No. 25-581

IN THE

Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN 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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR 43 MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are United States Senators and Members of the United States House of Representatives committed to upholding Congress's longstanding, bipartisan tradition of protecting religious-liberty rights of all Americans. *See, e.g.*, 22 U.S.C. § 6401(a)(2) (Congressional recognition that religious liberty is a "universal human right and fundamental freedom"). Consistent with this tradition, amici have worked in Congress to safeguard religious-liberty protections in education. Amici submit this brief to explain that accepting the Tenth Circuit's holdings below will have spillover effects beyond Colorado preschools: it will provide states a playbook to discriminate against religious organizations while doling out federal educational benefits—directly contrary to Congress's purpose in providing such benefits. *See* Appendix for List of Amici.

INTRODUCTION

Many Members of Congress have championed school choice and been longtime advocates of religious liberty. That is why Congress passed the Educational Choice for Children Act (ECCA) last year to provide taxpayers with a means to fund scholarships for children to attend and receive services at public, private secular, or religious schools. Congress enacted ECCA to maximize choice and religious freedom for Americans throughout the country.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The Tenth Circuit decision below, coming a few months after passage of ECCA, has generated keen interest from Members of Congress. State participation in ECCA is crucial, with donated funds passing through state-designated scholarship granting organizations before distribution to students. If states like Colorado can attach nondiscrimination conditions to universal preschool programs that effectively exclude religious schools from the benefit program without violating the Free Exercise Clause, then states can attach nondiscrimination conditions to ECCA participation to effectively exclude religious schools. Indeed, states like Vermont have *already* attached such conditions to ECCA participation. Such state-imposed limitations will jeopardize Congress's landmark education scholarship program—the latest in a long line of Congressional actions that bolster school choice and support religious liberty. Congress enacted ECCA to provide choices to families and to advance religious *liberty*, not religious *discrimination*.

Fortunately, this Court's precedents prevent states from excluding religious schools either from universal preschool programs or ECCA participation. Over the past decade, this Court has consistently held that states cannot exclude religious schools from otherwise generally available educational funding programs. *See Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017); *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464 (2020); *Carson* v. *Makin*, 596 U.S. 767 (2022). The only difference between those cases and the Colorado preschool choice program is that Colorado imposes an implicit—as opposed to explicit—bar of religious organizations that hold to traditional views of marriage and sex. But "what cannot be done directly cannot be done indirectly." *Students for Fair Admissions, Inc.* v.

President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) (cleaned up). This Court should therefore reverse the Court of Appeals.

ARGUMENT

I. CONGRESS, EDUCATION, AND RELIGIOUS LIBERTY

Congress's engagement in the education sphere is animated by two bedrock commitments: preserving parental choice in education and protecting the ability of religious institutions to participate in otherwise generally available public programs without surrendering their faith. These commitments are deeply rooted in our Nation's history, and Congress has reaffirmed them across a range of modern federal programs. ECCA is the latest expression of that tradition.

A. Congress's Commitment To Education Choice And Religious Liberty Is Bipartisan And Rooted In The Founding Era

Since the Founding, Congress has authorized programs that provide federal resources through education choice that includes religious organizations.

In 1787, the Congress of the Confederation enacted the Northwest Ordinance, which set aside federal land for both public and sectarian religious schools in the Northwest Territory. *See Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 862 (1995) (Thomas, J., concurring) ("Our Nation's tradition of allowing religious adherents to participate in evenhanded government programs … can be traced at least as far back as the First Congress, which ratified the Northwest Ordinance of 1787."). The third article of the Ordinance directly tied together schools, religion, and government: "Religion, morality, and knowledge being necessary to

good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787, art. III, *reprinted in* 1 Stat. 50, 52 (1789). In 1789, the First Congress reenacted the Northwest Ordinance, including Article III. Consistent with Congress's expectation, many of the schools built under the Ordinance were religious. *See* Antieau et al., *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 163, 174, 188 (1964). "Nevertheless, early Congresses found no problem with the provision of such neutral benefits." *Rosenberger*, 515 U.S. at 863 (Thomas, J., concurring); *see also* Antieau, *Freedom From Federal Establishment* 174 (noting that "almost universally[,] Americans from 1789 to 1825 accepted and practiced governmental aid to religion and religiously oriented educational institutions"). In addition to the Northwest Ordinance, "[e]arly federal aid (often land grants) went to religious schools." *Espinoza*, 591 U.S. at 481 (citing McConnell et al., *Religion and the Constitution* 319 (4th ed. 2016)). For instance, Congress "provided support to denominational schools in the District of Columbia until 1848." *Id.* (citations omitted).

