

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 PUBLIC FUNDS PUBLIC SCHOOLS,
NATIONAL EDUCATION ASSOCIATION,
AMERICAN FEDERATION OF TEACHERS,
AND EDUCATION AND CONSTITUTIONAL LAW SCHOLARS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

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**For Identification Purposes*

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INTERESTS OF THE *AMICI CURIAE*¹

Amici are committed to ensuring that public education remains the cornerstone of our nation's social, economic, and political structure, and that children of all backgrounds have the right to a public education that gives them a meaningful opportunity to succeed in school and in life, free from discrimination.

Public Funds Public Schools (PFPS) is a national campaign to ensure that public funds for education are used to support and strengthen public schools. PFPS opposes all forms of private school vouchers and discrimination by publicly funded education providers. PFPS is a partnership between Education Law Center (ELC) and the Southern Poverty Law Center (SPLC). ELC, based in Newark, New Jersey, is a nonprofit organization founded in 1973 that pursues justice and equity for public school students by enforcing their right to a high-quality education in safe, equitable, nondiscriminatory, integrated, and well-funded learning environments. SPLC, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 that serves as a catalyst for racial justice in the South and beyond, working to advance human rights.

National Education Association (NEA) is the largest union in the country representing nearly three million educators who serve our nation's students in public schools, colleges and universities. Since its founding over a century and a half ago, NEA has worked to create, expand, and strengthen the quality

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission.

of public education available to all children. NEA is committed to a strong public education system as the foundation of our vibrant, multiracial democracy.

The American Federation of Teachers (AFT), an affiliate of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), represents 1.8 million members who are employed across the nation in pre-K-12 and higher education, public employment, and healthcare. The AFT has a deep and longstanding commitment to ensuring that every child has access to a high-quality public education.

The Education and Constitutional Law Scholars listed in the Appendix (“Education Law Scholars”) are scholars of constitutional and education law who believe strongly in upholding a proper role for courts in enforcing constitutional rights where majoritarian democratic processes may have caused violations of the rights of disfavored minorities. At the same time, the Education Law Scholars recognize that the scope of judicial review is subject to important limitations that protect the constitutional separation of powers and ensure that courts do not improperly intrude on other branches’ choices, and instead allow for judicial review of the acts of legislatures, elected officials, and local administrators only where doing so is appropriate to protect and vindicate the constitutional rights of the actual litigants before a court. The Education Law Scholars have been immersed in the study of these core principles of judicial review through their scholarship and teaching, particularly as these principles relate to constitutional guarantees concerning education. They seek to assist this Court by explaining, in a historical, legal, and social science context, how these principles apply to the issues presented by this appeal.

SUMMARY OF ARGUMENT

Petitioners ask this Court to compel Colorado to fund preschool providers who refuse to comply with State law. Colorado's universal preschool program ("UPK") welcomes religious and non-religious providers alike. The State asks only that those who accept public funds abide by the same rules as everyone else, including providing equal access to all children regardless of sexual orientation or gender identity. Petitioners seek a special exemption from those requirements. And in practical terms, what Petitioners are asking for is a right to receive state funds while denying services to three- and four-year-old children because of their or their parents' identities. Nothing in the Constitution requires Colorado to abandon its interest in universal access to preschool and instead subsidize such discrimination that directly contradicts that interest. The Court should reject Petitioners' request.

Colorado enacted its universal preschool program to provide all the State's children access to free, high-quality preschool services. Colo. Rev. Stat. ("C.R.S.") § 26.5-4-204(1)(a). Under this program, public, private, and faith-based preschool providers can (and do) receive public funds subject to neutral, generally applicable standards that further the State's objective of providing quality education for all students. The UPK's nondiscrimination requirement sets forth one such standard, ensuring that all children have an equal opportunity to participate in publicly funded preschool programming free from discrimination based on their or their parents' race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability. C.R.S. § 26.5-4-205(2)(b).

Petitioners seek to participate in the UPK program but be excused from compliance with the UPK's nondiscrimination requirement, claiming that the requirement impacts their free exercise of religion. Petitioners contend that their religious beliefs preclude them from serving certain children and families based on sexual orientation or gender identity, and that the State cannot deny them funding even though they intend to act in accordance with those beliefs in a way that would violate program requirements.

