

No. 25-581

IN THE
Supreme Court of the United States

ST. MARY CATHOLIC PARISH,
LITTLETON, COLORADO, *et al.*,

Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS
EXECUTIVE DIRECTOR OF THE COLORADO
DEPARTMENT OF EARLY CHILDHOOD, *et al.*,

Respondents.

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

**BRIEF OF THE CONSCIENCE PROJECT
AND CATHOLIC FAMILIES AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

THE CONSCIENCE PROJECT advances freedom of conscience and the right to practice one’s faith free from interference by the government through public education that includes insightful commentary and legal analysis as well as in filing *amicus* briefs in key religious freedom and free speech cases.

Amici CATHOLIC FAMILIES are Catholic parents residing in Colorado who seek to enroll their children in Catholic preschools that have been excluded from Colorado’s Universal Preschool Program (“UPK Colorado”) because these schools cannot participate without violating their religious beliefs. They attest to the crucial role of faith in the exercise of their role as primary educators of their children, their desire to enroll their children in Catholic preschools, and the costs of Colorado’s exclusion of these schools from UPK Colorado.

STATEMENT OF THE CASE

In 2022, Colorado’s Department of Early Childhood established a universal preschool program to provide all preschoolers with 15 hours of free education per week at a private or public school of their parents’ choice in the year before kindergarten. Colo. Rev. Stat. §§ 26.5-4-201, et seq. Private schools that wish to participate must agree

1. Pursuant to Rule 37.2, *Amici* provided timely notice of intent to file an *amicus curiae* brief to the parties’ counsel of record. Additionally, no counsel for a party authored this brief in whole or in part; and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

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). Colorado’s Department of Early Childhood adopted this same language in regulations governing the program and has also included this in the Program Service Agreement providers must sign. See 8 Colo. Code Reg. 1404-1:4.109.

Petitioners—the Archdiocese of Denver, two Catholic parishes, and the parents of preschool children—contend that by conditioning participation in the UPK Program on compliance with this mandate, namely the sexual-orientation and gender-identity aspects of the requirement, Colorado excludes many parents from receiving a generally available public benefit in violation of their rights guaranteed by the Constitution.

The district court denied injunctive relief after a three-day trial, finding that the nondiscrimination requirement does not violate the Constitution. The Tenth Circuit affirmed on September 30, 2025.

SUMMARY OF ARGUMENT

Amici Catholic Families are representative of the many Catholic parents with preschool-aged children in Colorado who have taken up their rights and responsibilities as primary educators of their children by choosing to send their children to Catholic schools, including to preschools like Petitioners’ schools. These parents understand that educating their children includes forming their children in

the faith and regard Catholic schools as essential partners in this endeavor. They want to send their children to Catholic preschools like Petitioners' precisely because these schools operate consistent with Catholic teaching. They object to Colorado's mandate that conditions participation in UPK Colorado on schools agreeing to operate in ways that are inconsistent with their religious beliefs and mission.

This Court's recent decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* clearly prohibit Colorado's exclusion of religious preschools from a generally available public benefit. Moreover, this case presents an ideal opportunity to overrule *Employment Division v. Smith*, which has proven as unworkable and harmful to religious liberty as *Lemon v. Kurtzman* was to Establishment Clause jurisprudence. Under any standard, Colorado's exclusion fails constitutional scrutiny.

ARGUMENT

I. *AMICI* CATHOLIC FAMILIES RECOGNIZE THEIR ROLE AS THE PRIMARY EDUCATORS OF THEIR CHILDREN AND THEIR RIGHT TO SELECT THE BEST EDUCATIONAL FIT

The Catholic Church has long taught that parents are both the first and the primary educators of their children, a role that must be recognized and respected in society. Pope Paul VI proclaimed this teaching: "Since parents have given children their life, they are bound by the most serious obligation to educate their offspring and therefore must be recognized as the primary and principal educators." Declaration on Christian

Education, *Gravissimum Educationis*, October 28, 1965, https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html.

