool providers engage with parents and neighborhood leaders in a formal and meaningful way, including seeking input for policy and programming decisions.
- Requirements for serving children who are dual-language learners.
- Requirements for offering voluntary vision, hearing, dental, and health screenings, and,

upon parent request, referrals to appropriate health providers for children who are enrolled by a preschool provider.

Curriculum and Assessment

- Provider agrees that all educational services performed will meet or exceed the requirements of UPK Colorado.
- Provider is encouraged to participate as a partner in the effort to define a "high quality" UPK learning environment including instructional approach, curriculum and assessment tools, and use expectations. At a minimum Provider must:
    - Participate in developing instructional standards
        - Contribute to a resource library of aligned evidence based resources
        - Participate in aligned pilot programs
        - Complete survey requests
        - Join work groups

Data Management

- Provider agrees to submit any additional information and/or documentation requested by CDEC related to Provider's participation in UPK Colorado.
- Provider agrees to report data in the Application Portal on at least a monthly basis, detailing UPK Colorado enrollment and open slot capacity. Provider agrees to report data for

the previous month by the 15th day of the next month.

Provider Rights

If Provider contends that CDEC or its payment vendor has not made adequate payment based on program rules for care provided, Provider has the right to an informal conference with CDEC.

- Provider may request a conference in writing within 10 Business Days, as defined in Section 3 of Exhibit A, of the date Provider was to receive the disputed payment.
- Provider request should be addressed to CDEC Director of the Division of Universal Preschool.
- Provider may request that CDEC staff participate in the conference. That participation may be by telephone conference.
- The conference shall be held within 10 Business Days of the date that the written request is received by CDEC.
- The purpose of the conference will be limited to discussion of the payments in dispute and the relevant rules regarding payment.
- The final decision of CDEC shall be mailed to Provider within 15 Business Days of the conference date.

CDEC Responsibilities

- CDEC will, through a payment vendor, reimburse Provider for authorized, attended, and properly recorded preschool participation. Payments to Provider will be based on rates set by rule at 8 CCR 1404-1.

- CDEC will, through the Application Portal, determine a family's eligibility for universal preschool services within 20 Business Days of receiving a complete application packet pending verification.
- CDEC will provide an informal conference within 10 Business Days of Provider's written request, to discuss the basis for any denial or termination of this Agreement or to discuss any payment dispute(s).
- CDEC will pay Provider based on the information regarding the number of students that applied and were approved through the Application Portal. Provider will be paid beginning in August of each school year based upon the number of slots allocated to Provider. Subsequent payments will be made based upon actual enrollment in November, February, and May of the school year.

Termination

- Either CDEC or Provider may terminate this Agreement with 20 Business Days' written notice to the other Party.

* * *

Authorized Signatures

CDEC Designee _____

Date _____

Print Name/Title of CDEC Designee _____

Provider Legal Name _____

Authorized Representative _____

Date _____

Print Name/Title of Authorized Representative

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-02079-JLK

ST. MARY CATHOLIC PARISH IN LITTLETON; ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD; LISA SHELEY; DANIEL SHELEY; and THE ARCHDIOCESE OF DENVER,

Plaintiffs,

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood; and DAWN ODEAN, in her official capacity as Director of Colorado's Universal Preschool Program,

Defendants.

DECLARATION OF DAWN ODEAN

I, Dawn Odean, pursuant to 28 U.S.C. § 1746, do depose and state as follows:

1. I am over 18 years of age. I am a citizen of the United States and resident of the State of Colorado. I am competent to make this declaration under oath, and make this declaration based on my personal knowledge.

2. I am the Director of the Universal Preschool Program (the "UPK program") for the Colorado Department of Early Childhood. I assumed my

position as Director of the Program on August 15, 2022.

Background of the UPK program

3. Since 1988, Colorado has steadily increased its investment in high-quality preschool programming. In 1988, Colorado established the Colorado Preschool Program, which focused on serving Colorado's most in-need families. Nevertheless, in 2019-2020, the Colorado Preschool Program was able to serve only approximately 25 percent of Colorado's four-year-old children.

4. In the 2020 general election, Colorado voters overwhelmingly approved proposition EE, establishing a dedicated source of funding for statewide, voluntary, universal preschool.

5. All the prior responsibilities of the Department of Human Services for administering early childhood programs and services, including the preschool UPK program, were transferred to the Colorado Department of Early Childhood (the "Department") on July 1, 2022. Families of children in the year before they are eligible for kindergarten, and qualifying three-year-olds, can apply for the UPK program. Every child is eligible for up to a half-day (15 hours) of state-funded, voluntary preschool each week the year before they are eligible for kindergarten. The Department was charged with identifying and recruiting preschool providers throughout the state to participate in the UPK program. The Department's mission for the UPK program is to provide early childhood opportunities for all children in Colorado and prioritize the equitable delivery of resources. The UPK program is statutorily required to provide a

"mixed delivery system" of preschools which includes public, private, and parochial schools. The UPK program allows families to choose the right setting for their child, whether it is in a licensed community-based, school-based, or homebased preschool environment.

6. The Department has actively reached out to public, private, and parochial preschools and engaged them in discussions regarding the UPK program. Colorado welcomes preschool providers of all types to participate in the UPK program—religious, secular, or otherwise.

7. The Department convened a faith-based work group which met on a bi-weekly basis from December 20, 2022, through June 13, 2023. The purpose of the group was to ensure the Department was inclusive of faith-based providers. A representative of St. Mary Catholic School in Littleton, one of the Plaintiffs here, participated regularly in the work group and frequently conveyed what she asserted were the views of the Denver Archdiocese.

8. One product of this bi-weekly dialogue with faith-based providers is the ability of faith-based providers to give a preference to members of their own congregations. Faithbased providers participating in the UPK program may give preference to members of their congregation by reserving all or a portion of their preschool seats for their congregation members, and may decline a match from a family that is not part of their congregation. Through its ongoing rulemaking process, described in more detail below, the Department is currently evaluating how broadly or narrowly to define "congregation" for this purpose.

9. After the Department had providers enrolled in the UPK program, it started the process of matching families to those providers. Before a family is matched with a provider, the family chooses up to five providers and ranks them from one to five. The Department will only match children with one of the family's choices. If none of the family's choices are available, the family will have the opportunity to select additional providers for their child. Ultimately, families must accept a match before their children can be enrolled with a provider. Of the children matched to providers, 94% of families received one of their top 2 choices and 82% of families received their top choice. As of September 2023, over 38,000 children and roughly 1,900 preschool providers are participating in the UPK program mixed delivery system.

10. Currently, there are 40 faith-based providers participating in the UPK program and 904 children have been matched to faith-based providers.

Quality Standards Required by Law

11. Colorado law requires the Department to develop and establish in rule the Quality Assurance Standards that each preschool provider must meet to receive program funding. Colo. Rev. Stat. § 26.5-4-205(1)(a). These standards must reflect national and community informed best practices, and the Department must work with families, educators, and program administrators to review and revise them as necessary.

12. By statute, the Quality Assurance Standards must also include a requirement that each participating preschool provide eligible children with an equal opportunity to enroll and receive preschool

services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family. Colo. Rev. Stat. § 26.5-4-205(2)(b). To implement this antidiscrimination provision, participating preschool providers must enter into a Program Service Agreements (the "Agreement") with the Department in which they agree not to discriminate on the basis of the protected classes identified in section 26.5-4-205(2)(b).

13. The UPK program is at the early stages of its rulemaking as it relates to Quality Assurance Standards. On September 11, 2023, the Department held a public stakeholder webinar to discuss the Quality Standards. The Department accepted stakeholders' written comments, suggested questions for inclusion in the Department's FAQs, and suggested changes to the Quality Standards up through September 22, 2023. The Department will review and consider all submitted feedback before drafting proposed rules for the Quality Standards.

14. Anyone, including all child care providers, are welcome to participate in that process as a stakeholder. The proposed rules will be reviewed by the Department's Rules Advisory Council[1] early next year. Once the Quality Assurance Standards are adopted in rule, they will not become effective until the 2024-2025 school year. The prior rules adopted by the Department of Human Services continue in effect and apply until the Department promulgates Quality

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[1] *See* Colo. Rev. Stat. § 26.5-1-105(2)(a) and (j)(2023).

Assurance Standards in rule. Colo. Rev. Stat. § 26.5-1-106(1)(c). All rules promulgated by the Department must increase equity in access to programs and services. Colo. Rev. Stat. § 26.5-1-105(1)(a)(III).

15. As indicated, through its ongoing rulemaking process, the Department is currently evaluating how broadly or narrowly to define "congregation." As discussed, faith-based providers participating in the UPK program may give preference to members of their congregation by reserving all or a portion of their preschool seat for their congregation members.

16. The Department interprets and applies Contractual Provision 18(B) in the Agreement—which Plaintiffs call the "Catch-all" provision—to permit religious organizations to hire co-religionists in accordance with federal law and to protect religious organizations' employment decisions about their ministerial employees in accordance with federal law. The Department disavows enforcement of Contractual Provision 18(B) against religious providers who hire co-religionists in accordance with federal law, and against religious providers' employment decisions involving their ministerial employees as protected by federal law.

17. The Department has not sanctioned or disciplined any faith-based preschool provider in the UPK program, nor has it filed any action to enforce any terms in the Agreement against a provider. The Department is the only entity with authority over the UPK program and the only entity with the ability to enforce compliance with the Agreement.