Congress's support of religious liberty in education continued into the twentieth century. In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified at 20 U.S.C. § 6301 *et seq.*), to "provid[e] full educational opportunity to every child regardless of economic background." S. Rep. No. 89-146, pt. 1, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1450. Congress provided federal funds, through the states, to "local educational agencies," which then used the funds to support education, guidance, and job counseling to eligible students. 20 U.S.C. §§ 6311, 6312, 6315(b), 6315(c)(1)(A). In

Agostini v. *Felton*, 521 U.S. 203 (1997), this Court made clear that Congress intended Title I funds to bolster—not squelch—religious liberty. It did so by recognizing that the Constitution allowed public school teachers to provide educational services to disadvantaged children in parochial schools pursuant to Title I. And after this Court's decision in *Agostini*, Congress reauthorized the key provisions of Title I on an overwhelmingly bipartisan basis, both in the No Child Left Behind Act of 2001 and the Every Student Succeeds Act of 2015 (ESSA).[2]

This trend of protecting school choice and religious liberty has continued. Launched in 1997 and significantly expanded in 2001, Coverdell Education Savings Accounts are tax-advantaged accounts created by Congress that allow use of deposited funds for expenses related to enrollment and attendance at a "public, private, or religious school." 26 U.S.C. § 530(b)(3)(A)(i). Like Title I, Congress created and expanded Coverdell Education Savings Accounts on a bipartisan basis.[3] Similarly,

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[2] *See H.R. 1 (107th): No Child Left Behind Act of 2001*, GovTrack (Dec. 13, 2001) (indicating the bill passed the House 381-41), https://tinyurl.com/bdecr2ve; *H.R. 1 (107th): No Child Left Behind Act of 2001*, GovTrack (Dec. 18, 2001) (indicating the bill passed the Senate 87-10), https://tinyurl.com/mr23ardb; *Summary of the Every Student Succeeds Act, Legislation Reauthorizing the Elementary and Secondary Education Act* 1, National Conference of State Legislatures (indicating ESSA passed the House 359-64 and the Senate 85-12), https://tinyurl.com/32ky8m9d (visited July 2, 2026).

[3] *See H.R. 2014 (105th): Taxpayer Relief Act of 1997*, Congress.gov (indicating the bill creating Coverdell Education Savings Accounts passed the House 389-43 and the Senate 92-8), https://tinyurl.com/3tr7jrcr (visited July 2, 2026); *H.R. 1836 (107th): Economic Growth and Tax Relief Reconciliation Act of 2001*, GovTrack (May 26, 2001) (indicating the bill expanding Coverdell Education Savings Accounts passed the House with the support of 211

in 2004 Congress enacted the D.C. School Choice Incentive Act[4] to establish the D.C. Opportunity Scholarship Program, which provides vouchers for low-income students in Washington, D.C. to attend private schools of their choice, including religious schools. This Act, like the others, was passed with significant bipartisan support.[5]

Finally, during the COVID-19 pandemic, Congress approved billions in emergency funding for schools, including religious schools. Specifically, the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), created two major funding streams for both public and non-public schools. *See* United States Conference of Catholic Bishops, *Federal Emergency COVID Assistance to K-12 Catholic Schools Summary*, https://tinyurl.com/9pcuca2d (visited July 2, 2026). A few months later, in December 2020, Congress created the Emergency Assistance to Non-Public Schools program, a $2.75 billion set-aside

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Republicans and 28 Democrats), https://tinyurl.com/m67empt; *H.R. 1836 (107th): Economic Growth and Tax Relief Reconciliation Act of 2001*, GovTrack (May 26, 2001) (indicating the bill expanding Coverdell Education Savings Accounts passed the Senate with the support of 46 Republicans and 12 Democrats), https://tinyurl.com/4usjk26v.

[4] The D.C. School Choice Incentive Act is a part of the Consolidated Appropriations Act, Pub. L. No. 108-199, §§ 301-313, 118 Stat. 3, 126-134 (2004).