The Catechism of the Catholic Church affirms: “Parents have the first responsibility for the education of their children.” Catechism of the Catholic Church, 539, <https://www.usccb.org/sites/default/files/flipbooks/catechism/539/>. The Catechism continues: “As those first responsible for the education of their children, parents have the right to choose a school for them which corresponds to their own convictions. This right is fundamental.” *Id.* at 540.

Consistent with their obligation and right to live out their authority as primary educators of their children, *amici* families desire to send their young children to Catholic preschools. The stories of these families illustrate the profound impact of Colorado’s exclusionary policy and demonstrate the real-world harm inflicted when government conditions generally available benefits on the abandonment of religious exercise.

A. The Abols Family

Andy and Gina Abols are parents of five children ranging in age from two years to eleven years old. Andy works as an account executive, while Gina is a stay-at-home mother. The family carefully budgets every month: “First comes our tithe, then the mortgage, then it’s food/bills and education for the kids. Anything left we use for fun or extracurriculars, but that’s not a lot.” The Abols live their faith intentionally, making financial sacrifices that reflect their deepest values and commitments.

The Abols' nine-year-old daughter, Reese, has spina bifida. Andy says Reese is "very much a centerpiece of our family." The family's entire life has been shaped by Reese's needs. They stay in Colorado specifically because "Reese's medical needs are covered by Medicaid better here than any other state." Having to pay out of pocket for their four-year-old to attend preschool at St. Mary's is a worrying drain on the family's finances, creating stress that Andy describes with palpable frustration: "While I pay for other children to go to preschool for free with my taxes, I'm also paying for preschool for my own daughter instead of saving that money. I'm moving backwards to protect our children's minds and instill virtue. Which I'm glad to do, but I shouldn't have to."

Andy is thankful for the community of support they have found at St. Mary's in Littleton, Colorado. The Abols chose St. Mary's because the parish has "great young Catholic families just like us." The family's "social life is centered around the church itself. All of our friends attend Mass." On the weekends, the Abols are part of a Lord's Day group where they get together with other families. "It's kind of comical," Andy says with evident affection. "You might have a handful of adults and like 40 kids come together to worship the Lord and build friendships."

When discussing the education of his children, Andy says "our faith is critical." He "absolutely trusts" St. Mary's, explaining that "they're just a lot more tender with the kids" than the other schools his older children attend and "they have the compassion that our family appreciates." Andy and Gina would love to send all their children to Catholic schools, but it's too expensive. Two of the Abols children are enrolled in a charter school that

“doesn’t dabble in the realm of politics or anything along those lines.” Their eleven-year-old son attends a hybrid school where he homeschools with Gina a few days a week.

The Abols are thankful that preschool at St. Mary’s “integrates stories from the Bible” as part of classroom teaching. Andy emphasizes that “St. Mary’s prioritizes virtue and faith” and attributes this to “a clear difference in our children who have gone to preschool at St. Mary’s versus our children who have gone elsewhere.”

Andy values Catholic education because “our faith teaches us to love everyone because we’re all children of God.” He explains that Catholic schools teach “there is objective truth given to us by God, that we were created a certain way to be beautiful in his eyes, and for the world.” Thanks to St. Mary’s preschool, Andy says “our kids came home well-rounded, beautiful little people, understanding what God teaches about loving everyone.”

If UPK Colorado funded their preschool education, Andy would use the savings for his family’s needs—he would likely use that money to help with the costs incurred from the numerous surgeries and travel expenses required for his daughter. Even if Andy only had an extra \$2,500, he says, “that gets me halfway to Florida for her orthopedic surgeon to improve my daughter’s life and get her closer to walking independently.”

B. The Ramirez Family

Karina and Rogelio Ramirez are parents of six children in Longmont, Colorado. Although both were

baptized in the Catholic Church, neither grew up particularly connected to their faith.