18. The two Plaintiff schools here—St. Mary Catholic Preschool and Wellspring Catholic Academy

of St. Bernadette Catholic School—are not currently participating in the UPK program and have not signed the Agreement.

19. I am aware from my work with the Department, including its convening of the faith-based work group, that other faith-based providers strongly disagree with Plaintiffs' decisions not to participate in the UPK program based upon their desire to reserve the ability to discriminate against LGBTQ families and children.

Colorado's regulation of childcare facilities

20. In addition to the Department's oversight of UPK program providers, licensed child care providers, including preschools, are subject to licensing requirements that long predate the UPK program. *See* 12 C.C.R. 2509-8. The state often receives complaints regarding licensed child care facilities from concerned parents, guardians, community and family members. The complaints run the gamut, from allegations of child abuse or neglect to child care staff not having proper certifications or qualifications. The Department has access to the records of any and all complaints made against any licensed childcare facility for as long as the facility has had a child care license.

21. Thirty-five schools affiliated with the Denver Archdiocese, including the two Plaintiff schools in this case, hold child care licenses. Some have a history of complaints, with the oldest complaint dating to 1992 involving alleged harsh treatment of a child. None of the 35 schools, however, has any history of a complaint from an LGBTQ family or other person alleging LGBTQ-based discrimination.

22. Wellspring Catholic Academy of St. Bernadette Catholic School has been licensed as child care facility since 2007. The state has no records of complaints of any kind against it during that time.

23. St. Mary Catholic Preschool has been a licensed child care facility since 2006 and has two complaints against it during that time: (i) for dispensing the wrong medication to a child in 2017, and (ii) for failing to report an injury in 2009.

24. Neither of the Plaintiff schools has any history of a complaint from an LGBTQ family or other person for LGBTQ-based discrimination.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of October 2023.

/s/ Dawn Odean
Dawn Odean

Bench Trial Transcript Excerpts
January 2, 2024
St. Mary Catholic Parish in Littleton, et al. v. Lisa Roy, et al., Case No. 23-cv-2079-JLK

Direct Examination of Abriana Chilelli

* * *

[Page 42-55]

Q. (By Mr. Davis) All right. So, we've been discussing the Archdiocese's oversight of Catholic Schools on matters of faith and morals. Specifically with respect to faith and morals, how does the Archdiocese exercise that oversight?

A. Sure. In a few different ways. The faith and morals of the Catholic faiths are threaded throughout our policy manual. So, in that way, by requiring our schools to operate within the Archdiocesan policy for the operation of their schools. We also have language regarding faith and morals in guidances that we issue to our schools that we ask them to follow. We also have language related to faith and morals in work agreements or teacher contracts, for teaching faculty and nonteaching faculty. And then we also communicate the expectations regarding faith and morals through documents such as we call it a statement of community beliefs, which is a document that provides abundant clarity on what we believe in the Catholic school.

Q. Okay. Does the Archdiocese also issue curriculum guidelines to its schools?

A. Yes, we do.

Q. If you wouldn't mind tabbing or turning to the document that's tabbed as Exhibit 9.

A. Okay.

Q. And do you recognize this document, Ms. Chilelli?

A. Yes. This is our early childhood curriculum guidelines that we issue from the Archdiocese.

Q. Okay. And are all Archdiocesan preschools expected to follow these guidelines?

A. Yes. Per the administrators' manual, it's required that schools are required to follow those curriculum guidelines. And then like I was mentioning before, in our teacher work agreements or contracts, teachers are also required to teach the curriculum guidelines.

Q. And if you could flip to page 25, the bolded page 25 in the bottom right.

A. Okay.

Q. Does the curriculum guidance require Archdiocesan preschools to include religious instruction in their curriculum?

A. Yes. Every preschool is required to teach religious instruction, which means that every teacher is required to teach religious instruction as a separate block of time during the day, but also threaded throughout the entirety of the other disciplines in preschool: reading, math, science, et cetera.

Q. Okay. And so at the preschool level, it's the main teacher that's doing the religious instruction as well; is that right?

A. Yes. It's the main teacher.

Q. Thank you. If we could turn back to the exhibit that's tabbed as Exhibit 2.

A. Okay.

Q. You mentioned the statement of community beliefs earlier. Is this the statement of community beliefs that you were referring to?

A. Yes. This is our statement of community beliefs, and we have versions for multiple roles of employees in the schools: teachers, leaders, nonteaching faculty, support staff, et cetera.

Q. Okay. And just to spell that out, it looks like the version that begins on the bolded page one, is that the one for principals?

A. Yes. This is for presidents, so some of our schools have a president-principal model. This one is for principals, and then assistant principals as well

Q. Okay. Great. And then on the bolded page three, that's the one for teachers?

A. Yes.

Q. Bolded page five, that's for other staff?

A. Yes. Any other staff in the school is required to sign this.

Q. Okay. And then the bolded page seven, that's for parents to enroll at the school?

A. Yes. So, parents at the time of enrollment are asked to sign this document so that it's abundantly clear what the Catholic school will teach and what the Catholic school community believes.

Q. Okay. And you're familiar with this document through your role at the Office of Catholic Schools?

A. Yes, I am.

Q. Did you help prepare this document?

A. I did.

Q. So, does the statement of community beliefs, does it address the behavior of school employees?

A. Yes. So, it communicates the church's beliefs, and then it delineates the expectations for teaching staff, faculty staff, that our faculty and staff, including teachers, that they would live in such a way that would promote the church's teachings. We ask them to unabashedly defend the church's teachings, and at a minimum, we ask them to provide a simply supportive attitude, and at the bare minimum to never live in a manner contrary to church teaching that would cause confusion about the reputation of the school and what it teaches.

Q. Okay. And are there any other documents besides this one that address the behavior of school employees within the Archdiocese?

A. Yes. A few. So, language from our statement of community beliefs is also threaded within our teacher contracts, specifically the terms and conditions of the teacher contract, especially related to behavior or expectations. So, in our teacher contracts, and then all of our Archdiocesan employees, including those who teach in schools or work at schools are required to sign the Archdiocesan code of conduct, which also delineates expectations regarding behavior of employees.

Q. Great. And just briefly, if you could turn to the document that's tabbed as Exhibit 4. Is this the code of conduct that you were just referring to, whenever you get there?

A. Yes. This is the Archdiocesan code of conduct.

Q. Okay. So, this is a document issued by the Archdiocese?

A. Yes.

Q. And you're familiar with it because Archdiocesan employees are also subject to this code of conduct?

A. Yes. Anyone who works in the Archdiocese of Denver must sign this and agree by it.

Q. Great. If you could turn to the document that's tabbed as Exhibit 6. Is this the terms and conditions that cross reference that statement of community beliefs that you were testifying about a moment ago?

A. Yes. Exhibit 6 is the parish school teacher and formator contract terms and conditions.

Q. And these terms and conditions are issued by the Archdiocese?

A. Yes. They're issued out of our office on behalf of the Archbishop, and they're required for use in all of our parish or regional schools.

Q. And who is required -- who in particular is required to sign this version?

A. Any full-time teacher or any full-time teacher support staff.

Q. Does this contract and then the statement of community beliefs that's incorporated into it, do they require employees to conduct themselves consistently,

specifically with Catholic doctrine on human sexuality?

A. Yes. So, the expectations for behavior regarding any manner of exemplifying characteristics of Catholic living, and then refraining from any public position that would – or conducting oneself in a manner that's contrary to the teachings of the church, including human sexuality.

Q. Thank you, Ms. Chilelli. And if you could just briefly set out what the church's teachings on human sexuality are, just because it might be relevant to what comes up later.

A. Sure. The teachings of the church and the beliefs that we ask our employees to hold are that human beings were created by a loving creator, God, who creates the human person at the time of conception, and in their mother's womb, and that the human person is endowed, created, not only with a soul, but with a body, and that the body-soul unity is the makeup of the human person.

And so we believe and teach in our Catholic Schools that in order to find happiness or human flourishing, that means to find a life lived in friendship with Jesus Christ, and so because of our understanding of human flourishing, the truths of the body are taken very seriously. We believe strongly, then, that the body is of utmost good and importance, and that the body communicates not only that purpose, but our identity as well.

And so being a biological man or a woman is of great importance and reverence. And so in that way, we take the body as good, and an important contributor to human flourishing. And so because of

that, the church has a particular understanding of marriage as being between a man and a woman, given the biological realities of the body, and the way that the body is ordered towards unity with one another and the procreation of children, who we believe are owed the identity of being beloved sons or daughters created with -- between the love of a man and a woman in a marriage.

Q. Okay. And where do these beliefs come from?

A. Jesus Christ. But they come from the church's tradition, millennia of church teaching, tradition, sacred scripture, the Catechism of the Catholic Church. These have been the consistent beliefs of the church throughout time. Locally they come from -- locally they come from the Archbishop's own teaching authority on these particular topics.

Q. Great. Has the Archdiocese itself issued any sort of teaching documents on this issue?

A. Yes. Multiple ways. Specifically for our schools, we produced and promulgated through the Archbishop a document called The Splendor of the Human Person, which helps give articulation for the church's teaching on human sexuality.

Q. Great. If you could just briefly turn to the document tabbed as Exhibit 7. Is that the teaching document that you were just mentioning from the Archdiocese?