Colorado's lawmakers have determined that the UPK's nondiscrimination requirement is vital to preserving the benefits of publicly funded preschool education for all Colorado children. Such antidiscrimination laws enable the State to remove obstacles—such as discrimination in admissions—that can prevent the most vulnerable students from accessing educational opportunities. These antidiscrimination protections facilitate the State's implementation of a mixed-delivery system whereby accessible preschool services are provided by public and private actors. This system ensures wide-reaching preschool access, furthering the fundamental goal of publicly funded education that is open to all. Exempting preschool providers from the nondiscrimination requirement would harm Colorado's preschool students—three- and four-year-old children—and hinder achievement of the State's goal of ensuring universal access to preschool. It would also undermine the ability of the State to enforce laws protecting the civil rights of its citizens and would threaten a host of other government-funded, mixed-delivery programs in Colorado and elsewhere, many of which contain similar nondiscrimination requirements. If religious entities have an unconditional right to public funds free of neutral, generally applicable rules the government may impose, such

programs will become untenable and states will pull back from them.

Colorado’s policy conditioning the receipt of public funds on compliance with the UPK’s nondiscrimination requirement passes constitutional muster because it is neutral and generally applicable, and therefore subject to rational basis review. But even if this Court applies a strict scrutiny standard, the nondiscrimination requirement should be upheld. Colorado has a compelling interest in eliminating discrimination in publicly funded education and ensuring that every Colorado child can participate in the program on equal terms. Moreover, the UPK’s nondiscrimination requirement is narrowly tailored to prevent only specific discriminatory conduct while otherwise allowing wide flexibility and deference. The requirement does not apply to other aspects of preschool programs and does not apply at all to religious preschool providers that do not accept public funds.

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

ARGUMENT

I. The State’s core education objective—ensuring equal educational opportunities for all students—can only be met in nondiscriminatory schools.

Recognizing the vital role of a high-quality preschool education for all children, Colorado enacted its universal preschool program in 2022. C.R.S. §§ 26.5-4-201 *et seq.* Under this program, all children in the state are eligible to receive free preschool services in the year prior to kindergarten enrollment. C.R.S. § 26.5-4-204(1)(a). To ensure that preschool programming is equally available to all children, the State

requires all preschool providers that receive public funds under the program to comply with certain neutral, generally applicable standards, *see Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), including a nondiscrimination requirement. These standards advance Colorado's goal of ensuring that every student has access to a high-quality preschool education and that public funds are not used to facilitate state-sponsored discrimination against students.

The core mission of Colorado's early childhood education system is to deliver "an inclusive, community-centered, data-driven, high quality, and equitable early childhood system that supports the care, education, and well-being of *all* Colorado's young children" Colo. Dep't of Early Childhood, *CDEC Mission*, <https://perma.cc/B5WH-ZLHA> (emphasis added). To achieve this objective, Colorado established a "mixed delivery" system for the provision of preschool education, enabling families to select preschool providers for their children "from as broad a range as possible within their respective communities." C.R.S. § 26.5-4-204(2). Families may choose public or private preschools, including faith-based and in-home providers. To ensure safe and high-quality learning environments, all preschool providers must adhere to neutral and generally applicable quality standards related to child-care licensing, teacher qualifications, instructional practices, family and community engagement, and more. *See* C.R.S. §§ 26.5-4-205(1)(a)(III), (2)(a)-(l). These requirements apply to all participating schools with no discretionary exceptions. The requirements do not target religious practices, nor are they motivated by religious animus.

The UPK’s nondiscrimination requirement is another quality standard that applies to religious and non-religious providers alike and is designed to ensure that all Colorado preschoolers can receive a publicly funded education free from discrimination. Under the requirement, all children are guaranteed the opportunity to participate in preschool programming regardless of their or their parents’ “race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.” C.R.S. § 26.5-4-205(2)(b).

Petitioners ask to be excused from the UPK’s nondiscrimination requirement so that they may both receive public funds and expressly discriminate against young children and their families. A ruling in Petitioners’ favor would jeopardize civil rights laws, as well as the basic ability of state governments to place neutral and generally applicable conditions on publicly funded programs. Indeed, if states like Colorado cannot impose reasonable regulations on their mixed-delivery preschool programs—particularly to ensure that providers serve *all* members of the public when accepting public funds—operating such programs will become untenable.

