

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

**BRIEF OF THE NATIONAL WOMEN'S LAW
CENTER, CHILD CARE PROVIDERS, AND CHILD
CARE ADVOCACY ORGANIZATIONS AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICI CURIAE

Amici are a diverse group of organizations united in our common purpose of ensuring expanded access to affordable, high-quality child care for all families.¹

The National Women’s Law Center (NWLC) is a nonprofit legal advocacy organization that fights for gender justice in the courts, in public policy, and in our society. NWLC’s work spans the issues that are central to the lives of women and girls—especially women and girls of color, LGBTQIA+ people, and low-income women and families. NWLC has worked to dismantle barriers to economic opportunity for women and girls, including consistent advocacy for improved access to affordable, quality child care.

Ten *amici* operate early-education programs that collectively serve thousands of children in Colorado and beyond. They work every day with the families that Colorado’s Universal Preschool Program is designed to reach, and have a substantial interest because permitting publicly funded providers to exclude children based on family status would undermine the mixed-delivery model that expands access for the families they serve.

The remaining *amici* are national, state, and local organizations that advocate for expanded access to child care and early education.

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

Amici have a common interest in ensuring that Colorado’s families have continued access to a broad provider network to improve child health and educational outcomes, support women’s workforce participation, and strengthen overall family economic security.

A full list of *amici* appears in the Appendix.

INTRODUCTION

At its core, this case is straightforward. Colorado created the Universal Preschool Program (“UPK”) to give every eligible child meaningful access to high-quality preschool. UPK welcomes religious and secular providers alike, but requires every participating provider that accepts public funds to serve eligible children without discriminating based on protected characteristics, including sexual orientation or gender identity. All preschools are welcome to participate in UPK, and they retain their autonomy to hire the staff they choose and to teach the curriculum they prefer, including religious practices and tenets. Preschools that do not wish to participate may continue to operate independently without receiving state funding and without complying with UPK’s requirements. Participating preschools are subject only to licensing requirements and grant conditions, including certifying that their chosen staff will teach their preferred curricula to all eligible children whose families wish them to attend.

As providers of religious preschooling in Colorado, Petitioners cannot credibly maintain—though they try—that UPK excludes or disadvantages them in any way. By its plain terms, it does not. Instead, they argue that a

provider that accepts public funds designated to expand preschool access for all children should be permitted to exclude a four-year-old, or any other child, merely because of how that child's family is structured. Their position here flies in the face of the Colorado legislature's intent in enacting UPK to ensure universal access for all children. This Court should reject it, as did the Tenth Circuit below.

SUMMARY OF THE ARGUMENT

Allowing publicly funded providers to exclude children based on family characteristics—starting with children from LGBTQ+ families—would fundamentally contravene UPK's purpose: ensuring that every child in Colorado can access the developmental benefits of high-quality early education. UPK's nondiscrimination condition is essential because UPK's mixed-delivery model depends on a broad provider network that opens its doors to all families. Preschool access is a critical benefit for children's academic and future success, while also contributing to family economic security—for many families, and especially mothers, preschool is the educational and child care infrastructure that makes their participation in the workforce possible.

The facts of this case belie Petitioners' argument that they are "excluded" from UPK "solely because of their religious exercise—namely, their religious practices of ensuring that all enrolling families are supportive of the Catholic Church's teachings on sex and marriage." Petr. Br. at 29. Colorado intentionally adopted a "mixed-delivery" system that allows families to use state-funded tuition credits at participating licensed providers, including public, private, community-based, faith-based,

and specialized providers. Indeed, Colorado specifically “welcomed and actively solicited the[] participation” of faith-based providers. *St. Mary Cath. Par. in Littleton v. Roy*, 154 F.4th 752, 764 (10th Cir. 2025). Colorado has not excluded religious providers *at all*, much less because they are religious; it has offered public funds on equal terms to all providers that agree to serve all eligible children. Thus, this case is not *Carson*, where only “nonsectarian” schools were eligible for tuition assistance. *Carson v. Makin*, 596 U.S. 767, 778 (2022).

As of August 2026, UPK includes dozens of faith-based providers, including multiple Catholic providers.² And many of these providers report serving children across diverse faith backgrounds. In Denver, for example, the director of a Jewish preschool reports that the majority of their families are either not Jewish or interfaith.³ In rural Wiggins, where there are only a few providers, the director of a Baptist preschool shared that “almost all of our enrolled families are not actually members of our church.” These accounts reflect the reality on the ground that families face many obstacles accessing child care and early education—including finding programs that are affordable, geographically proximate, convenient with work schedules, and responsive to their child’s needs—and that the religious affiliation of the most workable options often cannot be paramount. The need is particularly acute

2. See Colo. Dep’t of Early Childhood, Universal Preschool Provider Search Results, Colo. Universal Preschool, <https://upk.colorado.gov/searches/4a97e9c6-1d66-4d87-97ee-2ca0b4625c41> (last visited Aug. 19, 2026) (“Provider Search”) (for example, Catholic Charities operates four providers in Denver).

3. Statements from providers and parents throughout this brief were provided to NWLC and are on file with counsel for *amici curiae*.

for the more than 20,000 children under the age of five who live in the forty-three Colorado counties with ten or fewer child care providers.⁴ Directing state funding to faith-based providers that turn away children for inconsistent faith traditions or family structure would exacerbate the same access issues that Colorado’s legislature sought to remedy through UPK.

Ultimately, Petitioners are asking this Court to bless using state funding to facilitate the very family-status discrimination that this Court previously identified as having a cognizable harm on children. *See, e.g., United States v. Windsor*, 570 U.S. 744, 772 (2013); *see also Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (“[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”). Such a detrimental impact on children and families is the exact opposite of Colorado’s intent to ensure broad access and utilization of child care and early education.