A. Yes. This is the document that we issued from our office for our schools in 2021.

Q. Great. If you could turn next to the document tabbed as Exhibit 5. Do you recognize this document, Ms. Chilelli?

A. Yes. This is a document that we issued to our schools as a guidance document for any issues concerning the human person and sexual identity.

Q. Okay. And the "we" there, that's the Office of Catholic Schools?

A. Yes. On behalf of the Archbishop.

Q. And you're familiar with it through your role at the Office of Catholic Schools?

A. Yes, I am.

Q. What year was this guidance issued? Do you know?

A. This was issued in 2019.

Q. All right. And did this guidance reflect some new position of the Archdiocese, or was it consistent with what the Archdiocese had already taught?

A. Yes. This was completely consistent with what the church has always taught related to the human person and sexual identity. This document specifically was issued in 2019 when there were beginning to be a number of sort of conflicting understandings of the human person in modern or secular society, and many of our school leaders needed assistance and help from the Archbishop with a few things, terminology related to biological sex, gender, sexual identity.

The guidance also goes through certain situations that may come up in the Catholic school, especially in our postmodern secular society, and then it gives specific directives for issues related to human sexuality that may come up in the life of the school.

Q. Great. Was the guidance -- was it issued to all Archdiocesan Catholic schools?

A. Yes. Every Archdiocesan Catholic school, including our preschools.

Q. Great. And you mentioned it gave guidance on certain situations that could come up in Catholic schools. Let's just talk through a couple of those situations.

A. Sure.

Q. So, first, are there any -- is there any guidance here about a situation in which a family is seeking enrollment at an Archdiocesan school but isn't living in a manner consistent with the church's teachings on sexuality?

A. And you mean the parents are not living in a manner?

Q. Correct. Yes.

A. Yes. There is guidance. The guidance speaks specifically regarding enrollment. And as mentioned earlier, the guidance communicates to the school to have an enrollment process that makes it abundantly clear to any family seeking to enroll what the church teaches on human sexuality. And so in that way, the document communicates that if a family is presenting themselves as living in a sexual relationship between one another, that's outside of how the church would understand human sexuality, but the principle would be abundantly clear that the church will teach the church's teachings on faith and morals regarding human sexuality, explain to the parents that this may cause confusion for the child, that this would be difficult for the child to hear from the school, especially if that's not what they hear from their parents.

And so in that way, because the school's mission is to serve the parents in their education of their children, we would never want to conflict -- cause conflict with what the parents are teaching in their home, and so the guidance does communicate to our school leaders that students in that circumstance with parents of -- in a same-sex couple, that guidance would not be possible given the confusion it would create for the child and the family.

Q. Okay. The guidance would not be possible?

A. I'm sorry. Enrollment would not be possible.

Q. Thank you, Ms. Chilelli. If you could turn to bolded page 14 of this document. Just to confirm, is this the guidance in the document that relates to the testimony you just gave?

A. Yes. So, the question here at the bottom of the page refers to the testimony I just gave.

Q. Thank you. What about for the church's teachings on sexual identity? Are there any guidelines in this document for how to handle situations where a family might seek enrollment of a child who asserts a gender identity at odds with the child's biological sex?

A. And you're referring to at the time of enrollment?

Q. Correct.

A. Sure. So, at the time of enrollment, there are guidance there is guidance in this document that communicates, for similar reasons that I just explained regarding children of a same-sex couple, for parents desiring to enroll a child who they're presenting with an identity as contrary or different than the child's biological sex.

We -- the guidance is that a school leader ought to explain to the family that we will teach the reverence of the body, the good of the body's biological reality, and that in that way, if the parents are teaching the child something contrary to that notion, that identity could be separate from biology. If parents are teaching that, then there is a conflict with what we will teach in our schools, and so in that way out of abundant respect for the parents and the child himself, we ask the school leaders to be abundantly clear about what will be taught. If the family doesn't see eye to eye on that, we ask our school leaders to please not admit the child out of abundant respect for the family.

Q. Okay. And flipping over to the bolded page six, is this the part of the guidance that speaks to the situation you were just addressing?

A. I'm sorry. What was the page?

Q. Page six. Maybe start with page five. Page five and six?

A. Yes.

Q. Thank you, Ms. Chilelli. And then just one more situation. Does this document include any guidelines on how to handle a situation in which a student is enrolled in a school but begins asserting an identity that's at odds with his or her biological sex?

A. Yes. It includes guidance for that particular situation.

Q. And what is that guidance?

A. Sure. The guidance is that assuming and hoping for a relationship with the parents to share with the parents the church's teaching on identity as being inextricably linked with biology, observable reality,

and so in that way, the school leader is asked to share with the family how we understand biological sex.

And because of that, out of abundant respect for the good of the child's body and their identity that's linked with that, we ask our school leaders to explain that we would not be able to make accommodations that we might see in secular institutions, but those kinds of accommodations wouldn't be able to be made. And so in communication and conversation with the parents, we specifically say in the guidance, reference to a few different accommodations that we could not honor or provide in the Catholic school.

For example, we can't use pronouns -- we wouldn't be able to use pronouns inconsistent with the child's biological sex. We wouldn't be able to allow things like bathroom use for use of a bathroom inconsistent with a child's biological sex. We also wouldn't be able to perhaps allow a child guidance allow a child to wear a uniform that may be inconsistent with their biological sex.

And so after explaining those conditions to the parents, if the parents decide that they would like those accommodations or they would like their child's identity that they're sharing with us to be affirmed, we explain that maintaining the relationship with the family with the child's enrollment would not be possible. The school wouldn't be able to fulfill their mission to support parents in their education of their children.

Q. Okay. And are the Archdiocese preschools expected to follow this guidance?

A. Yes. Every preschool is expected to follow this guidance.

Q. Great. Thank you, Ms. Chilelli.

A. Sure.

Q. Is there any other way besides the ones we've just been discussing that a preschool's enrollment policies are tailored to its Catholic faith?

A. Sure. So, at the time of enrollment, many of our schools are excellent, and so they often find themselves with waitlists. And so because our faith teaches that Catholic parents have a duty to educate their children, be that in the home or in a Catholic school, Catholic parents have a duty to provide a Catholic education for their children. So, because of that, we prioritize Catholic families who desire the mission of Catholic Schools, especially in situations with a waitlist.

Q. And how does the Archdiocese view the relationship between parents and its schools?

A. Yeah. To use the term again, sort of inextricably linked. And the mission of the Catholic school as taught through the church only exists to serve the family, to serve the parents in their duties as primary educators or principal educators of their children. And so in that way our schools only exist to serve parents, and that's why the relationship with the school and the parents is so critically important.

We actually -- we can't fulfill our mission without that partnership or that understanding of parents, understanding the mission of our schools and desiring it. Desiring to teach it within their family, to promote it, to defend it, and have their children formed in what we call a Catholic worldview.

Bench Trial Transcript Excerpts
January 3, 2024
St. Mary Catholic Parish in Littleton, et al. v. Lisa Roy, et al., Case No. 23-cv-2079-JLK

Direct Examination of Dawn Odean

* * *

[Page 196-198]

Q. Okay. Now, going back to Roman numeral IV, how has the department taken efforts to ensure both availability of preschool services and maintain the quality of preschool providers?

A. So, the availability really is through our approach in mixed delivery, to be as inclusive as possible, so that families have choice in where they might enroll their child. So, to ensure availability, we've worked really hard to hear from providers around the state to encourage them to participate, to be a thought partner and work through why or why they may not participate so that we have opportunities for families to have that access.

The quality component comes in once the children are in program and in the classroom where we're really being thoughtful about, again, continuing that equitable access to learning in a safe and healthy environment.

Q. And what -- why do those two factors go hand in hand?

A. Well, they really go hand in hand. We certainly know that this opportunity of Universal Preschool provides access that many families haven't had yet.

And so really the statute has told us to ensure that families have choice through this mixed-delivery model, and that families have confidence that those are safe and healthy environments, and that they're in place not only for supervision, but so that their child can grow and begin a positive journey for learning.

Q. And so I want to move on to subsection two of 26.5-4-205, and ask you about the antidiscrimination provision that's at issue in this case. Why was this provision, subsection (2)(b), included in the quality standards component of the statute?

A. My understanding of why it was included in the statute is to ensure that children who historically have been discriminated against aren't. So, going through as a provider through the participating in the bill writing, it was my understanding that it was critical for this to be in place to ensure that by creating a universal program, we weren't inadvertently putting children in a place where they weren't able to continue the gains that were made through the previous program, but also be thoughtful about not putting children in an unsafe or unhealthy environment as well.

So, to be really intentional about children having that environment so that they can grow to their maximum ability, and that we're collectively working toward that as a community in the state of Colorado.

Q. And does this provision apply to both children and families?

A. It does.

Q. And why is that?

A. Part of a child feeling safe and being safe and healthy is also that their family feels safe and healthy and that they feel a part of their family. And we certainly want them and their family to feel a part of the community and the learning environment that they're in.

Q. And you've said "safe environment" a bunch of times. What is a safe environment?

A. I think the way I understand it is -- and the way that we're interpreting it for the program is that when a child is in the preschool setting, they feel safe so that they aren't worried about being unsafe. They feel welcome so that they aren't concerned about being unwelcome. And in that way, they can access learning engagement with their peers, engagement with their educators in a way that maximizes their growth and development.

