

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 to “provide eligible children an equal opportunity to enroll

1. 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.

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. 1404-1:4.110(B).

Petitioners—the Archdiocese of Denver, two Catholic parishes, and the parents of preschool children—contend that by conditioning participation in the UPK Colorado 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 sexual-orientation and gender-identity aspects of Colorado’s “equal-opportunity requirement” are neutral, generally applicable, and satisfy strict scrutiny. The Tenth Circuit affirmed on September 30, 2025.

SUMMARY OF ARGUMENT

Amici Catholic Families are Colorado parents with preschool-aged children who, as primary educators of their children, prefer Catholic preschools like those operated by Petitioners. They regard Catholic schools as essential partners in forming their children in the faith and prefer schools that operate consistent with Catholic teaching.

They object to Colorado’s mandate conditioning UPK Colorado participation on schools agreeing to operate in ways inconsistent with their religious beliefs and mission.

This Court’s decisions clearly prohibit Colorado’s effective exclusion of religious preschools from its universal preschool program. First, this Court has made clear in both *Employment Division v. Smith* and *Fulton v. City of Philadelphia* that general applicability is defeated whenever a government creates a mechanism for individualized, discretionary exemptions—which Colorado plainly has done. Second, *Carson v. Makin* is not limited to cases where a government’s exclusion of religious institutions is facially explicit. *Carson* holds that once a state offers a generally available benefit, it cannot condition that benefit on religious schools abandoning their religious exercise—whether the exclusion is express or achieved through facially neutral conditions that Catholic schools cannot satisfy consistent with the exercise of their religion. Under either basis, Colorado’s exclusion fails strict 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, § 2223, <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 § 2229.

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.²

A. The Abols Family

Andy and Gina Abols are parents of five children ranging in age from two years to eleven years old. Andy

2. All statements made by *amici* Catholic families are on file with counsel for *amici curiae*.

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 (currently expecting baby number seven) 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 eleven 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 are happy to have welcomed more children to their family.

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. Today, the couple has a kindergartner and a first grader at St. John’s, a three-year-old in the parish preschool, and a freshman at a Catholic high school in Broomfield. Their three-year-old is set to begin preschool this coming fall. Karina hopes their youngest, now almost two years old, will attend the following 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 consistent 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 seven-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-Mier Family

Ana Karen Mier and Franklin Skinner are also expecting their seventh child and live in Aurora, Colorado. Franklin works as a loan processor; Ana Karen is a stay-at-home mother.

Their older children attend Catholic schools in Aurora, with the eldest son graduating this past May. 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 were unable to afford to send their youngest to preschool there. Instead, the Halls enrolled him this year at a nearby Lutheran preschool—

one that participates in the UPK Colorado program. It was not the choice they wanted to make. 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.”³

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.”

3. 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 closed at the end of the 2024-2025 academic year. “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>.

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.”

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*. On the 60th anniversary of *Gravissimum Educationis*, Pope Leo XIV reaffirmed this foundational teaching, writing that the family remains “the primary place of education” and that Catholic schools are called to “collaborate with parents”—not to replace them. *Drawing New Maps of Hope*, Apostolic Letter (Oct. 28, 2025), available at https://www.vatican.va/content/leo-xiv/en/apost_letters/documents/20251027-disegnare-nuove-mappe.html. This anniversary letter confirms that the Church’s commitment to parental primacy in education is not a relic of the Second Vatican Council but a living principle of contemporary Catholic teaching.

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 instructs 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.* Pope Leo XIV echoed and deepened this instruction in his 2025 Apostolic Letter on education, writing that “when faith is true, it is not an added ‘subject’ but a breath that oxygenates every other subject.” *Drawing New Maps of Hope, supra.* He called Catholic education “leaven in the human community” that “generates reciprocity, overcomes reductionism, and opens up to social responsibility”—a formation that is possible only when the school’s identity and its religious mission remain inseparable. *Id.* Colorado’s mandate, which conditions participation on Catholic schools altering precisely those identity-shaping practices, strikes at the core of what the pope has defined as authentic Catholic education.

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 Pet.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.” JA 558-85. (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, 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.” Pet.App.242a, 249a. 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 IS SUBJECT TO STRICT SCRUTINY

A. Colorado’s Program Lacks General Applicability Under Smith Because Colorado Created a System of Categorical and Discretionary Exemptions

This Court has held that states can apply a “valid and neutral law of general applicability” that intrude on religiously motivated practices without running afoul of the First Amendment. *Employment Division v. Smith*, 494 U.S. 872, 879–80 (1990). But a law that grants individualized exemptions from its requirements is not generally applicable and must satisfy strict scrutiny. *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). The first question this Court has agreed to resolve is whether proving a lack of general applicability requires a showing of exemptions for *identical* secular conduct. The answer is no.