UPK was established in Colorado through democratic engagement, with a statewide vote and extensive input from parents, providers, and experts, who emphasized that young children and families need access to a broad range of options for preschool’s critical educational, developmental, and social supports. *Amici* respectfully submit that UPK’s design is constitutional and serves Colorado’s children and families, and the Tenth Circuit’s decision should be upheld.

4. Provider Search, *supra* n.2; Colo. State Demography Off., County Age Lookup (last accessed Aug. 17, 2026), https://demography.dola.colorado.gov/assets/lookups/county_sya_lookup.html (“Colorado Demography”).

ARGUMENT

I. COLORADO ENACTED UNIVERSAL PRESCHOOL TO ENSURE EVERY CHILD HAS ACCESS TO HIGH-QUALITY EARLY EDUCATION.

A. The Legislative History Confirms Colorado’s Intent to Provide All Children in Colorado with the Well-Understood Benefits of Early Education.

Colorado voters laid the foundation for UPK when they approved Proposition EE in November 2020 by a margin of nearly two to one, creating dedicated funding for voluntary universal preschool for all four-year-olds in the state. Colo. Rev. Stat. § 26.5-4-202(1)(a)(V) (2021). That electoral mandate reflected a broad public consensus that early education is a necessity and that the state must make it available to every family. In 2021, the General Assembly enacted House Bill 21-1304, the Early Childhood Act (“the Act”), to begin organizing a universal preschool program, and in 2022, House Bill 22-1295 officially established UPK. The Act declared its purposes clearly: to “[p]rovide high-quality, voluntary, affordable early childhood opportunities for *all* children in Colorado” and to “[p]rioritize the equitable delivery of resources and supports for early childhood.” Colo. Rev. Stat. §§ 26.5-1-102(1)(a), (f) (2021) (emphasis added).

The General Assembly used the word “all” in the text of the statute intentionally. The legislative declaration accompanying the Early Childhood Act emphasized that UPK would “significantly improve outcomes for *all*

children at ***all levels*** of Colorado’s educational system [and] effectively support ***all Colorado families*** in providing voluntary, high-quality child care and education.” H.B. 21-1304 § 26-6.2-301, 73rd Gen. Assemb. (Colo. 2021) (emphasis added). The Legislature’s repetition of “all” was deliberate and reflected its intent that universality be UPK’s defining feature.

The legislative sponsors described the same objectives. Speaker Alec Garnett explained that early childhood experiences “lay the foundation for so much of what is to come later in children’s lives” and that affordable and quality early childhood experiences are “critical” for “Colorado families, for our economy, and for the future of our state.” *Early Childhood System: Hearing on HB21-1304 Before the H. Comm. on Education*, 2021 Leg., 73rd Sess. (Colo. 2021) [hereinafter “H. Comm. Hearing”] (Speaker Garnett). Representative Emily Sirota emphasized that families with young children often have “the least support” at the moment when “children can face the greatest hurdles to opportunity.” *Id.* (Rep. Sirota) (“This is the age when children are the most likely to live in poverty, most likely to experience homelessness, and least likely to have access to child care and preschool, because families are earning the least amount of money in their careers.”).

The Legislature also heard from early-childhood professionals whose years of experience confirmed the benefits of preschool education. Jennifer Spires, an early childhood educator with fifteen years’ experience, testified that children who had access to quality early childhood experiences were “resilient, engaged in pro-social behaviors, and came to school ready to learn,” while

“[t]hose who did not faced more academic and emotional challenges.” H. Comm. Hearing (written testimony of Jennifer Spires). Susan Hill, an early childhood consultant with over forty years in the field, emphasized that UPK is “critical to the future of Colorado” and that “children who receive quality early education are 20% more likely to graduate from high school” and “earn 50% more than their peers.” *Id.* (written testimony of Susan Hill). And representatives from Clayton Early Learning—a major Denver provider—testified that “[t]he research is clear that the early years are the most effective time to invest and lay a foundation for future learning.” *Id.* (written testimony of Paula Smith, Christina Walker & Kia Abdool, Clayton Early Learning). The consensus from those working directly with Colorado’s children reinforced the Legislature’s conviction: universal preschool was not merely good policy, but an urgent necessity.

Colorado’s decision to make UPK universal was also designed to support socioeconomically integrated classroom environments. The Legislature recognized: “economically disadvantaged children derive greater benefits from preschool programs in states that offer universal programs than in states that offer preschool programs specifically for economically disadvantaged children.” Colo. Rev. Stat. § 26.5-4-202(1)(a)(IV).

To achieve truly universal access, the Legislature determined that the state could not rely on a single delivery mechanism. Colorado is a geographically vast state, constituting over 104,000 square miles. Even with UPK’s significant investment, child care centers and schools are not evenly distributed: forty-three of Colorado’s sixty-four counties have ten or fewer preschool

providers, including five counties with just a single provider.⁵ More than 20,000 children under the age of five reside in these forty-three counties.⁶ The Legislature therefore established a “[m]ixed delivery system” designed to enable families to “select preschool providers for their children from as broad a range as possible within their respective communities.” Colo. Rev. Stat. § 26.5-4-204(2).

This deliberate inclusion of diverse provider types in UPK—public schools, private centers, community organizations, and faith-based programs—was a structural choice intended to effectuate the state’s commitment to providing quality education for every child. Senator Janet Buckner underscored this design principle: “We want families to be able to have those options of making the decision of what settings are best for their children...[it’s] really important for families to be able to make those decisions.” *Early Childhood System: Hearing on HB21-1304 Before the S. Comm. on Education*, 2021 Leg., 73rd Sess. (Colo. 2021) (Sen. Buckner).

Nothing in that design was intended to or has excluded religious providers. The statutes authorizing UPK welcomed faith-based preschools, and UPK actively solicited their participation. Dozens of religious preschools currently participate in UPK, including Catholic schools and those of other faiths.⁷ UPK’s requirement that participating providers serve all eligible children without

5. See Provider Search, *supra* n.2.

6. See Colorado Demography, *supra* n.4.

7. See Provider Search, *supra* n.2 (for example, Catholic Charities operates four Head Start providers in Denver).

discrimination is inseparable from its mission to ensure universal access. A program that purports to serve “all” children cannot achieve that purpose if participating providers are free to turn some children away based on their own or their families’ identity.