* * *

[Page 207-230]

Q. And so you heard some references yesterday to a temporary waiver in statute, and I want to direct your attention to that provision now. And I'm referring to subsection (1)(b), Roman numeral II, of the statute. Are you familiar with this provision?

A. I am. This is the provision that aligns with what I was referring to as far as the phased process of implementation of the quality standards. So, we certainly recognize that the practices and approaches may take time to develop, and we want to support providers in that development.

Q. And in looking at that provision, subsection (1)(b), Roman numeral II, it says, if necessary to ensure the

availability of a mixed delivery system. What does that mean?

A. So, that's really honoring the uniqueness that each provider might bring. So, mixed delivery is in-home family child care settings, is small centers, large centers, Head Start programs, school-district-based programs, faith-based programs, and so really being thoughtful that with that uniqueness and the variety of settings that the approach to quality may have been different than some of the frameworks that we've reviewed or the work that we're doing to ensure quality across all settings.

Q. So, under what circumstances would the department be allowed to offer a temporary waiver of some of the quality standards?

A. An example might be where in-home family child care provider may not have done formative assessment around documenting child observations to inform their practices. It might be an approach that they utilized, but it might look different than it looked, for example, in a school district setting. And so while we're working with educators and providers to make informed decisions on whole child development, we certainly would support that process and that growth for that educator and that provider.

Q. And within that same subsection of statute, what does a limited time while working toward compliance with the quality standards mean?

A. It depends on what the work is, potentially. So, there might be opportunities, for example, for us to provide a tiered approach for different providers. For example, you might have educators coming in who are new to the profession in what is typically called an

induction setting, where you're giving more support early, and then over time -- you might have masterful educators who have been working in the field for a very long time who still continue to want to be the best that they can for children and grow and change, and that differentiated support might look a little different based on those different educator types.

And so we are really working across our department with our workforce team, with coaching, with our local coordinating organizations to consider what resources might be available and how we can leverage those in this effort.

Q. And then also within that same section, it says that except that a preschool provider must meet all quality standards relating to health and safety. What quality standards would relate to health and safety? What does that mean?

A. So, those are the things that we've been talking about this morning in regards to health and safety, where certainly only licensed providers are participating in assurances of that minimum safety, physical safety, but also that health and safety as it refers to the learning environment as well. Those are certainly a minimum bar, but very important as well.

Q. Has the department allowed any preschool provider to participate in the UPK program without following all the quality standards at this point?

A. At this point, we are in development of the quality standards. So, we're really being thoughtful about providers' work that they've done so far. We're engaging with providers on what that work is and what that looks like so we can help support the

implementation of the quality standards as they're implemented.

Q. So, has the department allowed any preschool providers to exercise this temporary waiver in the statute?

A. We haven't had a waiver request at this point.

Q. And under this provision, could a provider that wasn't complying with the antidiscrimination quality standard participate in UPK on a temporary basis?

A. The waiver doesn't exempt a provider from what's in the law, so that wouldn't be a waiver associated with this process.

Q. And is the nondiscrimination language -- is the nondiscrimination statute a health and safety requirement?

A. It is.

Q. I want to turn now to talking about some of the logistics of Universal Preschool. How many children have been able to take advantage of UPK in year one?

A. We're at almost 40,000 children around the state.

Q. And do you have any idea what percentage of four-year-olds that would make up?

A. That's about 60 percent of eligible four-year-olds.

Q. And what was the department hoping in the first year of implementation of UPK?

A. We were anticipating 50 percent. Certainly what we've seen around the United States is a much lower uptake in year one, but because of the success of the Colorado Preschool Program previously, and because of the quality providers around the state, we

anticipated that Colorado might have a higher uptake than 50 percent, and have exceeded that.

Q. And how many more children has UPK been able to serve compared to the Colorado Preschool Program?

A. So, the Colorado Preschool Program, I believe in its last years, was at about 18,000.

Q. And Ms. Cooke went through the basics of how a family signs up and selects Universal Preschool providers, but I wanted to back up on something we didn't talk with Ms. Cooke about. Can a family meet with a provider before making their selections for their top five preschool providers?

A. They absolutely can. And we encourage that, and our local coordinating organizations encourage that as well. The system, the application system was never intended to replace the interactions between the family and the provider, but to facilitate that enrollment and to allow for families, especially who were seeking formal care for the first time, or a change, that they had a place, a one-stop shop, if you will, that they could go to to find information in a way that they hadn't been able to before. But certainly have -- providers even in their profiles have listed opportunities for tours or for introductions, phone calls, and so forth, and the system absolutely doesn't replace that relationship.

Q. And you heard testimony from the plaintiff preschools, St. Mary's and St. Bernadette's Preschools yesterday about their process of encouraging families to take tours of the preschool and having conversations with the families. Is that permissible within the UPK program?

A. It is.

Q. And you also heard Ms. Cooke talk about the deferred acceptance algorithm, or the DAA. Are there any factors that that algorithm can't account for?

A. What we found was that it doesn't account for mixed delivery. So, it's a standardized supported lottery algorithm, if you will, in an information technology landscape. But it wasn't built specifically for our unique program in Colorado.

Q. And so how did the department address that?

A. So, we heard from our LCOs, from providers, and from families very early on as we began the development of this system. We had different user experience -- user experience testing scenarios. And then through our outreach with our LCOs, really heard from families that there were some things that weren't -- didn't feel like they were being contemplated, and that were a priority, and that we know lead to positive child outcomes, and that included continuity of care.

So, really wanted to recognize that these quality providers around the state have been working with a family over the years. If you think about an in-home child family care, they might have had that child since they were an infant and would have them until they go on to kindergarten.

And we know that continuity of care yields high outcomes for children, and we wanted to honor that. We didn't want this algorithm to not consider that. So, that was one of the weights that we applied to the algorithm.

We also applied siblings at location and employee's child. And so both of those are really being thoughtful about that community, honoring that safe and healthy community, and the continuation of that for the child and the family.

Q. Why is continuity of care important?

A. Continuity of care limits the transitions for a child. And so there's certainly a lot of research around that opportunity for continuity of care to provide positive outcomes for growth for the child and supportive environment for that community and the family.

Q. And you also mentioned certain relationships that the department would want to honor. Why are those relationships important, or what examples of relationships can you give us?

A. So, the sibling priority or weight was to ensure, again, that continuity of the community for the family, but also to support the family in thriving, if you will. So, we don't want them to have to go to -- so, if you have a child who is Universal Preschool age, and then you have an infant that you might be able to go to the same location and not have to go to multiple locations within a day, which we know has an impact overall on the family.

The employee's child is a priority, because we certainly know from our department's workforce team and from our providers very clearly that many of our educators have young children who are eligible to participate and may not be able to work if their child can't participate at the program that they're working in.

Q. Would it be possible to have both a universal and a mixed delivery preschool program if every provider had to accept every child matched to that provider?

A. It would be really hard to do that. It would be -- when we look at what other states have done, where they've prioritized school districts as the lead provider or as the sole provider, that's where universal -- at each location might work. Mixed delivery, because of the variety of programming that providers offer and the variety of settings that they offer, completely universal at every setting, it would be really difficult and would be difficult to have providers be able to participate.

And so in the consideration of mixed delivery, the department has worked very intentionally about being inclusive of a variety of providers to ensure that they can participate, and really with the aim that families have that choice.

Q. And so it wouldn't be possible for a mixed delivery system if every provider had to accept every child?

A. I don't know how. That would be really hard.

Q. Ms. Cooke talked yesterday about the faith-based working group. Were there any other working groups that met to discuss the different needs of different types of providers and communities?

A. Could you say that again?

Q. Sure. Were there any other types of groups that met to discuss the different types of needs of communities and providers besides the faith-based work group?

A. Yes. As I said earlier, we on the program team certainly met with providers daily, a variety of providers who are participating or those that were

considering it. We had different working groups specifically with school districts, with Head Starts, with in-home family child care, with corporate providers. We really wanted to hear from folks and continue that collective voice as we developed. We were moving really quickly to start up, and so it was important that we were engaging regularly, and now that we are working toward year two to really formalize stakeholder input and feedback as we continue to move forward.

Q. And when you say working toward formalizing, what do you mean by that?

A. When the bill was being written, the ECLC had very formal working groups where they were established and scheduled on a regular basis for stakeholders to engage and be involved in and around the state. In our compressed timeline, following that same calendar was a challenge, and so we offered town halls. We offered small groups with our LCOs. We provided our LCOs with support to do local information gathering and provide that to us.

We certainly had, again, through the work, were having a lot of conversations and being responsive to what we heard, and then we began to create different working groups around specific tasks, like enrollment, for example. So, certainly recognized that at many providers, it wasn't one person who did it all, although we do have providers where one person does it all, and certainly wanted their input and feedback, but also wanted to understand that there might be an early childhood director. There might be an office manager. Those folks might have very different impacts from the change of a new program, and we wanted to be supportive of the roles that help uplift the program.

Q. And just -- I know that early childhood has a lot of acronyms, so I just want to make sure, what does the ECLC stand for?

A. It's the Early Childhood Leadership Council.

Q. And then the LCO?

A. Local coordinating organization.

Q. Great. And Ms. Cooke also yesterday talked about the preferences which were implemented in year one prior to the rule-making. Are those preferences now being incorporated into the proposed rules we started talking about earlier?