Colorado’s nondiscrimination mandate is riddled with exemptions. The state grants *categorical* exemptions for disability and income level—providers may admit only children with disabilities or only children from low-income families. Colorado further permits providers to serve exclusively “children of color,” “gender-nonconforming children,” and the “LGBTQ community.” And the state’s program incorporates a discretionary “catchall” through which individual preschools may seek additional accommodations. Each of these mechanisms represents exactly the kind of “system of individual exemptions” that *Fulton* held defeats general applicability. 593 U.S. at 533.

The Tenth Circuit nonetheless found general applicability intact because, in its view, none of Colorado’s exemptions cover conduct *identical* to refusing to enroll children based on a parent’s sexual orientation. That analysis is wrong. *Fulton* does not require a religious claimant to find a secular twin whose identical conduct was excused. The question is whether the government has “create[d] a formal mechanism for individualized exemptions.” 593 U.S. at 537. Where such a mechanism exists, the government must extend it “to cases of religious hardship” or show that withholding it satisfies strict scrutiny. *Id.* at 534 (quoting *Smith*, 494 U.S. at 884). Colorado’s discretionary preference mechanism does exactly that: it gives program officials authority to grant or deny exemptions on a case-by-case basis. That the officials have chosen not to extend that discretion to religious schools does not save the program—it condemns it.

Requiring identical secular comparators would also make *Smith*’s general applicability requirement a dead letter. Discriminatory programs are rarely so clumsy as to exempt a secular actor engaged in conduct *precisely* identical to the religious claimants’. The point of the general applicability inquiry is to identify whether the government has created a system flexible enough to accommodate secular interests but rigid only as to religion. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-43 (1993). Colorado’s system bends for disability organizations, LGBTQ-focused providers, and providers serving families of color, but finds itself suddenly inflexible when a Catholic school asks to serve families who share its faith. That selective rigidity is the hallmark of a system that is not generally applicable.

This Court need not overrule or restructure *Smith* to decide this case. It need only apply *Fulton*'s straightforward teaching: where a government maintains a mechanism for discretionary, individualized exemptions, a religious claimant who is denied the same accommodation is entitled to strict scrutiny.

Colorado's program is precisely the kind of scheme *Smith*'s general applicability requirement was designed to prevent. Colorado deliberately included requirements excluding religious schools adhering to traditional teachings, then claimed immunity from strict scrutiny because the requirements are facially "neutral." Officials compared Catholic teachings to segregationist policies, yet faced no consequence because the Tenth Circuit accepted their facial-neutrality defense. That is the precise result *Smith*'s general applicability prong exists to prevent.

B. Colorado's Exclusion Violates Trinity Lutheran, Espinoza, and Carson—And Carson Applies Regardless of Whether Religious Exclusion is Explicit

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, 461-62 (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.

Question 2 directly implicates this holding. Colorado contends that *Carson* applies only where a government program contains an explicit religious classification on its face. That reading drains *Carson* of its meaning. Maine’s tuition program in *Carson* was also facially neutral—it excluded schools based on their “sectarian” use of funds, not by naming religions. 596 U.S. at 777-78. This Court rejected the argument that the absence of an explicit religious label insulated Maine’s policy from strict scrutiny. The operative question under *Carson* is not whether the government used the word “religion” but whether the practical effect of the condition is to exclude schools *because of their religious exercise*. *Id.* at 778-781. Colorado’s sexual-orientation and gender-identity mandate is satisfied by every preschool in the state except those whose religious beliefs require them to teach a particular understanding of sex and human identity. It

is, in every meaningful sense, a condition that targets religious exercise, and *Carson* requires strict scrutiny accordingly.

C. Colorado's Exclusion Fails Strict Scrutiny

Besides failing to meet *Smith's* general applicability requirement and running afoul of this Court's holding in *Carson*, the state fails to survive strict scrutiny. "A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. So long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 542 (quoting *Lukumi*, 508 U.S. at 546). "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.*

Colorado's programmatic interest in providing universal preschool access to its residents is undermined, not advanced, by excluding Catholic preschools. *Amici* are Catholic families who seek to enroll their children in Catholic preschools because those schools' mission aligns with their sincerely held religious beliefs. Applying Colorado's equal opportunity requirement without offering religious exemptions produces an unequal result: while some families may attend the school of their choice, certain religious families may not, because the schools they have chosen adhere to religious beliefs Colorado disfavors. In short, the families this program was designed to serve include those it excludes.

Further, excluding Catholic preschools was not contemplated when the program was enacted—and indeed was contrary to the understanding of its supporters.