B. Free Access to Early Public Education Benefits Children and Families.

1. Expanding Access to Early Public Education Supports Children’s Development and Educational Outcomes.

Throughout UPK’s implementation, Colorado parents have recognized the benefits of expanded access to early-childhood education (“ECE”) and child care. George Davis, a father of two, testified that his daughter entered kindergarten “excel[ling] both academically and socially, and emotionally, because of her enrollment in [a] full-day quality Head Start program.” *Hearing on HB22-1295 Before the S. Comm. on Education*, 2022 Leg., 73rd Sess. (Colo. Mar. 31, 2022) [hereinafter “S. Comm. Hearing 22-1295”]. Annie Zean Dunbar, whose young daughter is currently enrolled in a faith-based preschool in Denver, notes that she “absolutely would not” have been able to continue with her preschool without UPK and that her daughter has “learned so many things about the world” and “gotten a chance to be a leader in the [preschool] classroom.”

Research confirms that high-quality ECE programs produce substantial long-term returns, including improved cognitive and social skills, better adult health outcomes, and greater economic mobility, making them

a sound public investment. Those benefits begin early and persist into adulthood. Children who attend high-quality preschool are, on average, eight months ahead in academic learning and five months ahead in executive-function skills compared to children who do not attend preschool.⁸ The gains from high-quality early child care and education continue to grow through eighth grade.⁹ Indeed, children who attend high-quality preschool are more likely to graduate from college, more likely to delay parenthood until after their teenage years, and less likely to need public assistance later in life.¹⁰ Sustained high-quality early care and education result in measurable and meaningful benefits to adults, with positive effects on income, educational attainment, and health.¹¹

Longitudinal studies confirm ECE's role in securing better outcomes for children into adulthood by reducing educational disparities and improving overall health and development. Using studies by the National Institute of Child Health and Human Development, one researcher found that ECE was associated with reduced income-

8. Colorado Universal Preschool Recommendations Report at 8 (Jan. 2022) [FINALUniversalPreschoolRecommendations.pdf](#) (citing Arya Ansari, *The Persistence of Preschool Effects from Early Childhood Through Adolescence*, 110 J. Educ. Psych. 952 (2018)).

9. Yu Bai et al., *Long-Term Effects of Early Childhood Programs Through Eighth Grade: Do the Effects Fade Out or Grow?*, 112 Children & Youth Servs. Rev. 104890 (2020).

10. See Colorado Universal Preschool Recommendations Report, *supra* n.8 at 8 (citing Ansari, *supra* n.8).

11. Andres S. Bustamante, et al., *Adult Outcomes of Sustained High-Quality Early Child Care and Education; Do They Vary by Family Income?*, 93 Child. Dev. 502 (2022).

based disparities in educational attainment and wages at age 26, and that sustained high-quality ECE was particularly important for children from lower-income backgrounds.¹² In another study, disadvantaged children randomly assigned to a high-quality early-childhood intervention had significantly lower rates of cardiovascular and metabolic disease risk factors in their mid-30s.¹³

2. Expanding Access to Early Public Education Supports Family Economic Security.

Universal preschool also strengthens families' overall economic security, particularly for mothers. For families with young children, early education is a source of child care as well as lifelong developmental benefits. Child care is no mere convenience; it is vital infrastructure that enables workforce participation and improves family economic security. Without accessible and affordable ECE, parents—disproportionately mothers—face impossible tradeoffs between earning income and providing care.

These economic considerations were front-and-center when the Legislature considered UPK. Natalie Perez, a single mother, testified that “as someone with barely any support system, I needed my son to be in school for me to work and provide for him.” S. Comm. Hearing 22-1295 (Natalie Perez). Another mother emphasized how many working families are priced out of child care: “my salary is not enough to cover full-time tuition for my child, but is high enough for me to not qualify for [prior subsidies] ...

12. *See id.*

13. *See* Frances Campbell et al., *Early Childhood Investments Substantially Boost Adult Health*, 343 *Science* 1478 (2014).

every child deserves an early childhood education without questioning their parent’s paycheck.” *Id.* (Josie Martinez).

Rising child care costs push mothers—particularly lower-income mothers—out of the workforce at disproportionate rates.¹⁴ Families with young children who lack child care lose \$134 billion per year in lost earnings and job-search costs.¹⁵ In 2024, an average of 1.34 million workers, the vast majority of whom were women, were affected by inadequate child care options each month.¹⁶ But those pressures ease when women and families have access to publicly-funded preschool options. As Analise Gonzalez-Fine, a Colorado UPK mother shared, “the cost of living in Colorado is so astronomically high ... I would not be able to work outside the home without high quality access to child care” through UPK. Economic data confirms that when the government invests in accessible ECE, the returns for mothers are substantial. Research by NWLC and the Center on Poverty and Social Policy found that affordable, high-quality child care and early education would increase the number of women with young children working full-time by approximately seventeen

14. Valeska Araujo, Linden McBride & Danielle H. Sandler, *The Impact of Childcare Costs on Mothers’ Labor Force Participation* 1 (Ctr. for Econ. Stud., U.S. Census Bureau, Working Paper No. CES-25-25, Apr. 2025), <https://www2.census.gov/library/working-papers/2025/adrm/ces/CES-WP-25-25.pdf>.

15. See ReadyNation, *The Child Care Crisis Costs the U.S. Economy \$172 Billion Each Year* 3 (Feb. 2026), https://www.instituteforchildsuccess.org/wp-content/uploads/2026/02/Cost-of-Child-Care-Crisis_ReadyNation_2026_Report.pdf.