A. They are. Again, what we heard was the algorithm wasn't developed to consider mixed delivery in a variety of settings that might be provided through preschool. And we had to create a way for that to be a part of the process. And so those preferences were developed based on what we heard from providers in that engagement that would be helpful, one, to inform the family and support the family in making the best decision, but also helping providers to be able to meet their programmatic policies.

Q. So, I want to go back to the proposed rules, which are now Exhibit 71, and direct your attention to page seven, under section 4.110. And is this what you were just referring to?

A. It is.

Q. And so under the top -- the bottom of page six, before we get to page seven, the rules say that an eligible preschool provider may utilize the following programmatic preferences during the matching process. I want to start with the preference number two. And can you please tell me what are cooperative

preschool providers, or co-ops, as I believe they were referred to yesterday?

A. They are preschool providers that have an expectation of the family's involvement through volunteering in the preschool setting.

Q. Why were co-ops, or cooperative preschools, included as a preference?

A. Those providers had expressed that they wouldn't be able to participate if they didn't have that commitment from families. So, we really worked through these preferences to kind of be expansive of mixed delivery and inclusive of the uniqueness of what the providers and the communities they've established bring.

Q. And does this cooperative preference give cooperative providers an exception from the antidiscrimination provision?

A. No.

Q. And I want to turn to the next preference, number three. What are school districts maintaining enrollment consistent with their established boundaries?

A. So, each school district has geographic boundaries where they're required to serve K-12, the children that live within those boundaries. And this actually has a tie to continuity of care as well. So, we heard from school districts that for the preschool component, they wanted to honor those boundaries as well, and many districts don't have the capacity to serve children beyond their boundaries. And so this preference was put in place so that they could honor both continuity of care for their families and ensure that they could

prioritize that geographic expectation that they have for K-12.

Q. Why was this preference included in the proposed rules?

A. So, this was included so that school districts could prioritize those families and ensure that continuity of care.

Q. Does this preference allow school districts an exemption or an exception from the antidiscrimination provision?

A. No.

Q. Turning to the next one, participating preschool providers reserving placements for a student with an individualized education program to ensure conformity with obligations incurred pursuant to law. What does that preference mean?

A. That preference ensures that school districts and their contracted partners can meet their federal mandate under IDA. And that might include ratios in the classroom, aligned resources and services, the development -- evaluation and development process for an IEP with the family and so forth.

Q. And what is an IEP?

A. It's an individualized education program.

Q. And what does that mean?

A. So, that supports specific aligned services for a child with a disability.

Q. Why was this preference included in the proposed rules?

A. It was included because it was called out in statute as a priority, and also in our work with our partner state agency Colorado Department of Education and school district providers we heard right away that it was critical for them to be able to participate and be able to meet the mandate.

Q. And this preference only applies to school districts?

A. This specifically applies to school districts and their contracted partners.

Q. Does this preference allow school districts or their contracted partners an exception from the antidiscrimination provision?

A. No.

Q. Why doesn't the department interpret the antidiscrimination provision from prohibiting providers from prioritizing kids with disabilities?

A. Children with disabilities were specifically called out as a priority in the law that developed the department and the program as a priority. I believe because historically, they haven't had equitable access or aligned care that meets their needs. And so programmatically, we wanted to ensure that those children who participated previously, that we didn't miss a beat, if you will, as we moved into the new program, but that we had assurances that those children would continue to be served.

Q. And when you say continue to be served or were being served previously, you mean through the Colorado Preschool Program?

A. Yes.

Q. Turning to the next preference, number five, what are Head Start programs?

A. Head Start programs are federally funded programs that prioritize comprehensive supports for young children and their families who are living in poverty, are low-income, or have children with disabilities.

Q. And what is your understanding of Head Start eligibility requirements?

A. As a Head Start grantee, there are federal expectations of who is enrolled and the priorities of the children that are enrolled, in alignment with their expectations around low-income, poverty, and children with disabilities.

Q. And are there any other eligibility requirements for Head Start besides just income level of a family?

A. I believe that they also look at other assistance that families might be receiving as an indicator of qualification, but I haven't been a Head Start grantee, so I'm not an expert.

Q. Why did Head Start providers receive a preference in the proposed rules?

A. They were also called out, again, because it's a program that has shown positive outcomes for children and families over the years. And certainly was intentionally written into the law that they were prioritized as participants and that the children they serve were prioritized as participants.

Q. Are Head Start providers able to utilize any type of an exception or an exemption from the nondiscrimination requirements of statute in the proposed rules?

A. No.

Q. Why doesn't the department understand prioritizing low-income children and families to violate the antidiscrimination provision?

A. The antidiscrimination provision prioritizes families who have historically been discriminated against. And so the department has been called out to ensure that they're protected moving forward, and that they have assurances around everything that the program can provide.

Q. And were there any concerns that this population wouldn't continue to benefit from preschool under the new system as it did under the prior system?

A. I believe that's why it was written into the law to have assurances that even though the program moved to universal, that there was still a priority for these specific children and their families.

Q. Turning to number six, why -- well, can you describe what preference number six is?

A. Preference number six gives priority or preference for providers who have employees whose children may attend, again, to ensure that we have a sustainable workforce. But there are also providers who are employee-based, or employer-based providers who give priority to their employees' children in the programs that they provide.

Q. And why did these types of providers receive a preference in the proposed rules?

A. It really was what we heard from them that was the only way that they could participate. So, certainly workforce has been a challenge through the pandemic and previous to the pandemic, and so we know in early

childhood that as we value early childhood and we value early learning, we want to ensure that our educators are able to continue to educate, but also have the same services for their children, and that they may not be able to if it isn't in the same setting.

And for employer-based providers, which I think probably will become more and more popular, but we certainly see growth in that around the state where employers understand that their employees can participate in the workforce if they have access to a quality environment for their children, and they want to be able to provide that so that their employees can --

Q. Is this a preference that can be utilized by any type of preschool provider?

A. It is.

Q. Turning to number seven, can you describe what this preference is.

A. So, this is the preference for continuity of care. And this is what we discussed earlier, where it's -- we understand that through research, that continuity of care is a strong indicator of child success, and we typically see children who have fewer transitions are able to grow and develop in a healthy manner.

Q. And can any type of preschool provider take advantage of this preference?

A. Yes.

Q. Turning to preference number eight, can you describe what that preference is.

A. That's the preference for providers to consider the enrollee child for preschool if they have siblings

attending the same program. So, it gives a preference to children whose siblings are already attending there.

Q. Why did this -- why was this called out as a preference in the proposed rules?

A. This was something we heard very clearly from families was important in their decision-making, and we also heard from providers, again, to ensure that continuity of community with a family, that the sibling priority was critical to participate.

Q. And can any preschool provider utilize the sibling preference?

A. Yes.

Q. Turning to number nine, can you describe what that preference means.

A. Number nine is a preference for providers who offer preschool services in languages other than English. And we have a variety of providers who do so. So, we have school district providers who have specific programming for dual or multilingual programs. Some of those have federal expectations around how those children are served or the ratios that the children are served. For example, if it's a bilingual classroom, there may be a certain number of children expected that are native English-speaking and a certain number of children who are native Spanish-speaking.

We have community providers who offer in their communities preschool services in a range of languages that meet the needs of the families in that community.

Q. And does this preference provide an exception for providers that serve multilingual children, an

exception or an exemption from the antidiscrimination provisions?

A. No.

Q. I want to back all the way up to number one, which is the faith-based provider preference. And can you please describe what that preference means.

A. That preference was put in place as we heard from faith-based providers considering to participate and being thoughtful about being inclusive of faith-based providers being able to, again, be inclusive to their community, and be able to participate and their families to be able to have access.

Q. What is a faith-based provider?

A. In Universal Preschool, when providers register, they can define themselves as faith-based. So, that might be a religious-based community that they're a part of. It might be a specific faith that they build their program around.

Q. Why did faith-based providers include a preference in the proposed rules?

A. We included the preference in the proposed rules to ensure, again, that we could be expansive in mixed delivery and inclusive of a variety of provider types, including faith-based providers. And the preference, again, wasn't a part of the standard algorithm. And so like the other preferences, was included to ensure that they were able to align to their program.

Q. And in looking at this preference, it says, faith-based providers granting preference to members of their congregation. Is "congregation" defined in the proposed rules?

A. It is.

Q. And if I could direct your attention to page two on the same document. Is this what you're referring to?

A. Yes.

Q. Why did the department decide to define "congregation" in the proposed rules?

A. In year one, with the word "congregation," there were a lot of questions from providers about what that meant. And so we certainly listened to stakeholder input to define that further to help support, again, that expansive inclusion of provider types.

Q. How did the department develop this proposed definition?

A. So, again, same as everything in the rule. Looked at what other providers had done, what had worked, what hadn't, talked to providers, and this is the current draft.

Q. What types of providers did the department speak with?

A. Through the standards process, all provider types. And definitely had faith-based providers weigh in as well.

Q. And when you say that the department believed that this definition was a way to be inclusive of faith-based providers, can you tell me more about that.

A. Again, it's about that continuity of care for a community and being intentional about honoring mixed delivery and those different communities that families and providers engage in.

Q. And so were there some concerns in year one that the congregation preference wasn't broad enough?

A. Yes.

Q. And how did the department believe that this definition addressed those concerns?

A. We believe this definition expands on what was maybe initially understood as the word "congregation."

Q. And are providers allowed to define what their congregations are?

A. They are.

Q. Can faith-based providers continue to provide feedback on this proposed definition and the preferences in general?

A. Yes.

Q. Does this preference give faith-based providers an exception from any of the antidiscrimination requirements?

A. No.

Q. Why not?

A. The preferences set forth by the program and in rule don't change the law. So, the law still has the antidiscrimination provision that we follow.