Testimony before both the House and Senate Education Committees in support of UPK Colorado, for example, described the program’s promise as encompassing a “robust array of different models for parents to choose from,” mentioning Catholic schools by name as examples. See Colorado House Education Committee, *House Education [Mar 17, 2022]*, at 04:21 PM (Colorado General Assembly, Mar. 17, 2022), <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220331/-1/12921>. One lawmaker remarked that the UPK Colorado’s “mixed delivery” system includes “denominational faith” preschools, that they are an “irreducible requirement” of the legislation and that “faith tradition” providers would remain “alive and vibrant” in the program for years to come. Colorado Senate, *Colorado Senate 2022 Audio Legislative Day 093*, at 09:44 AM (Remarks of Sen. Paul Lundeen, Colorado General Assembly, Apr. 14, 2022), <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220331/-1/13332>. Colorado’s subsequent exclusion of Catholic schools is at odds with the program’s design.

Colorado cannot rescue this contradiction by pointing to the “equal opportunity” overlay as an independent interest. A condition that excludes religious providers from a universal access program does not advance universal access or family choice—it contracts both. As this Court observed in *Fulton* where the City of Philadelphia pointed to a similar policy to exclude Catholic Social Services from its foster care placement program, including a Catholic agency “seems likely to increase, not reduce,” available options. 593 U.S. at 541-42.

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.

A. This Court’s Precedents Establish Parental Authority Over Children’s Moral and Religious Formation

Parents possess a fundamental constitutional right to direct the upbringing, education, and religious formation of their children. “The child is not the mere creature of the State.” *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Rather, parents bear the primary responsibility for preparing children “for additional obligations.” *Id.* Likewise, in *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), this Court recognized that the liberty protected by the Fourteenth Amendment includes the right of parents “to control the education of their own.” And in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), the Court reaffirmed that the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” See also *Mirabelli v. Bonta*, 146 S. Ct. 797, 803 (2026) (noting that “Under long-established precedent, parents—not the State—have primary authority with respect to ‘the upbringing and

education of children.”); see also *id.* at 804-05 (Barrett, J., concurring).

These precedents reflect a foundational constitutional principle: parents, not the government, possess primary authority over the moral, religious, and educational formation of their children. The Constitution does not permit the State to “standardize its children” or to displace the role of parents in determining how children should be educated and formed. *Pierce*, 268 U.S. at 535. That principle carries special force where parents seek an education consistent with their religious convictions.

Other recent Free Exercise cases reinforce the constitutional protection afforded to parental educational choice. In *Espinoza*, this Court held that although a State need not subsidize private education, “once a State decides to do so, it cannot disqualify some private schools solely because they are religious.” 591 U.S. at 486. Likewise, in *Carson*, this Court held that Maine violated the Free Exercise Clause by excluding schools that provided religious instruction from a generally available tuition assistance program. 596 U.S. at 789. These decisions recognize that parents do not surrender their constitutional rights when they seek public benefits to support religious education for their children.

This Court’s decision in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), further underscores the constitutional significance of parental authority in matters of education and moral formation. There, parents challenged a school district’s refusal to provide notice and opt-outs from instruction involving gender and sexuality themes that conflicted with their religious beliefs. This Court held that

the parents were likely to succeed on their constitutional claims, recognizing both the substantive due process right of parents to direct the upbringing of their children and the protections afforded by the Free Exercise Clause when government policies substantially interfere with parents' religious formation of their children. The Court rejected the notion that public schools may override parental religious convictions merely because the challenged instruction appears within a generally applicable curriculum.

Building on *Mahmoud*, this Court in *Mirabelli* reaffirmed and extended these principles: it held that California's policy of concealing a student's gender transitioning from parents "substantially interfere[d]" with parents' right "to guide the religious development of their children," 146 S. Ct. at 802, and likely violated parents' substantive due process right to participate in significant decisions about their children's mental health and upbringing. The Court's twin rulings in *Mahmoud* and *Mirabelli* establish that the Constitution does not permit government entities to override parental direction of their children's moral and religious formation, whether through mandatory curriculum or exclusionary funding conditions.

Mahmoud is especially significant because it recognizes that parental rights extend beyond selecting whether a child attends public or private school. Parents also retain constitutional authority over the moral and religious messages conveyed to their children during their formative years. The Constitution protects not only the abstract right to choose a school, but the practical ability to select an educational environment that reinforces, rather

than undermines, the religious and moral instruction parents provide at home.