Years ago their marriage hit a rough patch. “My husband was an alcoholic at the time, and we ended up separating,” Karina explains. Rogelio reached out to the local Catholic church, started attending services and, according to Karina, “had a very fast, profound conversion.” Rogelio convinced Karina to start going to church with him. The couple eventually reconciled, both Karina and Rogelio were fully confirmed in the Catholic faith, and seven years ago they were married in a religious ceremony. Today, they are deeply involved at St. John’s Catholic Church in Longmont.

Growing in their Catholic faith changed how Karina and Rogelio think about parenting. “When we started learning about Catholicism and what it implies, we had to change a lot of the things that we were currently doing.” Living their faith more seriously has meant that they have become “open to life” and now have four more children.

Living their faith more fully drew Karina and Rogelio to take a closer look at Catholic education. They pulled their older children out of the public school and enrolled them in their parish school. “It has been the best thing we’ve done,” says Karina. Their three younger children attended their parish preschool and their three-year-old is currently attending there now as well. Karina hopes their youngest, now almost two years old, will attend next year.

Karina works full-time for a lumber company. Rogelio is self-employed as a house painter. “We’re not able to travel or take family vacations,” she says. “Our

cars are pretty old and beat up, but they get us around.” During the long Colorado winters, Rogelio’s work slows down significantly. “That’s where we start to struggle financially,” says Karina. At first, the idea of enrolling their children in their parish school seemed out of reach. Karina recalls thinking: “Oh my gosh, I can’t afford that, I can’t do that. And that’s for rich people.”

Given their financial needs, the Ramirez family has qualified for a government-sponsored tuition assistance program that helps cover the cost of sending two of their younger children to St. John’s preschool. “We didn’t know this was an option for us, the non-wealthy families,” says Karina. Many lower-income families, however, are ineligible for that program and need assistance from the UPK Colorado program in order to afford the school.

Karina is thankful that St. John’s teaches consistently with Catholic faith, especially given that preschoolers are “at an age where they absorb everything.” She did not want her small children exposed to confusing ideas about human sexuality at such a young age. This, Karina says, “definitely inclined me to invest in Catholic education for them.”

Karina has seen how their Catholic preschool reinforces in her younger children the Catholic faith she holds dear. “They’re taking them to Mass at least once a month. They’re teaching them about Mary and Jesus, and all these extra things that reinforce your faith, plus your basics that you would learn in any other school. I have a five-year-old who says he wants to be a priest already.”

For the past seven years Karina and Rogelio have led marriage preparation classes for Spanish speakers at their parish. They often encourage other Hispanic families to consider enrolling their children in the parish preschool. “I know we have some families who have grown in their faith because they’re able to access this Catholic education again, because as parents, they get us involved,” reflects Karina. She believes removing discrimination from access to the UPK Colorado program will encourage other lower-income Hispanic families to enroll their children in Catholic preschool.

C. The Skinner-Meier Family

Ana Karen Meier and Franklin Skinner have six children in Aurora, Colorado. Franklin works as a loan processor; Ana Karen is a stay-at-home mother.

Ana Karen’s four eldest children attend Catholic schools in Aurora. Their eldest daughter suffered intense bullying when she attended their local public school. As Ana Karen recalls, “My daughter started hating school. She didn’t want to get up. She would cry, she would throw fits, she would make us be late. She would not do her classwork or homework. She just hated school.” Despite reaching out to the school, the bullying continued. “I took her out and said to myself, ‘It doesn’t matter how much I have to sacrifice. I’m not putting her through that another year.’”

When they chose to send their daughter to St. Therese Catholic Classical School, Ana Karen and Franklin also decided to enroll their son in preschool there. “I couldn’t afford the whole day. I had to do a half day for him. And

it was a struggle because I had to find time to pick him up or find somebody to pick him up at 12:00,” Ana Karen recalls. The results were impressive: “When you compare [him] to my other kiddos that couldn’t attend preschool, he right now is testing two grades higher.”