A. Accessible preschool has substantial benefits for children, parents, and society as a whole.

Quality preschool provides students and their parents with long- and short-term benefits in a range of social, emotional, intrapersonal, and academic contexts. In particular, preschool has been noted to benefit both early learning and social and emotional development of young children. *See, e.g.,* Jeanne L. Reid, *The Racial and Ethnic Composition of Pre-Kindergarten Classrooms and Children’s Language*

Development, 119 Penn St. L. Rev. 645, 650 (2015). When enacting the UPK program, the Colorado General Assembly underscored “[s]tate and national research demonstrat[ing] the positive and long- and short-term impacts of high-quality preschool” on student outcomes, including improved early literacy and increased high school graduation rates. C.R.S. § 26.5-4-202(1)(a)(III). The General Assembly further found that establishing a “statewide mixed delivery system of preschool providers to make preschool programming universally available to children throughout Colorado compounds the benefits for children who are in low-income families and increases the ultimate social and economic benefits of high-quality preschool programming for the state as a whole.” C.R.S. § 26.5-4-202(1)(a)(VI).

High-quality preschool programs can provide a strong foundation for young children and enhance early learning and development. *See* OECD, *Building Strong Foundations for Life: Results from the 2025 Early Learning and Child Well-being Study*, OECD Pub. 24-25 (2026). This is especially true for children from low-income families. Studies have shown that, while low-income students generally enter school less prepared than other children their age, students with access to quality preschool are more likely to obtain the necessary social and personal skills that set them up for success in kindergarten and beyond. Mary Therese O’Sullivan, *Early Childhood Education: An Ignored Solution to the Achievement Gap in the United States*, 14 J. L. Soc’y. 107, 113–14 (2013).

Children with ample opportunities to “develop their foundational learning, cognitive, social and emotional, and physical skills” have been found to have better school achievement outcomes by the age of

eight. OECD, *Building Strong Foundations for Life* at 21. Moreover, students who attended high-quality preschool were more likely to exhibit appropriate behavior, competent social interaction, and emotional maturity as compared to their peers who did not attend. Linda Bakken, Nola Brown & Barry Downing, *Early Childhood Education: The Long-Term Benefits*, 31 J. Rsch. Childhood Educ. 255, 263 (2017). Similarly, children who attend preschool programs are less likely to repeat grades or interact with the criminal legal system. O’Sullivan, 14 J. L. Soc’y. at 117. Early social skills and receptive language skills, which may be developed through preschool, correlate with better mental health in adulthood. OECD, *Building Strong Foundations for Life* at 22. And the educational opportunities and benefits of preschool have been shown to translate into increased earnings and decreased dependency on social welfare programs. W.S. Barnett, *Effectiveness of Early Educational Intervention*, 333 Sci. 975, 975–78 (2011).

Parents and the broader community also benefit from their children’s enrollment in preschool. For example, one study found that mothers who enrolled their children in preschool programs increased their employment by five percent. Lindsay Weixler, *The Labor Market Case for Early Childhood Education*, Brookings (May 19, 2025). Full-day preschool has also been shown to increase mothers’ time spent working by one hour per day and increase the income of both parents, with no impact on the amount of quality time that parents spend with their children. *Id.* Increasing productivity yields positive effects in the economy at large.

B. Requiring Colorado to fund discriminatory schools would harm children and families and undermine the purpose of the State’s universal preschool program.

Colorado set out to create an “*inclusive*, community-centered, data-driven, high-quality, and *equitable* early childhood education system that supports the care, education, and well-being of *all* of Colorado’s young children” and families. Colo. Dep’t of Early Childhood, *CDEC Mission* (emphases added). The UPK program was designed with these goals in mind, and cannot meet them if it is forced to fund providers that deny equal access to eligible families.

1. *Discriminatory exclusion harms children and families.*

No person—and especially no young child—should be denied access to public goods because of their own sexual orientation or gender identity.² Yet here, Petitioners not only seek an exemption to do just that—they also request free rein to discriminate against preschoolers based on protected characteristics solely attributable to the children’s parents. See Pet’rs’ Br. 12-14.

² Although young children, including preschoolers, can and do identify across a range of sexual orientations and gender identities, child development research cautions against inferring young children’s sexual orientation or gender identity from early behaviors or preferences alone. See, e.g., William J. Hall, Hayden C. Dawes & Nina Plocek, *Sexual Orientation Identity Development Milestones Among Lesbian, Gay, Bisexual, and Queer People: A Systemic Review and Meta-Analysis*, 12 *Frontiers Psych.* 1, 1–2, 10 (2021); David G. Perry, Rachel Pauletti & Patrick J. Cooper, *Gender Identity in Childhood: A Review of the Literature*, 43 *Int’l J. Behavioral Dev.* 289, 289 (2019).