[5] *See H.R. 2673 (108th): Consolidated Appropriations Act of 2004*, GovTrack (Dec. 8, 2003) (indicating the bill passed the House with the support of 184 Republicans and 58 Democrats), https://tinyurl.com/k678us9j; *H.R. 2673 (108th): Consolidated Appropriations Act of 2004*, GovTrack (Jan. 22, 2004) (indicating the bill passed the Senate with the support of 44 Republicans and 21 Democrats), https://tinyurl.com/mva9f8s7.

exclusively for non-public schools such as religious schools. *Id.* Congress passed the CARES Act unanimously,[6] and the bill creating the Emergency Assistance to Non-Public Schools program garnered an overwhelming bipartisan majority.[7]

As this brief history demonstrates, Congress has regularly and emphatically permitted religious organizations to participate in federally created education programs. Often enacted on a bipartisan basis, these programs foster school choice and encourage the participation of religious organizations with no conditions attached beyond those that would apply to any secular entity. As shown by its actions over the last 250 years, Congress's objective has been to level the playing field between religious education and secular education in this country.

B. ECCA Is The Latest Major Expansion Of Congress's Commitment To Religious Liberty And School Choice

ECCA is the latest example of Congress's longstanding tradition of bolstering religious liberty and school choice. Enacted in 2025 as a part of the One Big Beautiful Bill Act (Working Families Tax Cuts), ECCA creates a federal tax-credit scholarship program that supports parental choice and preserves the participation

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[6] *See H.R. 748 (116th): CARES Act*, Congress.gov (indicating the CARES Act passed the Senate unanimously and the House by voice vote), https://tinyurl.com/3k8e5vkj (visited July 2, 2026).

[7] *See H.R. 133 (116th): Consolidated Appropriations Act of 2021*, Congress.gov (indicating the bill creating the Emergency Assistance to Non-Public Schools Program passed the House 359-53 and the Senate 92-6), https://tinyurl.com/3sp8xt8s (visited July 2, 2026).

of religious schools. Pub. L. No. 119-21, § 70411, 139 Stat. 72, 76 (codified at 26 U.S.C. § 25F).

Specifically, ECCA adds a section to the Internal Revenue Code to establish a federal tax credit of up to $1,700 for taxpayers who make cash contributions to a scholarship granting organization (SGO). *See* 26 U.S.C. § 25F(b)(1). These SGOs, in turn, disburse the donated funds as scholarships to eligible families, who use them to pay for "qualified elementary or secondary education expenses." *Id.* § 25F(d)(1)(C). Qualified elementary or secondary education expenses are defined by cross-referencing 26 U.S.C. § 530(b)(3)(A), a provision of the Coverdell Education Savings Accounts that delineates expenses for tuition, fees, tutoring, special needs services, books, supplies, and other equipment incurred in connection with enrollment or attendance at "a public, private, or religious school." *Id.* § 25F(c)(4). ECCA encourages donations that benefit the wide panoply of American schools—from secular to sectarian.

Additionally, states play a significant role in ECCA. In order to act as an SGO under ECCA, an organization must be included on a list submitted by a "covered State." *See* 26 U.S.C. § 25F(c)(5)(D). In order to be a "covered State," a state must "voluntarily elect[] to participate" in ECCA and "to identify scholarship granting organizations in the State." *Id.* § 25F(c)(1); *see also id.* § 25F(g) (laying out requirements for submitting a state list of SGOs to the Secretary of the Treasury). Although any taxpayer can receive a credit for donating to an SGO, the SGO can distribute scholarship funds only in the state in which it is approved to participate in ECCA. *See id.* § 25F(c)(3) (SGOs may only use charitable contributions "to fund scholarships for eligible students solely within the State in which the organization is listed").

It is thus up to each state whether to participate in ECCA, thereby creating an opt-in framework for the statute's school-side benefits. A state does not reap ECCA's full benefits unless it submits a list of eligible SGOs to the Secretary of the Treasury.

As of June 22, 2026, 28 States have officially notified the Internal Revenue Service of their participation in the program. *Federal Scholarship Tax Credit (FSTC)*, IRS (listing states that have formally made an advance election to participate), https://tinyurl.com/3xscw8by (visited July 2, 2026). According to public reporting, at least 4 other States are considering participating. *State Participation in the Federal K-12 Education Tax Credit Scholarship Program*, Ballotpedia (collecting data and sources on states' intent to participate in ECCA, including Kansas, Kentucky, and New York), https://tinyurl.com/5n8r7ny3 (visited July 2, 2026); *see also* discussion *infra* Section II.A (discussing Vermont's intent to opt in to ECCA). This means that at least half, and possibly as many as two-thirds of states plan to participate in ECCA when it becomes effective on January 1, 2027.