Q. Why doesn't the department interpret this provision to allow faith-based providers to discriminate on the basis of religious affiliation or religion?

A. Again, it's the law to ensure that these children and their families who historically have been discriminated against aren't so that we can ensure

that they have access to a safe and healthy environment.

Q. And so is the department's understanding of a congregation broader than religion?

A. It is. And I'm not -- I'm not a religious expert, so I can't speak to each religion or their specific beliefs, but definitely as the program director wanted to be inclusive of faith-based providers as they define themselves and as families engage with them, and certainly in the services that children receive.

Q. You also heard Michael Cooke or Ms. Cooke yesterday talk about where a provider could fill out a form if none of the preferences that were part of the system applied to that provider. Was that process put into the proposed rules as well?

A. It was.

Q. And if I could direct your attention back to page eight.

Sorry. Page seven, and preference number ten. Is this the preference that you were referring to?

A. It is.

Q. What was the reason for this preference?

A. We have almost 2,000 participating providers, and as a new department and as a new director, don't know all of the programmatic opportunities that each provider might have. And so heard from providers as we developed the preferences initially in our first year of enrollment that we may not have caught all of the preferences that would be helpful to honor a mixed delivery system.

And so wanted to have an opportunity to be responsive again to providers, to our stakeholders, where a provider could tell us, hey, you didn't consider us, but we have this programmatic expectation. Could it fall within the preferences that you provided, or is there a unique preference that might be helpful for us to be able to participate?

Q. And, again, was this an effort to be more inclusive of different types of communities?

A. Yes. Again, really to honor mixed delivery and family choice and be inclusive of those communities.

Q. And yesterday, Ms. Cooke was asked about a request from the River Canyon School District. Do you remember that testimony?

A. I do.

Q. Are you familiar with River Canyon School District?

A. I am.

Q. I'm sorry. And it's River Canyon School, not school district. Are you familiar with River Canyon School?

A. I am.

Q. What type of school is River Canyon?

A. It's a Montessori program.

Q. And what type of preference did that school request or what type of community does River Canyon serve?

A. They have as part of their policy or process similar to a co-op, an expectation of volunteering in the program of families that register their children.

Q. And so is your understanding that the policies Mr. Reaves asked about yesterday, they're similar to the policies of cooperative preschool providers?

A. Yes.

Q. And what was the basis for the department granting River Canyon a preference?

A. Because it was aligned with the preference of a co-op, and yeah. It met those expectations, and we certainly wanted them to be able to participate.

Q. And then scrolling down to page eight, I want to direct your attention to subsection B at the top of page eight. What does that provision mean?

A. That provision means that the preferences don't allow for discrimination as defined in our antidiscrimination provision.

* * *

[Page 236-257]

CROSS EXAMINATION

BY MR. DAVIS

* * *

Q. Ms. Odean, is one of the goals of UPK to achieve a mixed delivery system of preschool?

A. It is.

Q. And that means a mix of different types of providers; is that right?

A. Yes.

Q. And that includes faith-based providers?

A. Yes.

Q. Is the point of that so that families can find the provider that's just the right fit for them?

A. It is.

Q. Ms. Odean, I think you answered this earlier, but about how many providers are currently participating in UPK?

A. About 2,000.

Q. And those providers generally have agreed to the UPK provider agreement; right?

A. Yes.

Q. And new providers are still able to join right now; is that right?

A. Correct.

Q. Is there a fixed number of providers that's able to participate in UPK?

A. There isn't.

Q. Okay. So, when a new provider begins participating, it doesn't take the place of a provider that's already in the program, does it?

A. Correct.

Q. It would participate alongside the current providers?

A. Yes.

Q. Ms. Odean, Head Start providers can participate in UPK; isn't that right?

A. That is right.

Q. And Head Start providers prioritize low-income families?

A. They do.

Q. In fact, you understand that Head Start programs might have income qualifications for students to enroll; right?

A. To define the qualifying factor? Is that what you're referring to?

Q. That's correct. Yes.

A. Yes.

Q. And so families that are above a certain income threshold, they may not have the opportunity to enroll at a Head Start provider; is that right?

A. It depends on the Head Start provider.

Q. But they might have to meet additional qualifications?

A. Correct.

Q. And some UPK providers reserve seats for children with disabilities; isn't that right?

A. Yes.

Q. Okay. And in fact some UPK providers only serve children with certain disabilities; isn't that right?

A. Yes.

Q. Faith-based providers are allowed to reserve seats for members of their congregation; correct?

A. Yes.

Q. And we discussed earlier, or you were discussing with your counsel earlier that the department has proposed a formal definition of "congregation," hasn't it?

A. It has.

Q. If I could have you look at what's been marked as Exhibit 71, which is the -- and it should be in your binder on the third volume there. We could also put it on the screen, if that would be easier. There we go. Great. It's on your screen now, Ms. Odean.

A. Yes.

Q. And this is the newly -- the new draft regulations for UPK that came out recently; right?

A. It is.

Q. Okay. So, if we could look at the middle of page two, that's the formal definition of "congregation"; correct? Sorry. This is paragraph L.

A. Yes.

Q. Would you mind reading that definition aloud?

A. "Congregation" means a religious-based convocation or multiple religious-based convocations of multiple individuals in a geographic area who share a common set of beliefs and who collectively engage in conduct with the direct nexus to the shared common set of beliefs.

Q. Thank you. So, under that definition, a congregation, that could be all Catholics in a particular area?

A. Yes.

Q. Or all Lutherans?

A. Yes.

Q. And so the Catholic provider could reserve seats for Catholics?

A. Yes.

Q. Lutheran provider for Lutherans?

A. Yes.

Q. And if the Catholic provider limited its seats to members of its congregation, it wouldn't have to provide an opportunity to enroll to Lutherans; right?

A. Correct.

Q. You testified earlier that this preference was broader than religion. Do you remember that?

A. I do.

Q. Okay. But if you look at the definition, it begins by saying, "congregation" means a religious-based convocation or multiple religious-based convocations, and then there are some other requirements; isn't that right?

A. Yes.

Q. Okay. So, the congregation does have to be religious-based?

A. When I said that earlier, I was referring to it didn't have to be a specific religious organization or a church-based, but that it had faith-based or is related to religion.

Q. Okay. Thank you for that, Ms. Odean. So, it does have to be religious-based; right?

A. Yes.

Q. Thank you. Just to back up a moment, we're looking at this Exhibit 71. And I think you testified earlier that this was the current draft version of the department's UPK rules; right?

A. Yes.

Q. When did this draft version come out?

A. Monday.

Q. Monday. Had it ever been put in front of the Court before today?

A. I believe, yes. Previous drafts were.

Q. Right. Not this draft, though; right?

A. Not this draft. Yeah.

Q. Okay. So, it came out on Monday. That's New Year's Day; right?

A. That's when I received the last draft, yes.

Q. Okay. And then it was put in front of the Court for the first time today; right?

A. Yeah. I don't remember if it was an exhibit yesterday, but yeah.

Q. Or, yeah. That's right. Excuse me. We put it into the record yesterday. We're discussing it for the first time today?

A. Yes. Correct.

Q. Thank you. So, I mean, it's curious timing. It was finalized on New Year's Day, put in front of the Court for the first time in -- at the beginning of our trial in this case. Why did the new draft come out on that timeframe?

A. We're as a department in process of the draft and incorporating stakeholder input. That's regular and ongoing for our department team. We don't have an open period of time with input where we wait, if you will. We're continuing to revise, take in input and

feedback, and adjust so that we can follow the rule process and timeline.

Q. Okay. You were aware that the trial was -- in this case was this week; correct?

A. Yes.

Q. Okay. It was finalized on Monday, on New Year's Day. Was it provided to plaintiffs that day? Are you aware of that?

A. I'm not aware of that.

Q. Okay. Are these new draft rules -- are they publicly available anywhere? Can somebody look them up online?

A. We typically post the drafts through revisions on our website. I don't know if these are posted yet. I haven't checked --

Q. Okay.

A. -- to ensure that, but that's typically the process that occurs. As revisions are released, they're posted.

Q. Okay. But if I told you that they weren't publicly available, would that surprise you?

A. I haven't checked.

Q. Okay. Thank you for that, Ms. Odean. So, at least prior to this draft coming out, there were nine different preferences -- programmatic preferences that were recognized in the rules; right?

A. I believe that's correct, yes.

Q. Okay. But then yesterday -- or, excuse me. When this new draft came out, there was a tenth programmatic preference that was added?

A. Yes.

Q. Okay. Did you approve this new preference?

A. Yes.

Q. Okay. If you turn to page seven, I think is where the preferences are.

A. Okay.

Q. And I'm looking at paragraph ten. That's the new preference, just for the record; right?

A. Yes.

Q. Okay. And it says, providers may grant preference to an eligible child based on, and then there's a few different things here, but one of them is the child and/or family being a part of a specific community, having specific competencies or interests, or participating in a specific activity; is that right?

A. Yes.

Q. Okay. But to claim this preference, it looks like under subsection A there, that the provider has to impose the same requirement on all participating children or families; is that right?

A. Yes.

Q. Okay. So, a provider can require all of its children or families to be part of a specific community or have specific competencies or interests?