16. Matthew Nestler, *The Great Exit: College-Educated Mothers of Young Children Leaving the Labor Force*, KPMG (Oct. 1, 2025), <https://kpmg.com/us/en/articles/2025/october-2025-the-great-exit.html>.

percent (and by thirty-one percent for women without a college degree).¹⁷ Access to child care and early education would, in turn, help narrow the gender earnings gap and increase a mother's lifetime earnings by approximately \$94,000, with the highest percentage gains accruing to Black and Latina women.¹⁸

Although Colorado's UPK program covers fifteen to thirty hours per week of school time, many providers offer extended-day or aftercare hours to meet the needs of working parents. Even when parent fees or other sources fund these extended hours, UPK's investment still significantly reduces costs for families, with one faith-based provider estimating "almost \$6,300 [in savings] if you're in Denver, [which is] a significant break for families." For families who need additional hours, such as to cover a full work day and commuting time or to cover multiple shifts, the availability and affordability of such programs is critical. Community-based child care providers, including faith-based providers, are often well positioned to offer these hours, which is one of the reasons a mixed-delivery model is so important for UPK. Dawn Spector, director of a faith-based provider in Denver, noted that "the majority of our families are two working parents. Some parents have more than one job, and they need full day care ... We definitely have more families now" that the provider offers extended hours from 7:30 A.M. to 5:30 P.M.

17. Robert Paul Hartley et al., Nat'l Women's Law Ctr. & Ctr. on Poverty & Soc. Pol'y, *A Lifetime's Worth of Benefits: The Effects of Affordable, High-Quality Child Care on Family Income, the Gender Earnings Gap, and Women's Retirement Security*, 4 (2021), <https://nwlc.org/wp-content/uploads/2021/04/A-Lifetimes-Worth-of-Benefits-Compliant.pdf>.

18. *Id.*

In addition to supporting working families, UPK also empowers parents to further their own education and build their professional careers. Carly Schlafer, a mother of three, shared how “UPK made it significantly easier to continue [my eldest child’s] education as I stepped away from a full-time salaried position to pursue a master’s degree and, ultimately, launch a business.”

Indeed, a child care provider’s proximity to home, school, or work can help provide greater stability for families. Sheila Purdin, director of the faith-based Temple Sinai Preschool in Denver, noted that “families choose a child care center first by location”—a dynamic that contributes to about 35% of her preschool’s population being from different faith traditions. The benefits of accessible child care providers span urban, suburban, and rural areas. Before UPK was adopted, Ms. Perez related that she would “travel on the bus from [suburban] Arvada to Denver”—a commute that could be over an hour each way—“so my son could have an education ... [and I could] work and provide for him.” S. Comm. Hearing 22-1295 (Natalie Perez). Maximizing UPK provider options closer to families’ homes and workplaces alleviates the burdens associated with lengthy commutes. This impact is especially relevant in rural Colorado, where provider scarcity means that each provider’s participation has outsized consequences for family access—particularly in the forty-three counties with ten or fewer providers.

Colorado created UPK because preschool access improves children’s developmental outcomes and supports families’ economic stability. Universal preschool programs are among the most effective public investments a state can make. Any policy that permits publicly funded

providers to exclude eligible children narrows that access and undermines the very benefits justifying the public investment.

C. The Nondiscrimination Requirement Supports Colorado’s Intent to Maximize Access to These Beneficial Services.

Colorado’s nondiscrimination requirement is not an incidental add-on to UPK. It is the structural rule that ensures UPK’s broad provider network translates into broad access for children. A mixed-delivery system cannot provide universal access if participating providers may exclude children based on family characteristics. The point is practical as well as legal. The General Assembly deliberately adopted a mixed-delivery system to ensure families can “select preschool providers for their children from as broad a range as possible within their respective communities.” Colo. Rev. Stat. § 26.5-4-204(2). This design recognized a geographic and demographic reality: Colorado’s population is widely dispersed, many communities are underserved, and meaningful family choice requires a diverse provider network. In the forty-three counties with ten or fewer preschool providers—including the five with only one—each provider’s decision to participate in UPK carries outsized weight. The refusal of even a single provider to serve certain families may eliminate those families’ only accessible option for publicly funded preschool.

The nondiscrimination requirement ensures that the breadth of the provider network translates into breadth of access for all families. Indeed, as Kelli Pfaff, the Executive Director of the Efshar Project, a network of

approximately twenty Jewish early-childhood programs across the state, confirms, “UPK has created meaningful opportunities for more families to access high-quality preschool.” A system that allows providers to close their doors to certain families because of how those families are structured cannot deliver universal access.

The practical reasons why families choose faith-based providers further demonstrate why the nondiscrimination requirement is essential. Many parents do not select preschools solely, or even primarily, on the basis of religious alignment. Ms. Pfaff emphasized that even families specifically seeking religious education for their children “are looking for more than an available seat. They need programs that are affordable, high quality, compatible with their work schedules, and a strong fit for their family and are in close proximity.”

For example, many families need providers that offer care before and after the preschool day. A faith-based center near a parent’s home or workplace that offers full-day care may be the only practical option—regardless of whether the family shares the provider’s faith. Consider the experience of Julie Giehl and her wife:

We had a preschool [placement] pulled out from under us and were left with two months to find new care for our daughter while we were expecting our son. The week the school closed was also the week we gave birth within a child care desert in Denver. We were so panicked, and we had heard about the Jewish community in Denver. We’re not Jewish. When we were looking, not only were we trying to process

[that] we have to find care, including infant care, for our kids that would allow us both to work full-time, but we had to find care that will be safe and open to a two-mom family. We joined Rodef Shalom's [preschool] and it's been a really positive experience.

Similarly, several faith-based providers report serving families from outside their faith traditions. Ashley Cole, director of the Summit Early Education Center in rural Wiggins, shared that “almost all of our enrolled families are not actually members of our [Baptist] church.” Ms. Pfaff noted that “approximately 25–30% of children across [Efshar's] network come from non-Jewish households [and] UPK participation has been nearly 100%, regardless of denomination or level of religious observance.” Ms. Purdin at Temple Sinai Preschool shared that not only was “35% of our school population not Jewish at all, but probably half of the others are interfaith.” Ms. Gonzalez-Fine, a UPK parent, echoed this experience: “My husband is Jewish. I'm Christian. We're a dual-faith household. We were looking at honestly any high-quality option for our daughter, whether it was faith-based or not faith-based.”