II. States' Attempts To Impose Nondiscrimination Conditions On ECCA Funds Undermine Federal Efforts To Protect Education Choice And Religious Liberty

Consistent with this Court's precedents on education choice and religious liberty, Congress passed ECCA to provide a means by which taxpayers could provide funds through private organizations in their states to both secular and sectarian schools. But some states, as discussed below, are attaching or considering attaching nondiscrimination conditions that would put religious schools to a choice: violate their sincerely held religious

beliefs or forgo ECCA participation. Congress never intended states to impose discrimination against religious organizations as a prerequisite to those entities' participation in ECCA, and this Court's precedents reject their attempts to do so.

A. Some States Are Already Attempting To Attach Nondiscrimination Conditions To ECCA Participation

Even though ECCA does not go into effect until January 1, 2027, state legislatures are considering—and passing—bills that will do to ECCA participation what Colorado did to universal preschool funds. These provisions enshrine in state law the very discrimination against religion which Congress has combated for many, many years. The replication of Colorado's preschool program in the ECCA context would functionally exclude many religious schools from a program built to include them. It would constitute a perverse inversion of ECCA if states could convert a program that *empowers* religious schools into one that *blocks* them from the program's benefits because of their faith.

This risk is not theoretical. Just weeks ago, Vermont announced its intent to opt into ECCA but imposed nondiscrimination conditions that restrict SGO eligibility. *See* H. 933, Gen. Assemb., § 19, 2025-2026 Reg. Sess. (Vt. 2026) (adding 3 Vt. Stat. Ann. § 24), https://tinyurl.com/5yy2cwnm. Specifically, the newly enacted law prohibits the state from designating organizations as SGOs unless, among other things, "when determining whether to award a scholarship, the organization does not discriminate against any student because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, crime victim status, or age or against a student with a disability."

3 Vt. Stat. Ann. § 24(b)(5). These requirements will functionally exclude many religious institutions in the state from ECCA eligibility, because they do not exempt organizations awarding scholarships to religious schools. Thus, like Colorado's nondiscrimination requirements for preschools, these nondiscrimination conditions will force many religious schools to choose between their sincerely held beliefs and the funding for which Congress has already determined they should be eligible. *See id.*; *see also, e.g.*, Pet.App.318a (Archdiocese of Denver instruction to its schools that if a family "doesn't see eye to eye on [the Catholic Church's teachings regarding biological sex and marriage], we ask our school leaders to please not admit the child out of abundant respect for the family").

Similar legislation was introduced in Colorado itself, as the Centennial State considered transporting the restrictions subject to challenge in this lawsuit beyond preschools into K-12 education. *See* Colorado H.B. 26-1292, *Concerning Requirements Related to a Federal Tax Program Involving Scholarship Granting Organizations*, 75th Gen. Assemb., 2d Reg. Sess. (2026), https://tinyurl.com/bdz2bt2y. The bill would have prohibited schools that participate in ECCA from discriminating on the basis of an array of protected classes, including "sex, sexual orientation, gender identity, [and] gender expression" through "admissions, enrollment, academic performance, access to or participation in educational services, and retention." *Id.* This bill actually *expands* upon the classes covered by Colorado's equal opportunity mandate for preschool funding, adding sex and gender expression to the list of protected characteristics. *Id.*; Pet.App.204a. For religious schools adhering to their sincerely held beliefs on sex and marriage—like Petitioners—this bill would almost certainly lead to

their exclusion from the funds doled out by Colorado's designated SGOs and thus bar those schools from receiving the scholarships Congress intended them to have.[8]

In practice, these provisions—and others like them that may surface in other states—work to subvert Congress's handiwork. Congress crafted ECCA to "protect[] religious liberty and private school autonomy." *School Choice: Expanding Educational Freedom for All: Hearing Before the H. Subcomm. On Early Childhood, Elementary, Secondary Education*, 118th Cong. (2023) (Statement of Hon. Luke Messer, Former Member of Congress), https://tinyurl.com/k5uuyvcd. And the religious organizations will not be the only victims: the families ECCA was meant to benefit—those who need financial assistance to send their children to the schools they feel best meet their needs and values, *see* 26 U.S.C.