Franklin was “very skeptical” about paying for private schooling, says Ana Karen. “I know how stressful it could have been on him, because he’s the one in charge of paying every bill, home bills, groceries, rent, car payment, moving back and forth.” But after that year, attending school meetings, and seeing how happy the children were, Franklin changed his mind.

For the past seven years, Ana Karen and Franklin have sacrificed in order to send their children to Catholic school. “We have struggles. We can’t have fancy dinners, we can’t go out to restaurants. We can’t go to the theaters every time we see a movie we want, because we need to put that money aside for the school, let alone for preschool.” But the sacrifice has been worth it. The school community at St. Therese’s has “been amazing” for Ana Karen and her family. “It’s just more than the school. It’s like a family with the teachers, the students.”

Ana Karen and Franklin couldn’t afford the cost of tuition when it came time for their now-nine-year-old to attend preschool. “I think he would’ve benefited a lot more,” says Ana Karen with regret in her voice. “We probably would’ve saved so much time in that pre-K. Him getting used to coloring, writing, speaking, numbers, letters—it would’ve helped him a lot.” She can see the difference between the child who attended preschool and the one who couldn’t. Fortunately, using COVID subsidies

they were able to send their now seven-year-old daughter to preschool at St. Therese. “She was fortunate,” says Ana Karen. “There was no way we could afford it.”

Now their four-year-old daughter is currently being tested for speech delay, and the family is unable to enroll her in the preschool at St. Therese’s because of the anticipated cost of therapies. “Things would be different if we could afford St. Therese,” Ana Karen says.

Unlike other preschools in Aurora, students at St. Therese’s attend Mass with the other school children and have “prayer partners” in older grades. Ana Karen thinks the preschoolers at St. Therese’s are more polite and respectful than their peers at other schools.

Ana Karen trusts the teachers and staff at St. Therese’s. When asked whether she would consider another preschool for her younger daughter, she was resolute: “I don’t feel safe to the point that I would take her to a public school. I want to leave her somewhere where I can call a community, a home where I know where she’s going to be. I know she’s taken care of.”

Ana Karen considers excluding Catholic preschools from UPK Colorado “discrimination, like a personal attack, like trying to hold you back.”

D. The Hall Family

Jill and Brian Hall were married in 2006 and have five children. The couple struggled with infertility for several years at the beginning of their marriage. On their way to New Zealand to help with earthquake recovery,

they learned that Jill was pregnant. “We were thrilled,” recalls Jill. Another child was born while they were out of the country, “but we really missed Colorado, so we moved back home.

Returning was a shock. Housing prices in Colorado had skyrocketed. They lived in Jill’s parents’ basement, saving for a down payment. “We really didn’t have a ton of money after that,” recalls Jill. “So we took it on the chin and kept going.”

The Halls learned about the preschool program at Our Lady of Lourdes in Denver. When they enrolled their first child, they received tuition assistance through the Denver Preschool Program. But after the family moved out of the city, they were no longer eligible. To cover the costs of preschool, Jill started a business of her own as a florist. “I hoped that would help supplement the education [costs] and all of the fees and everything that goes with it.”

Today, the Halls’ three oldest attend Our Lady of Lourdes full-time but they are unable to afford to send their three-year-old to preschool. Jill says with evident frustration: “I get really frustrated because I know that my other kids at this age were able to go to preschool and were ready for kindergarten. They knew what to expect, they were excited, they were probably better students because they knew how to listen.”

Preschool at Our Lady of Lourdes helped Jill’s three eldest children “learn about how to go to Mass and Adoration and the big things.” The teachers and administrators at the preschool tell parents something

that resonates deeply with Jill: “You are the first educator of your children. We are here to supplement.”

The Halls’ oldest son has several learning disorders and the preschool teachers often consulted Jill and Brian. “That was a huge benefit for his learning long-term. We could look at those things and zero in on them pretty quickly. It was a huge stepping stone for us in our learning process of how to help our child.”