UPK also helps secure the stability of child care placements, providing longer-term certainty to working parents and social and developmental benefits for participating children. As Dr. Dunbar shared, “UPK helped us not only [pay for] child care, but keep [our daughter] in a place that we want her to be. That's a really important distinction, because this is a place she started at when she was a baby ... We have a built-in community.” Ms. Giehl similarly noted that “with UPK, Rodef was able to retain all sixteen families in the class, compared to the

majority of families leaving the year before. Helping keep those kids together longer before they go out, especially if they've been together the whole time, is an important community builder.” If such publicly funded providers can exclude children based on their family composition, the family loses not only the UPK benefit and a child care arrangement that enables parental employment, but also the opportunity to build much-needed community for their child and family.

Colorado's nondiscrimination requirement is not only a structural necessity for universal access, but has also been readily accepted by many faith-based providers that choose to accept state funding through UPK. UPK makes no distinction between religious and secular providers regarding eligibility or funding. The same condition applies to every participating provider: they must serve all eligible children without discrimination. A faith-based provider that objects to this partnership remains free to operate outside UPK and apply its own admissions criteria using private funds. What it may *not* do is accept public funds designated for universal access while restricting that access based on protected characteristics. For Efshar Project programs, “[t]he nondiscrimination requirements have not been a barrier... Nearly all of [the Project's] programs already serve non-Jewish families...[and] [e]ven [their] most religiously observant programs with 100% Jewish children have not shared any challenges with us in complying with the nondiscrimination clause—they are just very clear about their Jewish identity, values, and educational approach, and families choose those programs knowing what the experience includes.” Ms. Cole of the Summit Early Education Center in rural Wiggins similarly noted, “with UPK funding, we're able

to serve a community need and welcome families of all denominations and faith backgrounds.”

Nondiscriminatory access is crucial to ensure the broad, inclusive provider network on which UPK’s success relies. Ms. Pfaff has been gratified by the state’s “explicit commitment from both the Department and the Governor’s Office to preserving family choice and supporting Colorado’s mixed-delivery early childhood system—including honoring the important role of faith-based providers.” She sees “[t]hat commitment [a]s important because families benefit when they can choose among school district, community-based, private, nonprofit, and faith-based programs and select the setting that is the best fit for their child and family.” Several of the forty-three counties with ten or fewer providers currently have a faith-based option that expands overall access for underserved communities—such as Trinity Lutheran Early Education Center in Logan County, Rocky Ford Methodist Preschool in Otero County, Faith Lutheran Preschool in Teller County, and Akron United Methodist Church Head Start in Washington County.¹⁹

Colorado adopted a mixed-delivery system because no single delivery model could reach every family. But that investment achieves its purpose only if UPK serves all eligible children. A program that funds providers to serve some children while turning others away based on family status is not universal preschool. It is discriminatory preschool subsidized with public dollars designated for universal access.

19. See Provider Search, *supra* n.2.

D. Depriving LGBTQ+ Families of Access to Universal Preschool Harms Children and Families.

Ensuring that providers do not discriminate against children of LGBTQ+ families is both a structural necessity to effectuate universal access and an essential safeguard to ensure that taxpayer-funded entities are not undermining Colorado families. There are approximately 300,000 children being raised by parents in same-sex couples nationwide.²⁰ Colorado’s nondiscrimination mandate works to shield LGBTQ+ families—and especially children in such families—from discriminatory exclusion that harms child well-being and family economic security.

This Court has repeatedly recognized that family-status discrimination inflicts cognizable harm on children. *See, e.g., Windsor*, 570 U.S. at 772; *see also Obergefell*, 576 U.S. at 668 (“[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”). While longitudinal studies and other research since *Obergefell* have repeatedly validated that children of same-sex couples thrive to the same degree as children of opposite-sex couples,²¹ parental experiences with

20. Bianca D.M. Wilson & Lauren J.A. Bouton, Williams Inst., *LGBTQ Parenting in the US 2* (July 2024), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Parenting-Jul-2024.pdf>.

21. Nanette Gartrell, Henny Bos & Audrey Koh, *National Longitudinal Lesbian Family Study—Mental Health of Adult Offspring*, 379 New Eng. J. Med. 297 (2018), <https://doi.org/10.1056/NEJMc1804810>; R. H. Farr, *Does parental sexual orientation matter? A longitudinal follow-up of adoptive families with school-age children*, 53 Dev. Psych. 252 (2017), <https://doi.org/10.1037/dev0000228>; Deni Mazrekaj et al., *School Outcomes*

discrimination can negatively impact child mental health.²² The district court heard testimony from Dr. Amy Tishelman, a clinical and research psychologist at Boston College, who explained that discrimination constitutes an adverse childhood experience:²³ a category of potentially traumatic events with documented long-term impacts on health and development.²⁴ Such adverse experiences inflict direct psychological damage on young children—damage that is particularly acute during the preschool years when critical brain development is underway.²⁵

This Court has similarly repeatedly rejected penalizing children for circumstances beyond their control. *See, e.g., Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968); *Plyler v. Doe*, 457 U.S. 202, 220 (1982). The four-year-olds

of Children Raised by Same-Sex Parents: Evidence from Administrative Panel Data, 85 Am. Socio. Rev. 830 (2020), <https://doi.org/10.1177/0003122420957249>; Nicola Carone et al., *Two decades of psychological adjustment of donor-conceived offspring of lesbian parents: examining donor contact and type*, 51 Reprod. BioMedicine Online (2025), <https://doi.org/10.1016/j.rbmo.2025.105020>; Yun Zhang et al., *Family outcome disparities between sexual minority and heterosexual families: a systematic review and meta-analysis*, 8 BMJ Glob. Health (2023), <https://doi.org/10.1136/bmjgh-2022-010556>.