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[8] Perhaps recognizing it is sailing toward dangerous shoals, the proposed legislation stated that its nondiscrimination provisions did not prohibit a nonpublic school from "(a) [m]aintaining its religious mission, character, governance, or instructional philosophy, or from making employment decisions consistent with constitutional protections; or (b) [o]ffering religious instruction or worship." Colorado H.B. 26-1292. This would be cold comfort for religious institutions. The bill granted religious schools protections for the specified activities, but it did not wholly exempt them from the nondiscrimination requirements, which apply to "all conduct." *Id.* That probably explains why Colorado's professional legislative staff predicted in an accompanying fiscal note that "[t]he [Colorado] Department of Law will have additional workload and costs" to support the bill, including costs "to handle legal challenges related to the enforcement of state and federal laws on private schools and the free exercise of religion." Colorado Legis. Staff, *Fiscal Note HB 26-1292: Scholarship Granting Organizations*, H. 75-LLS 26-0798, 2d Reg. Sess., at 4 (2026). In any event, the Colorado House Committee on Education voted to postpone indefinitely the current iteration of the bill. *See* Colorado H.B. 26-1292.

§ 25F(c)(2) (imposing an income limit on eligibility for students)—will see their choices sharply limited.

The mischief these governmental nondiscrimination provisions can do to free exercise is not academic. Nondiscrimination conditions have already wreaked havoc on other public–private partnerships designed to enhance educational opportunities for young people in ways that have forced Congress to step in. One recent example involved Chicago Public Schools (CPS), which refused to permit students from the Moody Bible Institute of Chicago to serve as student teachers. CPS required its partner universities to sign an agreement to not discriminate on the basis of "gender identity/expression, [or] sexual orientation" in employment decisions. Letter from H. Comm. on Education & Workforce to Macquline King, Interim Superintendent/Chief Exec. Officer of Chicago Pub. Sch. (Dec. 19, 2025) ("Committee Letter"), https://tinyurl.com/32c6j7rz. But Moody's hiring practices recognize the "distinction God created between male and female" and that "misrepresenting one's birth sex violates God's generous intention for human relationships." *Id.* Moody thus explained to CPS that its hiring practices were based on its religious beliefs and that signing the agreement would violate its beliefs. *Id.* But CPS held fast.

Congress investigated CPS's discriminatory policy, and Moody sued CPS for religious discrimination. *See* Committee Letter. Members of the House Education and Workforce Committee explained to CPS that Moody was within its rights under Title VII of the Civil Rights Act of 1964. *Id.* CPS eventually settled the lawsuit and paid Moody's attorneys' fees. Under the settlement, CPS agreed to execute a revised agreement with Moody,

making its students eligible to be classroom observers and student teachers. *Settlement and General Release Agreement* 2-3 (Mar. 11, 2026), https://tinyurl.com/44vycm63. This example illustrates both the threat that seemingly neutral nondiscrimination provisions pose to religious exercise and the lengths some public agencies will go to exclude religious organizations from otherwise broadly applicable educational programs.

B. Excluding Religious Organizations From Government-Funded Programs Violates This Court's Precedents

Whether preschool funds in Colorado or ECCA participation, this Court's precedents are clear: A state cannot "disqualify" schools from otherwise generally available benefits "solely because they are religious." *Espinoza*, 591 U.S. at 487; *see also Carson*, 596 U.S. at 789 (governments cannot "exclude otherwise eligible schools on the basis of their religious exercise"). Although attaching nondiscrimination conditions to public funding is more indirect than an explicit bar on religious organizations, "what cannot be done directly cannot be done indirectly." *Students for Fair Admissions*, 600 U.S. at 230 (cleaned up).

This Court's recent Free Exercise Clause precedents have confirmed that a state may not condition access to a generally available public benefit on the surrender of religious identity or the abandonment of religious exercise.

In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017), Missouri denied a church-operated preschool and daycare center access to a state program that provided rubber playground surfaces made from recycled tires. The state relied on a provision

of the Missouri Constitution establishing "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." *Id.* at 455 (quoting Missouri Const. art. I, § 7). This Court reversed, holding that the "exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution … and cannot stand." *Id.* at 467. By conditioning a generally available public benefit on the relinquishment of the applicant's religious character, the state "impose[d] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 462. Missouri had "put[] Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution." *Id.* The Free Exercise Clause does not countenance such a choice.