However, this Court has acknowledged that discrimination against a child's parents causes harm to the child. For example, denying rights to same-sex couples, such as the right to marry, causes "their children [to] suffer the stigma of knowing their families are somehow lesser . . . thus harm[ing] and humiliat[ing] the children of same-sex couples." *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015). *Cf. Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("[L]egal burdens should bear some relationship to individual responsibility or wrongdoing."). Research bears out the harms of stigmatization in school settings. Families with sexual orientation-minority parents may encounter unsupportive teachers or school staff, manifesting in lack of acknowledgment, explicit stigmatization, and bias against their children. Abbie E. Goldberg & JuliAnna Z. Smith, *Preschool Selection Considerations and Experiences of School Mistreatment Among Lesbian, Gay, and Heterosexual Adoptive Parents*, 29 *Early Childhood Rsch.* Q. 64, 64 (2014).

As discussed above, *supra* Section I.A, preschool occurs at a critical phase of child development, and high-quality early education programs can enhance cognitive and social development, as well as academic readiness. Elaine A. Donoghue, *Quality Early Education and Child Care From Birth to Kindergarten*, Pediatrics, Aug. 1, 2017, at 1, 2. Opening the door to discriminating against young children, in school admissions or otherwise, could have profound negative effects throughout their childhoods. Research evaluating K-12 students finds that perceived discrimination is associated with greater psychological distress, lower self-esteem and school engagement, and poorer academic achievement. Aprile D. Benner et al., *Racial/Ethnic Discrimination and Well-Being During*

Adolescence: A Meta-Analytic Review, 73 *Amer. Psych.* 855, 855 (2018).

The UPK’s nondiscrimination requirement ensures that children have “an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child *or the child’s family*.” C.R.S. § 26.5-4-205(2)(b) (emphasis added). This provision is designed to avoid the injustice of denying opportunity to children based on the sexual orientation or gender identity of their parent(s). See Catherine E. Smith, *State Action that Penalizes Children as Evidence of a Desire to Harm Politically Unpopular Parents*, 51 *Suffolk U. L. Rev.* 439, 439, 441 (2018). As this Court has recognized, the state interest in preventing such discrimination “is a weighty one, for [o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021) (quoting *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 584 U.S. 617, 631 (2018)). Colorado should not be prevented from protecting three- and four-year-old children and their families from categorical discrimination based on protected characteristics.

2. *Permitting discriminatory exclusion undermines the goal of universal preschool access.*

The concept of universality is core to Colorado’s UPK program. To provide all children in Colorado “access to voluntary, high-quality, universal preschool services free of charge . . . ,” C.R.S. § 26.5-4-204(1)(a),

the State must ensure that publicly funded preschool is available to all, in every community.

A rule requiring Colorado to subsidize preschools that discriminate against children and families could have the perverse effect of undermining educational opportunity for all students. First, if the State permits preschool providers in a mixed-delivery program to discriminate, some children would not be guaranteed access if they or their parents were disfavored due to their sexual orientation or gender identity. Under such circumstances, the UPK program would not be universal.

Furthermore, states have a strong interest in ensuring that publicly funded educational services are available to all eligible children on equal terms. If establishing a publicly funded preschool program requires them to finance providers that exclude families based on protected characteristics, states may reasonably conclude that the administrative, legal, and policy costs of operating such programs outweigh the benefits. Faced with that prospect, some states may choose to limit the scope of preschool initiatives or reduce public funding—defeating universality—or decline to create such programs altogether.

That result would undermine, rather than advance, educational opportunity. Public preschool programs are designed to expand access to early childhood education, particularly for families who might otherwise lack affordable options. States can best achieve those objectives when they are able to establish uniform standards ensuring that publicly funded providers serve all eligible participants without discrimination. Requiring states to subsidize discriminatory practices would frustrate those goals and weaken

public confidence that state-funded educational programs will be open to every child.

Almost every state now funds one or more state preschool programs, and—as in Colorado—most of these states use a mixed-delivery system that includes public school districts along with funding for private providers. Karin Garver, et al., Learning Pol’y Inst., *State Preschool in a Mixed Delivery System: Lessons from Five States*, at v, 1 (2023). Partnering with private providers builds state capacity to provide preschool on a universal basis. *Id.* For states like Colorado that prioritize the prohibition of discrimination in taxpayer-funded educational programs, a mixed-delivery system is only tenable because *Smith* allows predictable legislative planning and crafting. In adopting a model that includes private providers, these states rely on a workable application of Justice Scalia’s *neutral and generally applicable* requirements.