22. Alisia G.T.T. Tran, *Family Contexts: Parental Experiences of Discrimination and Child Mental Health*, 53 Am. J. Comm. Psych. 37 (2014), <https://doi.org/10.1007/s10464-013-9607-1>.

23. Trial Tr. vol. 2, 339-42.

24. *See* Erica M. Webster, *The Impact of Adverse Childhood Experiences on Health and Development in Young Children*, 9 Glob. Pediatr. Health 1 (2022).

25. *Id.*

who would be excluded from UPK-funded preschools have no control over their family structure. They are being penalized for circumstances entirely beyond their control in a way that this Court has recognized “does not comport with fundamental conceptions of justice.” *Plyler*, 457 U.S. at 220.

Additionally, depriving LGBTQ+ parents of affordable child care options will exacerbate stark economic disparities that are fueled by ongoing discrimination. LGBTQ+ parent families are approximately twice as likely to live in poverty compared to heterosexual cisgender parent families.²⁶ In 2020, 36% of LGBTQ+ parent families with children under eighteen lived below the poverty line, compared to 24% of cisgender heterosexual parent families.²⁷ Stable child care placements can facilitate consistent employment for LGBTQ+ parents, who face disproportionate workplace discrimination—with one-third of LGBTQ+ employees having left a job at some point in their lives because of how they were treated by their employer based on their sexual orientation or gender identity.²⁸ Because LGBTQ+ families are disproportionately low-income, their children

26. Trial Tr. vol. 2, 287.

27. See Abbie E. Goldberg Expert Report, JA 1037; see also Alyssa Schneebaum & M. V. Lee Badgett, *Poverty in US Lesbian and Gay Couple Households*, 25 Feminist Econ. 1 (2019) (finding same-sex couples more likely to be in poverty than different-sex married couples after controlling for characteristics including education, employment, and race).

28. Brad Sears et al., Williams Inst., *LGBTQ People’s Experiences of Workplace Discrimination and Harassment* 3 (Aug. 2024), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Aug-2024.pdf>.

are particularly supported by the UPK program. *See* Colo. Rev. Stat. § 26.5-4-202(1)(a)(IV) (acknowledging that “economically disadvantaged children derive greater benefits from preschool programs in states that offer universal programs”). This means these families also stand to lose the most from being excluded from the publicly funded program. Denying already-vulnerable children access to preschool does not merely withhold a benefit; it compounds existing disparities by depriving the children who most need early educational intervention the opportunity to receive it.

II. COLORADO’S NONDISCRIMINATION REQUIREMENT IS NECESSARY TO ENSURE UNIVERSAL ACCESS TO PRESCHOOL AND IS A PERMISSIBLE CONDITION ON PUBLIC FUNDING.

As described above, Colorado’s UPK Program was designed to reach all eligible children, and the nondiscrimination requirement attached to UPK funding is fundamental to that mission. The condition is neutral, generally applicable, and a permissible exercise of Colorado’s authority to ensure that taxpayer dollars serve their intended beneficiaries: children throughout the state. Petitioners’ Free Exercise theory does not entitle a religious provider to receive public funds earmarked for all children while reserving the right to exclude some children because of their or their parents’ sexual orientation or gender identity. Nor does Colorado’s permissible prioritization of underserved populations and children with disabilities somehow transform the nondiscrimination condition into unbridled discretion

to grant exemptions (like the provision of Philadelphia’s standard foster care contract at issue in *Fulton v. City of Philadelphia*, 593 U.S. 522, 535 (2021)) or discrimination against religion (like Maine’s exclusion of “sectarian” schools from an otherwise generally available tuition-assistance program at issue in *Carson*).

A. The *Carson* Line of Cases Does Not Control Because Colorado’s UPK Statute Does Not Exclude Religious Preschools.

Petitioners’ reliance on the *Carson/Espinoza/Trinity Lutheran* line of cases is misplaced because those decisions address a different situation: statutes that categorically exclude religious institutions from public benefits solely *because of* those institutions’ religious character. See Petr. Br. at 28-35 (discussing *Carson v. Makin*, 596 U.S. 767 (2022), *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449 (2017), and *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020)). Colorado’s UPK statute makes state funds accessible to *both* public and private preschools, regardless of their curricula, and actively solicits both secular and faith-based providers. *St. Mary Cath. Par.*, 154 F.4th at 764. Numerous religious preschools currently participate, including Catholic preschools.²⁹ In Efshar Project’s Jewish preschool network, “UPK participation has been nearly 100%, regardless of denomination or level of religious observance.” Those schools remain free to offer the curriculum they choose, whether secular or religious.

Moreover, mandatory adherence to a nondiscrimination *conduct* requirement is not a *status*-based restriction.

29. See Provider Search, *supra* n.2.

Schools that choose not to participate because they refuse to refrain from discrimination are not excluded because of their religious character (as in the *Carson* line of cases) or religious exercise (*see* Petr. Br. at 29). Such schools are simply experiencing the consequences of their refusal to comply with neutral, generally applicable UPK requirements that directly and necessarily further the program’s goals.

Trinity Lutheran and *Espinoza* aptly illustrate the distinction between status-based discrimination and permissible conduct requirements. In *Trinity Lutheran*, 582 U.S. at 454, this Court explained that the constitutional defect was *categorical disqualification*; in *Espinoza*, 591 U.S. at 487, the Court held that once a State subsidizes private education, it cannot disqualify private schools “solely ***because they are religious.***” (Emphasis added.)

Colorado imposes no such prohibition with UPK. In Colorado, *all* preschools—religious and secular—are eligible for public funds on the same terms. A faith-based provider’s decision not to participate in UPK because it refuses to comply with the neutral, generally applicable nondiscrimination condition is not a governmental penalty based on religious status. It is simply a choice a faith-based provider is free to make.