Our Lady of Lourdes school, remarks Jill, is “authentically Catholic.” “When you first come into any part of the school, they let you know the mission of the school is to have a personal relationship with Jesus Christ and to nurture that.”

Jill says she is sad and disappointed that Our Lady of Lourdes is unable to participate in the UPK Colorado program. “I feel like we’ve been excluded from something that should be for every kid.” She adds: “I’m not choosing something so extreme. I’m choosing just a faith, and here I’m being punished for that.”

E. The De La Cruz Family

Melissa and Antonio De La Cruz have been together for 14 years. Today they are the proud parents of four children ages 13, 11, 6, and 5.

Melissa attended Catholic high school. Antonio attended the local public schools. Both she and Antonio were raised Catholic. All the children attend Notre Dame Parish school. “It’s been wonderful to be at Notre Dame,” says Melissa. “My kids are thriving. They’re happy. They

love the school culture. They love their teachers. I love it here.”²

Several years ago, Melissa worked for Catholic Charities as an early education specialist. “I would hear a lot of different stories about what happens in public school systems.” She adds, “I love knowing that my kids are safe, I don’t agree with [security resource officers] that are in public schools. I don’t want my kids policed. I want them to feel secure, at Notre Dame they take security very seriously and ensure that all children are safe without adding police to the school. I chose to keep my kids in a private school setting, where I have more teacher-to-parent interaction.”

Melissa chose Catholic schools so her children would “have the same faith that I have, to know that if they do have a problem, they can turn to God, turn to their religion, turn to the church. Within the school, I know that they’re also learning morals and values and how to treat others, how to have respect, how to communicate.” She knows that Notre Dame teaches its students very traditional Catholic teachings. “I am completely OK with that.”

2. The De La Cruz children previously attended Wellspring Catholic Academy, the pre-K-8 grade parish school for St. Bernadette in Littleton, Colorado. Wellspring closed in December of 2024 and Guardian Angels Catholic School in Denver will close at the end of the 2024-2025 academic year amid “serious financial challenges in Catholic schools” within the Archdiocese of Denver. “Archdiocese restructuring Catholic schools’ footprint for ongoing vitality,” Denver Catholic, Sept. 13, 2024, <https://www.denvercatholic.org/archdiocese-restructuring-catholic-schools-footprint-for-ongoing-vitality>.

Sending all their children to private school involves enormous financial commitment. “With the times right now, groceries are so expensive. Gas is so expensive. Anything you do is basically expensive,” says Melissa. “This year has also been very tough on us.”

To lower tuition expenses, Melissa decided to work as the Registrar and Tuition Officer at Notre Dame Parish School. “What I make at the school is not what I could possibly be making at another employer. But it means giving me a discount on my tuition and allows me to be close to my children.” She is thankful for the chance to send her youngest to preschool, but says “a lot of families out there would love to have their kids go to a school like the ones that we have here and that aren’t able to because they aren’t able to pay. I know that a lot of families have left because of the cost of pre-K.”

II. CATHOLIC SCHOOLS ARE BOUND TO OPERATE CONSISTENT WITH THE TEACHINGS OF THE CHURCH

In the Second Vatican Council’s Declaration on Christian Education, Pope Paul VI proclaimed that “Holy Mother Church must be concerned with the whole of man’s life, even the secular part of it insofar as it has a bearing on his heavenly calling. Therefore she has a role in the progress and development of education.” *Gravissimum Educationis, supra*.

The U.S. Conference of Catholic Bishops explains that education remains critically important for the Catholic Church, helping “in the formation of the human person by teaching how to live well now so as to be able to live

with God for all eternity.” United States Conference of Catholic Bishops, Catholic Education, <https://www.usccb.org/committees/catholic-education#:~:text=Our%20schools%20serve%20both%20the,nation%20in%20which%20they%20live>. The bishops assert that “Our schools serve both the faith community and society by educating children, young people and adults to contribute to the common good.” *Id.*