Three years later, in *Espinoza*, 591 U.S. 464, this Court took up a variation on the same theme. There, Montana had established a tax-credit scholarship program that allowed families to use state-funded scholarships at private schools. *Id.* at 467-468. Montana's Department of Revenue, however, promulgated a rule barring families from using those scholarships at religious schools, relying, as Missouri had, on a state constitutional no-aid provision. *Id.* at 472-473. This Court again struck down the exclusion—confirming that *Trinity Lutheran*'s reasoning extended to educational funding more broadly—holding that a state cannot "disqualify" schools from otherwise generally available benefits "solely because they are religious." *Id.* at 487. This Court also rejected an attempt to cabin *Trinity Lutheran* to its facts, making clear that the Free Exercise Clause's protections do not "depend on a 'judgment-by-judgment analysis.'" *Id.* at 484 (quoting *Medellin* v. *Texas*, 552 U.S. 491, 514 (2008)).

Then, in *Carson*, 596 U.S. 767, this Court confronted yet another effort to circumvent these holdings. Maine's tuition assistance program allowed parents in rural districts without public secondary schools to direct state funds to the private school of their choice but excluded schools that provided religious instruction. *Id.* at 771-776. Maine did not deny funding to all religiously affiliated schools; it denied funding to schools that taught their curricula "through the lens of" their faith. *Id.* at 775. The state thus attempted to draw a distinction between religious *status* and religious *use*—arguing that it had not excluded schools because they *were* religious but only because they *used* funds for religious purposes. *Id.* at 786-787. This Court squarely rejected that distinction. "Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission," this Court explained, "would also raise serious concerns about state entanglement with religion and denominational favoritism." *Id.* at 787. This Court emphasized that the prohibition on excluding religious schools from public benefits "turn[s] on the substance of free exercise protections, not on the presence or absence of magic words." *Id.* at 785.

The situations addressed by this brief—both Colorado's universal preschool program and the emerging threat of state restrictions on ECCA—fit comfortably within this line of precedent. In each instance, religious schools are denied access to a generally available public benefit not because of any deficiency in the quality of the education they provide but because their religious exercise—here, their faith-based admissions practices—conflicts with a state-imposed condition. The means of exclusion may differ from the express religious bars invalidated in *Trinity Lutheran* and *Espinoza*: Colorado instead deploys facially neutral nondiscrimination

conditions that have the same practical effect—barring religious schools from participating in public programs unless they abandon their sincerely held beliefs. As this Court has explained since the Civil War, "what cannot be done directly cannot be done indirectly": "[t]he Constitution deals with substance, not shadows," and its "inhibition was leveled at the thing, not the name." *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).

* * *

The Free Exercise Clause prohibits government-driven religious discrimination. In Colorado, the government disapproved of Petitioners' religion and excluded them from a public preschool program for which they otherwise qualified. Should Colorado's end run around this Court's Free Exercise Clause jurisprudence be allowed to stand, the tactics employed by that state will not end in Colorado preschools. Efforts are already underway in Vermont, Colorado, and elsewhere to impose similar nondiscrimination requirements with the goal of excluding religious schools from ECCA, a program Congress specifically built to include them. Congress designed ECCA to advance religious freedom, relying on this Court's teaching that the Free Exercise Clause prohibits the exclusion of otherwise eligible schools from government programs on the basis of their religious exercise. Trusting that the Free Exercise Clause will be enforced, the People through their representatives in Congress have affirmed—and will continue to affirm—the participation of religious schools in educational programs.

CONCLUSION

This Court should reverse.

Respectfully submitted.

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JULY 2026

APPENDIX

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Appendix — Complete List of Amici Curiae

8 United States Senators

James Lankford
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Ted Budd
North Carolina

Jim Justice
West Virginia

Kevin Cramer
North Dakota

Roger Marshall
Kansas

Ted Cruz
Texas

Pete Ricketts
Nebraska

35 United States Representatives

Tim Walberg
Michigan

Andy Biggs
Arizona

Robert B. Aderholt
Alabama

Sheri Biggs
South Carolina

Rick W. Allen
Georgia

Mike Bost
Illinois

Tom Barrett
Michigan

Jeff Crank
Colorado

Michael Baumgartner
Washington

Byron Donalds
Florida

Aaron Bean
Florida

Gabe Evans
Colorado

Randy Fine
Florida

Virginia Foxx
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H. Morgan Griffith
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Glenn Grothman
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Mark Harris
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John McGuire
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Mary Miller
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John Moolenaar
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Andy Ogles
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Bob Onder, M.D.
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Burgess Owens
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August Pfluger
Texas

John Rose
Tennessee

Michael A. Rulli
Ohio

John Rutherford
Florida

Adrian Smith
Nebraska

Chris Smith
New Jersey

Daniel Webster
Florida

Joe Wilson
South Carolina