B. Colorado’s Exclusion Directly Burdens Constitutionally Protected Parental Choice

Parental choice is directly implicated here. *Amici* Catholic families seek to enroll their children in Catholic preschools precisely because those schools partner with families in the religious and moral formation of young children. They desire schools that teach their children “virtue and faith,” reinforce the Catholic understanding of the human person, and support parents in their role as “primary and principal educators.” For these families, education cannot be separated from formation. Preschool is not merely childcare or academic preparation; it is the beginning of a child’s moral and spiritual development.

Colorado’s exclusion of Catholic preschools from UPK Colorado directly burdens these constitutionally protected parental choices. The State conditions participation in a generally available public benefit on Catholic schools agreeing to operate in ways inconsistent with their religious beliefs concerning sexuality, gender identity, and the human person. The predictable effect is to pressure parents away from schools that reinforce their faith and toward educational institutions more acceptable to the State.

C. The Burden Falls Disproportionately on Lower-Income Religious Families

That burden is especially severe for lower-income and middle-income religious families. Wealthy families

may still be able to choose religious education despite Colorado's exclusionary policy. But many families represented by *amici* cannot. Karina Ramirez explains that her family originally viewed Catholic education as "for rich people" until financial assistance made it accessible. Jill Hall describes being unable to afford preschool for her younger child after previously benefiting from tuition assistance. Andy Abols explains that every dollar spent on preschool is money unavailable for the medical needs of his disabled daughter. Colorado's policy therefore places substantial pressure on families to forgo religious education not because they no longer desire it, but because the State has excluded their chosen schools from equal participation.

This Court has repeatedly rejected government policies that force families to choose between their faith and participation in public life. In *Trinity Lutheran*, this Court explained that denying a public benefit because of religious exercise imposes a penalty on the free exercise of religion. 582 U.S. at 462. And in *Carson*, this Court made clear that a State cannot condition public educational benefits on a school abandoning the very religious instruction that makes it religious. 596 U.S. at 786-89. Colorado's program imposes precisely that unconstitutional condition.

The constitutional injury extends beyond the schools themselves. Colorado's policy interferes with the rights of parents who seek to raise their children according to their faith. This Court recognized in *Yoder* that education implicates "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." 406 U.S. at 232.

That interest is not diminished because children are young or because the State characterizes its conditions as nondiscrimination requirements. To the contrary, the formative preschool years are among the most significant periods in a child's moral and psychological development. Parents understandably care deeply about the messages children receive concerning identity, morality, family, and human nature during that period.

Nor does Colorado's policy merely regulate conduct unrelated to religion. The policies Colorado seeks to prohibit are inseparable from Catholic schools' religious mission and understanding of the human person. Catholic preschools teach that human beings are created male and female in the image of God and that sex is not a characteristic detached from the person. Those teachings are not peripheral to Catholic education; they are part of the schools' effort to provide an integrated religious formation consistent with Church teaching. Colorado effectively demands that Catholic schools abandon or suppress those teachings as the price of participating in UPK Colorado.

The Constitution does not permit the government to leverage public benefits to frustrate the religious formation parents seek for their children. Yet Colorado's policy moves in precisely that direction by penalizing parents who choose schools that teach views the state disfavors.

The experiences of *amici* families demonstrate the concrete harms that follow when the state disregards the primacy of parental authority. Ana Karen Mier explains that she does not "feel safe" sending her children to

schools that do not share her family's values and faith commitments. Melissa De La Cruz values Catholic education because she knows her children are learning "morals and values and how to treat others." Andy Abols describes sacrificing financially "to protect our children's minds and instill virtue." These families are not seeking special treatment. They seek only equal participation in a public program while remaining faithful to their religious convictions and parental responsibilities.

This Court's precedents protect precisely that choice. The Constitution respects the primacy of parents in directing the education and religious formation of their children and forbids the state from using generally available educational benefits to pressure families away from religious education. Colorado's exclusion of Catholic preschools from UPK Colorado violates those principles and imposes unconstitutional burdens on both parental rights and religious exercise.

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.

D. The Constitution Does Not Permit Government to Leverage Public Benefits Against Religious Formation

The trial court accused Petitioners of missing "the irony in valuing choice for religious schools and their students—but not for LGBTQ+ children and their

families.” 736 F.Supp.3d 956, 1007 n.40 (D. Colo. 2024). 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.

There is nothing “ironic” in demanding that a public benefit be free of religious discrimination. It would be tragic if a program designed to expand preschool access instead became a vehicle for excluding religious families from 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 upcoming 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. Jill started a florist business to cover preschool costs and enrolled three children at Our Lady of Lourdes, but cannot afford it for her youngest. "I feel like we've been excluded from something that should be for every kid," she says.

Ana Karen Mier'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 reverse the decision below.

Respectfully submitted,

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