Recent guidance from the Vatican’s Congregation for Catholic Education impresses upon all Catholic educational institutions that “every official act of the school must be in accordance with its Catholic identity.” Congregation for Catholic Education, *The Identity of the Catholic School for a Culture of Dialogue*, https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20220125_istruzione-identita-scuola-cattolica_en.html. This instruction applies across all academic subjects because “there is no separation between time for learning and time for formation, between acquiring notions and growing in wisdom.” *Id.*

The Archdiocese of Denver takes these guidances seriously and has made clear that Catholic schools in the archdiocese are 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.” See App. 74a. As explained by the head of the Archdiocese’s Office of Catholic Schools, this mission is viewed as “serv[ing] the family [and] . . . parents in their duties as primary educators or principal educators of their children.” *Id.*

Of particular relevance, the Archdiocese has produced guidance on sexual orientation and gender identity, *Splendor of the Human Person: A Catholic Vision of the Person and Sexuality*, which serves as a “basic outline for addressing issues of the human person, sexuality and gender for use within parishes and schools in the Archdiocese of Denver.” App.76a. (citing Archdiocese of Denver, *Splendor of the Human Person: A Catholic Vision of the Person and Sexuality* at 6, https://personandidentity.com/wp-content/uploads/2021/08/The-Splendor-of-the-Human-Person_AOD.pdf).

Consistent with this guidance, the Office of Catholic Schools has developed detailed guidance for Archdiocesan schools to “implement policies that are consonant with Christian anthropology’s view of the person.” See Archdiocese of Denver, Office of Catholic Schools, *Guidance for Issues Concerning the Human Person and Sexual Identity* at 2, 9-12, <https://s3.documentcloud.org/documents/23218852/guidance-for-issues-concerning-the-human-person-and-sexual-identity.pdf>. The guidance adds that “[s]chools should avoid validating or affirming the premises of ‘gender ideology,’ even indirectly by silence or inaction.” *Id.*

Amici Catholic Families assent to such guidance. In light of the tender age of their preschool children, these parents do not want them exposed to certain themes regarding human sexuality. At the same time, they want their children to embrace the Catholic Church’s teachings on the nature of the human person.

III. COLORADO’S EXCLUSION OF RELIGIOUS PRESCHOOLS VIOLATES THE FREE EXERCISE CLAUSE

A. Colorado’s Exclusion Violates *Trinity Lutheran, Espinoza, and Carson*

This Court’s recent decisions establish that government cannot exclude otherwise eligible religious organizations from generally available public benefits because of their religious exercise.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 561-62 (2017), this Court held that denying “an otherwise available benefit” based on “religious identity” imposes “a penalty on the free exercise of religion.” *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 487 (2020), held that once a state “decides to subsidize private education, it cannot disqualify some private schools solely because they are religious.” And *Carson v. Makin* clarified that states cannot exclude religious schools based on their religious use of funds—specifically, their use of funds for religious instruction. 596 U.S. 767, 783-86 (2022). The Court rejected Maine’s attempt to distinguish between religious “status” and religious “use,” holding that both forms of discrimination trigger strict scrutiny.

Colorado excludes Catholic preschools not because they lack educational quality or fail safety standards, but because they maintain policies consistent with Catholic doctrine. This is precisely the discrimination *Carson* prohibits. *Id.* at 781. Like Maine’s exclusion of “sectarian” schools, Colorado targets religious schools that actually practice their faith.

B. This Court Should Overrule *Smith* and Replace It with a Workable Standard

This case presents an ideal opportunity to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990). Just as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), undermined the Establishment Clause before this Court abrogated it in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), *Smith* has undermined free exercise protections. Both decisions created unworkable tests that invited government hostility toward religion, generated endless confusion, and departed from constitutional text and history.

In *Fulton v. City of Philadelphia*, Justice Alito, joined by Justices Thomas and Gorsuch, explained that “*Smith*’s interpretation of the Free Exercise Clause is hard to defend” and “is fundamentally wrong.” 593 U.S. 522, 548, 552 (2021) (Alito, J., concurring). Justice Gorsuch noted there is no reason why “the First Amendment’s Free Exercise Clause should be demoted to a second-class right.” *Id.* at 557 (Gorsuch, J., concurring); see also *id.* at 543 (Barrett, J., concurring, joined by Kavanaugh, J., concurring) (“it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination”).