B. Colorado’s Nondiscrimination Requirement Is Neutral and Generally Applicable.

Even if the UPK nondiscrimination requirement somehow burdens Petitioners’ religious exercise, any such burden is incidental and easily passes constitutional muster because Colorado’s UPK statute is neutral and generally

applicable: it creates a neutral benefit program for which all providers—secular and religious—are eligible and may opt into. This Court’s jurisprudence establishes that “the government is generally free to place incidental burdens on religious exercise so long as it does so *pursuant to a neutral policy that is generally applicable*.” *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025) (emphasis added); *see also Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). Colorado’s nondiscrimination requirement satisfies both criteria. It applies identically to every participating provider, whether public, private, secular, or religious, and it was adopted as part of a comprehensive program to serve all children, not as pretext for a scheme to target religious belief or practice. Its purpose and its operation are facially neutral. Religious schools wanting to avail themselves of government funds are able to do so, so long as they adhere to the statute’s neutral and generally applicable requirements.

Indeed, Colorado does not compel any religious institution to operate a preschool, to participate in UPK, or to alter its theological convictions, curriculum, or teachings. A religious provider that objects to the nondiscrimination condition retains complete freedom to operate its preschool outside the UPK framework, apply whatever admissions criteria its religious beliefs dictate, and use private funds. Colorado’s nondiscrimination condition attaches to the *receipt of public UPK funds*, not to any provider’s religious identity. The Free Exercise Clause protects the right to practice one’s faith free from government coercion; it does not guarantee the right to practice that faith funded by government subsidies in a manner that contravenes the purpose of those subsidies.

Furthermore, a state may use funding conditions to ensure that public funds are spent for the purposes for which they were authorized. *See Rust v. Sullivan*, 500 U.S. 173, 196 (1991). Through UPK, Colorado spends public money to ensure that all children have meaningful access to quality preschool. A funding condition requiring participating providers to serve eligible families without discriminating on the basis of suspect classifications, including LGBTQ+ status, directly furthers that purpose and is essential to its realization.

C. Permissible Prioritization of Vulnerable Populations Is Neither Comparable to Discrimination Nor the Same as Unbridled Discretion.

Colorado’s UPK program permits nine ranking preferences for schools. Six preferences are practical (e.g., prioritizing siblings or the children of employees); two prioritize children with disabilities or underserved populations (i.e., students in Head Start programs); and one permits new categories to be created (the so-called “catch-all” provision), so long as they do not conflict with the nondiscrimination provision or any provision of the Colorado UPK statutes. 8 Colo. Code Regs. § 1404-1:4.110(A)-(B). Petitioners equate these latter three categorical enrollment preferences with the secular exemptions at issue in *Tandon v. Newsom*, 593 U.S. 61 at 63, and *Fulton*, 593 U.S. 522 at 535. Petr. Br. at 36-43. That comparison fails. Colorado’s preferences *expand* access for children facing recognized barriers; they do not authorize providers or officials to *exclude* children based on protected characteristics or grant individualized exemptions from the nondiscrimination rule.

Prioritizing children with disabilities and underserved populations in programs under the Individuals with Disabilities Education Act (IDEA), Exceptional Children's Education Act, and Head Start is not the same as discriminating based on protected characteristics. These programs address documented, unmet needs and direct resources toward children with a demonstrated need for services. IDEA-related programs, for example, provide specialized support that is crucial to children's development and well-being.³⁰ As Meghan S. Klassen, M.Ed., Executive Director of the Anchor Center for Blind Children, explained, the vast majority of Anchor's students have complex medical needs requiring specialized care like adaptive communication and motor equipment. One Anchor parent shared that "her daughter can't attend the neighborhood preschool because it doesn't have services in her IEP for blindness. At Anchor, they have a dedicated teacher of visual impairment, a motor room with dedicated physical therapy, a literacy room with a Brailier, [and

30. See, e.g., Annie D. Schoch et al., *Children's Learning and Development Benefits from High-Quality Early Care and Education: A Summary of the Evidence*, OPRE Rep. No. 2023-226 (Aug. 2023); Hannah Oppermann & Karen Schulman, *Child Care and Early Education for Children with Disabilities and Their Families: Key Policies and Programs*, Nat'l Women's L. Ctr. (2025); U.S. Gov't Accountability Off., GAO-24-106843, *Child Care Accessibility: Agencies Can Further Coordinate to Better Serve Families with Disabilities* (Sept. 2024); U.S. Gov't Accountability Off., *Think Child Care is Hard to Find? It's Even Tougher for Children, Parents with Disabilities* WatchBlog (Sept. 17, 2024), <https://www.gao.gov/blog/think-child-care-hard-find-its-even-tougher-children-parents-disabilities>; Cristina Novoa, *The Child Care Crisis Disproportionately Affects Children with Disabilities*, Ctr. for Am. Progress (Jan. 29, 2020), <https://www.americanprogress.org/article/child-care-crisis-disproportionately-affects-children-disabilities/>.

other] resources for children who have different visual challenges.” Anchor families are particularly likely to need financial assistance, not only due to low income but also as a result of expansive and expensive medical bills and equipment. Without the specialized support Anchor offers—which UPK funding makes possible—half of Anchor families would not be able to afford tuition.

Sewall Child Development Center, a nonprofit serving young children of all abilities in various neighborhoods and Denver’s first early-education program prepared to serve young children with disabilities, also relies on UPK funding to provide wrap-around services for “children of all backgrounds.” Sewall’s philosophy relies on being a place where the “door is very open” to all families to expand access to high-quality preschool. They are proud to support children who have been expelled or “counseled out” of other programs to make “significant progress before going to kindergarten,” and have seen children through difficult familial and custody challenges on to thrive as adolescents. Indeed, Sewall leadership identifies UPK as the program that has “made Pre-K accessible to lots of 4-year-olds,” especially children from “lower-income families.”