A. They can.

Q. Okay. I just want to understand what that means, Ms. Odean, if I could. Could a preschool be just for children in foster care, for example?

A. Yes.

Q. Because that would be part -- that would be part of a specific community?

A. Yes.

Q. Okay. Could a provider under this preference say that all of its children needed to be children of veterans or current service members?

A. Potentially, yes.

Q. Yeah. Same reason; right? Part of a specific community? Right?

A. Sure.

Q. Okay. Could it require all of its children or families to be interested in music?

A. Yes.

Q. Okay. Could a school be just for gender-nonconforming children?

A. Any preference was put into place to allow for mixed delivery and different provider types to be able to participate and be inclusive of the communities that they serve. It is not put in place to change the law of the nondiscrimination provision.

Q. Yeah. And my question is just if you have a provider that wants to be for gender-nonconforming children, would this preference allow them to do that?

A. It would.

MS. CARRENO: Objection as to speculation.

THE COURT: Overruled.

THE WITNESS: So, again, the preferences as they are now -- so, we had the exhibits of the form initially, which was our department response to hearing from

providers who had different programmatic expectations that they felt they wouldn't be able to participate unless they were honored. Those preferences didn't negate the part of the law that ensures that children aren't discriminated against who historically have been.

Q. (By Mr. Davis) Right.

A. Yeah.

Q. Okay. Just to clarify, so the school could be just for gender-nonconforming children, and that would not run afoul of the part of the law prohibiting discrimination?

MS. CARRENO: Objection to the extent it mischaracterizes her testimony.

THE COURT: You can bring that out on redirect.

THE WITNESS: As with any of these, it would be a conversation to determine whether that was appropriate or not.

But, yeah. So, we would definitely look into it and follow through. As long as there wasn't discrimination that was aligned to the antidiscrimination provision, they would be accepted.

Q. (By Mr. Davis) Okay. Could a school under this preference prioritize children of color from historically underserved areas?

A. Yes.

Q. And then, again, the preference says schools may grant preference to an eligible child based on the child and/or family being a part of a specific community. Does that include the LGBTQ community?

A. Yes.

Q. Ms. Odean, shifting gears here. UPK's nondiscrimination requirement, what you've been calling its nondiscrimination requirement, that's one of the quality standards that's set out in the UPK statute; right?

A. Yes.

Q. And the department is allowed -- is it true that the department is allowed to permit providers who don't meet quality standards to participate under some circumstances?

A. Yes. But it doesn't allow them not to follow the law.

Q. To clarify -- well, strike that. If a quality standard is not health and safety related, I think you agreed with your counsel earlier that the department had discretion to make exceptions for those quality standards on a temporary basis; right?

A. Correct.

Q. Does the statute specify which of the quality standards are health and safety related?

A. The statute defines health and safety as a priority in alignment with licensing and in alignment with the expectations of the law. I understand that as the director of the program to ensure a safe and healthy environment of learning for children.

Q. Thank you for that, Ms. Odean. My question was does the statute tell the public or you which of the quality standards are health and safety related, or is that something that you just are understanding yourself?

A. It doesn't specifically define that, except for in consideration of national and local best practices, which that would be a part of.

Q. Okay. Has the department ever issued any guidance as to which of the quality standards it understands are health and safety related?

A. That's what's in process through the development of the standards. Then there will be guidance alongside that as well.

Q. So, not yet; right?

A. Correct.

Q. Okay. I think you testified earlier that you view the nondiscrimination requirement -- what you've been calling the nondiscrimination requirement as health and safety related; is that right?

A. Yes.

Q. Okay. When did the department first determine that the nondiscrimination requirement was health and safety related?

A. I don't know that there was a specific point in time where that was a decision point. Having participated in, you know, as a provider in the stakeholder -- in writing the bill, it was always contemplated that that was a part of health and safety from my engagement in that.

Q. No specific point in time; right?

A. Yeah.

Q. Okay. Have you ever issued any guidance document to the public saying the nondiscrimination

requirement is a health and safety related quality standard?

A. No. Again, that's -- the quality standards are in process, and certainly we'll continue to provide guidance as that evolves.

Q. Okay. The nondiscrimination requirement, it's not the only minimum quality standard that's expressly set out in the statute, is it?

A. It isn't.

Q. Yeah. There are others?

A. Yes.

Q. Okay. Has the department determined that any of the other quality standards that are expressly set out in the statute are health and safety related?

A. We haven't written any specific guidance, but when you look at other frameworks and have conversations with stakeholders, certainly here the complexities of -- the overlap of health and safety with positive learning environments, positive learning engagements with children and their classmates, children and their educators.

Q. So, has it determined that any of the other quality standards expressly set out in the statute are not health and safety related?

A. We haven't specifically defined them that way, but certainly there are differences between cognitive and academic.

What we're really looking at with health and safety is the overall environment. And they all contribute, but some specifically to, again, access to the program, and then access for the child in the learning environment.

Q. So, you haven't made a specific determination that any of the other quality standards set out in the statute are or are not health and safety related except the nondiscrimination requirement?

A. Correct.

Q. How did the department arrive at its view that the nondiscrimination requirement was health and safety related?

A. Again, I think that was contemplated prior to the department. I think that in my experience in engaging in the bill writing, that was intentionally written in to ensure access to programs, but also being really intentional and thoughtful about children's access to learning once they're in that classroom, and that they -- their social-emotional development is dependent on their feeling safe and healthy and welcome in the environment that they're in so that they can grow and develop.

Q. Yeah. It was contemplated?

A. It was part of the conversation in the bill-writing process.

Q. Part of the conversation. Okay. Why didn't it get written into the statute that the nondiscrimination requirement was health and safety related?

A. Yeah. I don't know that, because I wasn't a bill writer, but I participated as a stakeholder.

Q. Okay. Ms. Odean, even before the UPK statute, I think you may have agreed with your counsel, but I will just ask the question anyway. Colorado child care centers were subject to health and safety requirements before UPK; right?

A. Yes.

Q. Okay. And but then you -- and that's the licensing requirements? Is that generally where those appear?

A. Licensing and Colorado Shines.

Q. Okay. But I think you also testified earlier that safety is more than licensing requirements; is that right?

A. Yes.

Q. And I think you testified something like in a really thoughtful way, that was called out in the law. Do you remember saying that?

A. I do.

Q. Where specifically in the law is it called out that safety goes beyond licensing requirements?

A. Again, I can't point to a specific citation. I can review the 500 pages where that's my understanding, but what I'd say is there's the requirements of licensing for safety, and there's the requirements of health and safety for the environment. And that's my understanding, having been a provider, and as we develop these quality standard rules to support providers.

Q. You testified a bit earlier with your counsel about what the statute means when it says this or that, but you weren't part of the general assembly when the statute was passed, were you?

A. No.

Q. And you haven't talked to all the members of the general assembly about what the statute means, have you?

A. No.

Q. Okay. So, when you were making those -- when you were giving that testimony, you were testifying about your understanding; right?

A. Yes. And what is written.

Q. Your understanding of what is written?

A. Yeah.

Q. But for providers, is it your understanding that's binding on them, or is it what the statute says that is binding on providers?

A. The law is binding for all of us.

Q. Yeah.

A. Yeah.

Q. The law, but not your understanding; right?

A. Well, and how we operationalize and implement the program.

Q. Okay. But not your testimony here today. That's not what's binding on all providers; right?

A. I'm not sure what you're asking.

Q. I can move on. So, I want to circle back to the health and safety regulations that predated UPK, some of them in the licensing requirements like we were just discussing. Does the department make those regulations available to providers?

A. The licensing regulations?

Q. Health and safety requirements that predated UPK.

A. The department programs who operate Colorado Shines and who operate licensing make those available to providers, yes.

Q. Does the department itself have a part of its website specifically about health and safety requirements?

A. I'm not aware.

Q. Not aware?

A. One way or the other, yup.

Q. Okay. All right. Just to be clear, we've been talking -- or you talked with your counsel a lot about the nondiscrimination provision in the UPK statute. I'd like you to take a look at Exhibit 13, if you could, and just let me know when you're there. It will be in your binder, I think in the first volume. Take your time.

A. Exhibit 13?

Q. Yes.

A. Okay.

Q. And if we could turn to the second page, fourth bullet down. Is that what you and your counsel were referring to as the nondiscrimination requirement?

A. The fourth bullet says about a student withdrawing?

Q. Excuse me. I'm sorry. If you look under the heading, quality assurance, sort of midway down the page, and then the fourth bullet down from that.

A. Could you repeat the question? Sorry.

Q. Yes. Is that the one beginning, requirement that each preschool provider, is that what you and your

counsel were referring to as the nondiscrimination requirement?

A. Yes.

Q. Okay. Could you please read it out loud, Ms. Odean.

A. Requirement that each preschool provider provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family.

Q. Does the word "discrimination" appear anywhere in that provision?

A. No.

Q. Does it say instead that providers have to provide an equal opportunity to enroll, regardless of, and then a list of protected characteristics?

A. It does say that.

Q. So, similarly, I would like to take a look at the statute again. If you could turn to Exhibit 67. This is in defendants' exhibit binder. I'm sorry for all the binder flipping.

A. I believe it's on the screen.

Q. Great. Thank you. Is this 67? Give me one moment, Ms. Odean. Scroll down a little further. There we go. Thank you for your patience. If you look at subsection B there, is that the part of the statute that you and your counsel were referring to as the nondiscrimination requirement?