Like the *Lemon* test, *Smith*’s “neutrality and general applicability” framework has generated endless litigation. The “general applicability” prong has been particularly unworkable. This Court in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-47 (1993), and *Fulton*, 593 U.S. at 533-42 has repeatedly tried to clarify when exceptions defeat general applicability, yet confusion persists.

This case exemplifies the problem. Colorado allows numerous exceptions to its nondiscrimination requirement—categorical exceptions for disability and income level, and individualized exceptions through its “catchall” preference mechanism. The lower courts engaged in tortured interest-balancing to determine whether these exceptions “undermine the government’s interest in the same way” as religious exceptions would. But *Fulton* rejected precisely this type of interest-balancing within the general applicability analysis. The question is whether the government created a system of exceptions triggering individualized assessment—which Colorado plainly has. Yet the Tenth Circuit found general applicability intact, demonstrating how *Smith*’s framework invites manipulation and produces inconsistent results.

Just as *Lemon* invited hostile government action against religious expression, *Smith* invites discrimination under the guise of “neutral” regulation. Colorado deliberately included requirements excluding religious schools adhering to traditional teachings, then claimed immunity under *Smith* because the requirements are facially “neutral.” Officials compared Catholic teachings to segregationist policies, yet faced no consequence because *Smith* allows such hostility behind plausible neutrality.

Like *Lemon*, *Smith* abandoned the First Amendment’s original meaning. The Free Exercise Clause protects the “free exercise” of religion—not merely belief, but action. As *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) recognized, the Free Exercise Clause requires compelling justification before substantially burdening religious exercise.

Abrogating *Lemon* restored clarity to Establishment Clause law. So too will overruling *Smith* end confusion about Free Exercise protections. Courts would ask straightforward questions: Does the law substantially burden religious exercise? Does the government have a compelling interest? Is the law narrowly tailored? This aligns Free Exercise jurisprudence with other fundamental rights.

After *Kennedy* retired *Lemon*, there is no principled reason to retain *Smith*'s equally flawed framework. The final end of *Lemon* produced no chaos. Similarly, expressly overruling *Smith* would not endanger legitimate government interests. Congress enacted the Religious Freedom Restoration Act in 1993, applying *Sherbert*'s compelling interest test, and numerous states have similar protections. These jurisdictions demonstrate that robust religious exercise protection is compatible with orderly government. RFRA's workability—like post-*Kennedy* Establishment Clause jurisprudence—proves *Sherbert*'s standard works.

C. Colorado's Exclusion Fails Strict Scrutiny

Whether this Court overrules *Smith* or applies it correctly, Colorado's exclusion violates the Free Exercise Clause.

1. Colorado's interest is not compelling.

A generalized interest in “decreasing discrimination” is neither judicially cognizable nor compelling. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023); *Fulton*,

593 U.S. at 542. A government interest in preventing “discrimination” cannot be compelling when the alleged discrimination is exercising sincerely held religious beliefs. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

Colorado cannot explain how excluding Catholic preschools advances equal access to education. Catholic preschools do not prevent LGBTQ families from accessing other preschools. Forcing Catholic preschools out reduces overall access to quality education.

2. Excluding Catholic preschools is not narrowly tailored.

As *Fulton* noted, “including” a Catholic agency “seems likely to increase, not reduce,” available options. 593 U.S. at 541-42. Including Catholic preschools would increase quality options for Colorado families. Colorado has less restrictive alternatives: exempting religious schools while maintaining other protections, or allowing parents to use funds at any licensed preschool without conditioning participation on admissions policies. Colorado chose the most restrictive option, which fails strict scrutiny.