Head Start programs, such as those that partner with Sewall, are similarly designed to address the particular needs of children from low-income families—specifically, a well-documented gap in access to early care and educational services—and to provide comprehensive support that evidence demonstrates has a significant impact on children’s well-being and development.³¹ For

31. See Arya Ansari et al., *Enrollment in Public-Prekindergarten and School Readiness Skills at Kindergarten*

example, the Catholic Charities of the Archdiocese of Denver use UPK funds to operate certain Early Head Start programs that are “specifically directed to assist parents who find themselves in poverty.”³²

The IDEA and Head Start preferences in UPK do not permit providers to evade the nondiscrimination provision. *See* 8 Colo. Code Regs. §1404-1:4.110(B) (“In utilizing these programmatic preferences, eligible preschool providers must still comply with [the nondiscrimination provision].”). Ms. Klassen of Anchor Center for Blind Children explains:

Since disability does not discriminate, we serve all kinds of children and families ... Our students come from every ethnicity, socioeconomic

Entry: Differential Associations by Home Language, Income, and Program Characteristics, 54 Early Childhood Rsch. Q. 60 (2021); Yu Bai et al., *Long-Term Effects of Early Childhood Programs Through Eighth Grade: Do the Effects Fade Out or Grow?*, 112 Child. & Youth Servs. Rev. 104890 (2020); Andres S. Bustamante et al., *Adult Outcomes of Sustained High-Quality Early Child Care and Education: Do They Vary by Family Income?*, 93 Child Dev. 502 (2022); Anne Martin et al., *Reframing High-Quality Public Preschool as a Vehicle for Narrowing Child Health Disparities Based on Family Income*, 21 Acad. Pediatrics 408 (2021); Francis A. Pearman II, *The Moderating Effect of Neighborhood Poverty on Preschool Effectiveness: Evidence from the Tennessee Voluntary Prekindergarten Experiment*, 57 Am. Educ. Rsch. J. 1323 (2020); Schoch et al., *supra* n.30; Hirokazu Yoshikawa et al., *Investing in Our Future: The Evidence Base on Preschool Education* (Soc’y for Rsch. in Child Dev. & Found. for Child Dev. 2013).

32. Petr. Br. at 13 n.3; Provider Search, *supra* n.2.

category, religion, and family situation. We have students in the foster care system, we have non-native English speakers, we have students being raised by grandparents, we have students from blended families, from same-gender couples, from places like Mongolia and Brazil. What they all have in common is a vision impairment, and the majority of them have other delays that affect their speech, motor, cognitive, and social-emotional development.

Prioritizing enrollment for students in IDEA and Head Start programs **expands** access for underserved young children. By contrast, discriminating against children in LGBTQ+ families **limits** access for underserved young children. The fact that UPK treats religious and secular providers identically distinguishes this case from *Tandon*, in which exemptions were not neutrally applied. Here, Colorado’s Head Start and IDEA preferences further, rather than frustrate, UPK’s equal-access purpose by expanding access for children facing recognized barriers.

Similarly, the “catch-all provision,” which is still subject to the nondiscrimination requirement, neither undercuts the nondiscrimination requirement nor allows Colorado unbridled discretion to grant new exemptions, as in *Fulton*. Petr. Br. at 36. In *Fulton*, the Court considered a *not* generally-applicable discretionary mechanism that permitted the city to grant case-by-case exceptions to the city’s nondiscrimination requirement for foster care contract programs. 593 U.S. at 523, 533-34. In contrast, Colorado’s UPK statute allows no such exceptions and confers no governmental discretion with respect to the nondiscrimination provision. The nondiscrimination

requirement applies categorically to every participating provider without exception, waiver, or individualized assessment; no government official is empowered to grant exemptions, and no administrative process exists through which a provider may seek one.

Indeed, the stakes of Petitioners' theory confirm why Colorado's rule is necessary. If religious providers participating in UPK may exclude children because the children's parents are in a same-sex relationship or marriage, then there is no principled basis for limiting that exemption. The same religious convictions that disfavor these children may, at any point, be construed to also disfavor children of unmarried mothers, interfaith households, divorced households, or even children born through assisted reproduction. Such a result would deny services to children because of the circumstances of their birth or their family structure—factors entirely beyond their control. Each potential exclusion would further fragment the statewide provider network, curtail access for vulnerable families, and progressively erode the universality that is integral to UPK. This is precisely the outcome the Colorado legislature intended the nondiscrimination requirement to prevent.

CONCLUSION

Colorado created UPK to give every child meaningful access to the developmental and family-support benefits of preschool. The Constitution does not require Colorado to fund providers that deny those benefits to children because of who they are or who their parents are. For the foregoing reasons, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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**APPENDIX — COMPLETE LIST
OF *AMICI CURIAE***

1. Academy of Arts and Knowledge
2. Advocates for Children of New Jersey
3. Alliance for Quality Education
4. Alliance to Reclaim Our Schools
5. Anchor Center for Blind Children
6. The Center for Law and Social Policy
7. Child Care Law Center
8. Children’s Garden Learning Academy
9. Children’s Village, Inc.
10. Clearinghouse on Women’s Issues
11. Cobalt
12. Colorado Statewide Parent Coalition
13. Community Change
14. The Efshar Project
15. Elephant Circle

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16. Feminist Majority Foundation
17. Foundation Montessori Preschool
18. Michigan League for Public Policy
19. Montessori Partnerships for Georgia
20. National Council of Jewish Women
21. National Organization for Women
22. National Women's Law Center
23. Natural Start Alliance (a Project of the North American Association for Environmental Education)
24. New Horizon Academy
25. NJ Communities United
26. Playcrafter Kids
27. Public Advocacy for Kids (PAK)
28. Public Counsel
29. Service Employees International Union (SEIU)
30. Sewall Child Development Center
31. Students Engaged in Advancing Texas (SEAT)

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- 32. Temple Sinai Preschool
- 33. Vote Mama Lobby
- 34. WEPOWER
- 35. The Women's Foundation of Colorado
- 36. 9to5 GA