A. Yes.

Q. Okay. And do you see the term "discrimination" or "nondiscrimination" or "antidiscrimination" in that provision?

A. No.

Q. You testified earlier that this provision was designed to protect groups that have been historically discriminated against. Do you remember that?

A. Yes.

Q. If you look at the provision now, does it say that?

A. It doesn't.

Q. Are you aware that Catholics have historically been discriminated against?

A. No.

Q. You're not aware of it; right?

MS. CARRENO: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: Not specifically.

Q. (By Mr. Davis) Okay. Ms. Odean, you were discussing the matching process earlier. And I think the general idea is that providers are required to accept the matches unless one of the programmatic preferences applies; is that right?

A. Yes.

Q. Okay. And then I just said the preferences, but the department has several programmatic preferences that are exceptions from that general matching requirement; right?

A. We have preferences to the algorithm to ensure mixed delivery, yes.

Q. Okay. Thank you. Do you know how many providers have claimed at least one of the preferences?

A. I believe it's about a thousand.

Q. About a thousand? If I told you that in your interrogatory responses, you said the number was 1,091, at least at that time, would that sound about right?

A. Okay. Yes.

Q. Okay. And the department has also allowed providers to request other preferences besides the ones that were recognized as programmatic preferences; right?

A. Yes.

Q. If we could look at Exhibit 31, and this will be back in the plaintiffs' binder, or maybe on the screen momentarily. I think it's on your screen now, Ms. Odean.

A. Okay. Thank you.

Q. Do you recognize this document?

A. Yes.

Q. Is this a document that allowed providers to request other exceptions to the matching process besides the programmatic preferences?

A. Yes.

Q. Okay. And if you look at the end of the document, we'll scroll down, under exception requested, it gives examples of the different kinds of preferences that someone might request using this form?

A. Yes.

Q. Okay. And one of these is my location only serves teen moms enrolled at a neighboring high school; is that right?

A. Yes.

Q. And one of them is my location only serves children with specific disabilities; is that right?

A. Yes.

Q. Did the department in fact receive some requests for other exceptions under this form?

A. We did.

Q. And it considered those requests on a case-by-case basis; right?

A. Yes.

Q. And it granted some of them; right?

A. Yes.

Q. If we could look at Exhibit 36. Is that the wrong exhibit?

34. Do you recognize this document, Ms. Odean?

A. Yes.

Q. Is this a spreadsheet showing the department's responses to exceptions that were requested by way of that form we were looking at?

A. Yes.

Q. Did the department grant an exception requested under the form allowing a provider to only accept fully-vaccinated children?

A. I don't recall specifically.

Q. Okay. But if on this spreadsheet, in the approved column it says yes, it would be your testimony that that exception was granted?

A. Yes.

* * *

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Q. Do you think that those preschools, given those enrollment practices, are similar to segregationist academies in the 1970s?

A. I don't believe I'm an expert on either. What I would say from the testimony I heard yesterday is as a program, we need to consider what we have in the law that we're implementing, including the antidiscrimination provision, and ensure that if a child is in a preschool setting of a participating provider, that it's safe and healthy for them to be able to engage, and that it isn't -- that safe and healthy isn't compromised by discrimination.

Q. So, the problem with St. Mary's and Wellspring is just the law. It's the antidiscrimination provision that's your problem with their practices?

A. I don't fully know all of their practices. I certainly learned a lot yesterday, as you pointed out. But since that's our focus in this conversation, that would be obviously something that we would have to consider.

Q. Yeah. If there were no antidiscrimination provision in the law, you would be okay with them participating in UPK?

MS. CARRENO: Objection. Speculation.

THE COURT: Overruled.

THE WITNESS: It is in the law, and I believe it's intentionally in the law to ensure that children have a safe and healthy environment, and I do agree with that.

Q. (By Mr. Davis) Yeah. So, the law is the obstacle to their participating; right?

A. Is that a question?

Q. Yes.

A. If they're choosing to discriminate, it is.

Q. Okay. In defending you in this case, your lawyers have also cited studies about the impacts of bullying and stigmatization on LGBTQ children. Are you aware of that?

A. I am.

Q. Do you agree that the policies that you heard about from the plaintiffs yesterday, that those are akin to bullying and stigmatization?

A. Potentially.

Q. Okay. Thank you. Ms. Odean, if we could look at Exhibit 20. Me and my colleagues can get that pulled up. Do you recognize this document, Ms. Odean?

A. I do.

Q. Does it -- well, what is it?

A. So, when a family is in our application system, and they choose and rank providers before they submit an application, it shows what preferences those providers might have.

Q. Okay. Why does it show those preferences?

A. So that families understand and are making an informed choice about the provider that they've listed.

* * *

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Q. What was the purpose of not just the congregation preference, but all of the preferences?

A. The purpose of the preferences came about because of the system's use of the deferred acceptance algorithm, which was -- which is an algorithm for a lottery matching. That specific algorithm didn't consider mixed delivery or early childhood enrollment, for example, but is an accepted algorithm for a lottery match.

And so the weights that are provided or the preferences that are provided are to honor the unique program we have in Colorado and the expectations around mixed delivery.

Q. And can providers use any of the preferences in a way that discriminates in violation of the statute?

A. The preferences are an exception to the algorithm, not to the law.

Q. And so I also want to direct your attention to some of the questions and hypotheticals you were asked about earlier on cross examination. Do you remember getting some hypothetical questions about scenarios earlier today?

A. Yes.

Q. And do you remember being asked about students of color, gender-nonconforming students?

A. Yes. I remember.

Q. Have you ever received any of those types of requests for a preference on those bases before?

A. No.

Q. And you were asked a number of hypotheticals and expected to answer those hypotheticals on the fly this morning. If you did encounter a situation like that, how would the department typically address those types of requests?

A. As a new request, as a new program, we would have a conversation as a department with our leadership team, and likely with our attorneys to determine what the next steps would be.

Q. And why would you do that?

A. Because it is tied to the law, and because it's new.

Q. You were asked about the possibility of a request from a preschool that serves only African-American children. Has the department ever received a request from a provider to turn away white children?

MR. DAVIS: Objection. Misstates the question, Your Honor.

THE COURT: You may conduct a surcross on that point if you wish.

MR. DAVIS: Thank you, Your Honor.

THE COURT: Go ahead.

Q. (By Ms. Carreno) Do you need me to repeat the question?

A. Yes.

Q. You were asked about the possibility of a request from a preschool that might serve only African-

American children. Has the department ever received a request from a provider to turn away white children?

A. No.

Q. And you were asked about the possibility of a request from a preschool that serves only gender-nonconforming children. Has the department ever received a request from a provider to turn away cisgender children?

A. No.

Q. You were asked about the possibility of a request from a preschool that serves only LGBTQ children or LGBTQ families.

Has the department received a request from a provider to turn away straight children or families?

A. No.

Q. And had you ever thought about those possibilities prior to this morning?

A. No.

Q. And if you were asked any of those hypothetical scenarios or questions, what would you do?

A. Again, I would go to our senior leadership team and to our attorneys to determine the appropriate process and next steps.

Q. Is that how the department typically makes decisions around the preferences?

A. Yes.

Q. Would you consult with any other people within the department before making that type of determination?

A. I would.

Q. And if during going through that process of analyzing one of these requests the department learned that any of these hypothetical situations were in violation of the law, would the department allow a provider to utilize those?

A. Not if they were in violation of the law.

Q. And I want to turn back to questions around the preferences allowing providers to prioritize low-income children or children with disabilities. You had talked about on direct that the statute specifically directs the department to prioritize those children from low-income families or those children with disabilities; is that correct?

A. Yes.

Q. And can you describe -- can you describe what that means?

A. My understanding is that means we as a program and as a department have to ensure those children have access to a high-quality setting for Universal Preschool, and specifically that we don't diminish the access that they had in the previous state-run program, but that we continue to serve and are able to meet those children's needs specifically.

Q. And those children are specifically identified in statute?

A. They are.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-02079-JLK

ST. MARY CATHOLIC PARISH IN LITTLETON, et al.,

Plaintiffs,

v.

ROY, et al.,

Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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* * *

87. "In utilizing these programmatic preferences, eligible preschool providers must still comply with [the nondiscrimination provision]." Tr. Ex. 71 at 8.

88. The Department understands the statute to mean that providers who prioritize low-income families do not violate the statutory nondiscrimination provision because the statute expressly directs the prioritization of low-income families to address the longstanding barriers to preschool access experienced by those families. Odean TR at 221:14-18, 222:1-12; Colo. Rev. Stat. §§ 26.5-4-205(1) and 26.5-4-203(14)(e).

89. The statute specifically identifies Head Start providers, which are "federally funded programs that

prioritize comprehensive supports for young children and their families who are living in poverty, are low-income, or have children with disabilities" as providers to be included in the Program. Odean TR at 220:22-25; Colo. Rev. Stat. §§ 26.5-4-205(1) and 26.5-4-203(14)(e).

90. Similarly, the Department understands the statute to mean that providers who prioritize children with disabilities do not violate the statutory nondiscrimination provision because the statute expressly directs the prioritization of children with disabilities because "historically, they haven't had equitable access or aligned care that meets their needs." Odean TR at 220:9-16; Colo. Rev. Stat. §§ 26.5-4-205(2); 26.5-4-204(1), (3)(a)(III), (4).

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