IV. THE TENTH CIRCUIT’S DECISION HAS PROFOUND IMPLICATIONS FOR RELIGIOUS LIBERTY AND PARENTAL RIGHTS

The Tenth Circuit’s decision, if allowed to stand, will have far-reaching consequences beyond Colorado. It signals that states may condition participation in generally available benefit programs on religious organizations abandoning their religious beliefs and practices. This undermines not

only religious liberty but also parental rights to direct their children's education—rights this Court has long recognized as fundamental. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The families represented by *amici* seek only what this Court has repeatedly guaranteed: the right to participate in generally available government programs without being forced to choose between their faith and public benefits. The Tenth Circuit's decision forces exactly this unconstitutional choice.

As Andy Abols explained, he is “moving backwards” financially “to protect our children's minds and instill virtue.” Jill Hall feels “excluded from something that should be for every kid.” Ana Karen Meier considers the exclusion “discrimination, like a personal attack, like trying to hold you back.” These are not abstract legal claims—they are the lived experiences of families forced to choose between their faith and equal treatment under law.

The trial court accused Petitioners of “missing the irony in valuing choice for religious schools and their students—but not for LGBTQ+ children and families.” This mischaracterizes Petitioners' position. Petitioners and *amici* families protest the exclusion of Catholic schools from UPK Colorado because of these schools' fidelity to Catholic teaching. They do not seek to prevent LGBTQ individuals from accessing preschool—numerous other preschools remain available. They simply ask that religious schools not be excluded from a generally available public benefit because they teach religious doctrine.

There is nothing “ironic” in demanding that a generally available public benefit be free of religious discrimination. It would be deeply ironic—and tragic—if a program designed to expand access to preschool education instead became a vehicle for excluding religious families and schools from full participation in civic life.

The real-world consequences of Colorado’s exclusionary policy fall heavily on families like *amici*. As Karina Ramirez laments, many Hispanic families are shut out from UPK Colorado, unable to afford the Catholic education that has been “the best thing we’ve done.” She has seen families “who have grown in their faith because they’re able to access this Catholic education again.” But too many families remain excluded by cost barriers that UPK Colorado could remove—if only it didn’t discriminate against religious schools.

The De La Cruz family has sacrificed vacations and other opportunities, with Melissa accepting lower wages to work at Notre Dame for the tuition discount. She knows “a lot of families have left because of the cost of pre-K”—families who want what she has found but cannot afford it without UPK Colorado assistance.

For the Abols family, the financial burden is particularly acute. With Reese’s double ankle surgery costing nearly \$5,000, every dollar counts. Yet Andy continues to sacrifice, paying for Catholic preschool because he refuses to compromise on his children’s moral and spiritual formation. The choice between medical care for a disabled child and religious education for younger siblings is a choice no family should have to make—yet Colorado’s policy forces exactly this impossible decision.

The Hall family’s experience illustrates another dimension of the harm. After starting a florist business to afford preschool costs and successfully sending three children through Our Lady of Lourdes preschool, Jill now watches her three-year-old miss out on the same opportunities her siblings enjoyed. “I feel like we’ve been excluded from something that should be for every kid,” she says.

Ana Karen Meier’s words capture the deep sense of injustice these families feel: excluding Catholic preschools from UPK Colorado is “discrimination, like a personal attack, like trying to hold you back.” For families who have made extraordinary sacrifices to provide Catholic education, the exclusion feels personal because it is personal. It targets their deepest convictions about how to raise their children and dismisses those convictions as unworthy of equal treatment.

These families represent thousands of Colorado parents who believe they are the “primary and principal educators” of their children. They have chosen schools that “prioritize virtue and faith” and view parents as the first educators. Colorado’s mandate forces them to choose between their faith and equal participation in a taxpayer-funded program—a choice the Constitution forbids and that inflicts real harm on real families every day.

CONCLUSION

For families hoping to offer their young children a Catholic preschool education, and to vindicate fundamental First Amendment rights, *amici* respectfully request this Court grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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