If these states cannot retain the crucial ability to prohibit taxpayer money from being used to fund discrimination, they will inevitably pull back from what are currently healthy and successful models of government-sponsored mixed delivery systems. State leaders would be forced to drastically reduce preschool programming or eliminate these programs altogether.

If a school desires to participate in Colorado’s pre-K program, it must comply with the program’s nondiscrimination requirement. To permit anything else would defeat the State’s core purpose of providing universal publicly funded preschool to all Colorado’s children. Colorado’s leaders can be expected to reasonably conclude that absolving preschool providers from that requirement would harm Colorado’s preschool

students and undermine the purpose of the universal program.

Moreover, permitting state-sponsored discrimination also directly undermines the goals of universal preschool education by requiring the State to pay for a message that certain students and their families are not entitled to the same opportunities as others. Public education is particularly vital to students of color, students with disabilities, and LGBTQ+ students who depend on publicly funded schools at higher rates than their peers. *See, e.g.,* Erica Frankenberg, et al., Civil Rights Project, Univ. of Cal., Los Angeles, *Harming our Common Future: America's Segregated Schools 65 Years after Brown* 4-5 (2019); Inst. of Educ. Scis., U.S. Dep't of Educ., *The Condition of Education 2024: Students with Disabilities (Ch. 2)* 4-5 (2024); The Trevor Project, *Research Brief: Anti-LGBTQ+ School Policies and LGTBQ+ Young People* 3 (Aug. 2024). Antidiscrimination protections for these vulnerable groups are crucial for student safety and educational achievement.

The logic Petitioners advance in their efforts to force Colorado to provide public funding to preschool providers that explicitly discriminate threatens a slippery slope of publicly funded discrimination against LGBTQ+ children and their families, as well as other vulnerable and protected classes of students, such as students with disabilities, religious minority students, and students of color. Forcing Colorado to issue wholesale exemptions from its preschool program's neutral and generally applicable requirements to any religious provider that objects to these requirements could lead to a range of discriminatory school policies funded by the State. This is fundamentally

inconsistent with Colorado’s objective to provide universal preschool education to all children.

* * *

In designing the UPK, Colorado reasonably concluded that a mixed-delivery program cannot remain universal if publicly funded providers may deny admission to children and families based on protected characteristics. The question, then, is whether the Constitution nevertheless requires Colorado to finance such exclusion. It does not.

II. The UPK’s nondiscrimination requirement is a permissible public funding condition.

This Court’s precedents have long distinguished between tolerating private conduct and requiring public support for that conduct. Particularly in education, states may—and in some cases, must—decline to subsidize discriminatory practices, even when those practices are religiously motivated.

Such requirements must be neutral and generally applicable, and states cannot apply nondiscrimination conditions unevenly, such as by allowing exceptions for secular but not religious reasons. *See Fulton*, 593 U.S. at 542. But governments are not required to compromise their “weighty” interest in ensuring that the benefits of public funds are available on an equal and nondiscriminatory basis. *See id.*

The UPK’s nondiscrimination requirement complies with this constitutional framework. It is neutral, generally applicable, and free of arbitrary exemptions.

A. The Constitution does not bar states from conditioning public funding for education on compliance with neutral nondiscrimination requirements.

This Court has long rejected the premise that government must subsidize conduct simply because it is constitutionally protected. And that principle applies with particular force in education. In *Norwood v. Harrison*, the Court explained this key distinction: “[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.” 413 U.S. 455, 463 (1973). *See also Runyon v. McCrary*, 427 U.S. 160, 161 (1976) (stating that even assuming “parents have a right to send their children to schools that promote the belief that racial segregation is desirable, and that the children have a right to attend such schools, it does not follow that the Practice of excluding racial minorities from such schools is also protected by the same principle”). And in *Bob Jones University v. United States*, it held that the government’s interest in eradicating discrimination in education justified withholding a valuable public benefit. 461 U.S. 574, 604 (1983).

Cases Petitioners rely upon to support their position involve special circumstances where the State’s non-discrimination rules were not neutral or generally applicable, or where the State has singled out religious actors for disparate treatment. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Those cases do not speak to conditions on public funds, and confirm that even where there is no state subsidy, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling

governmental interest.” *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). *See also Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025) (affirming 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” (citing *Smith*, 494 U.S. 872, 878–79 (1990))).

The UPK’s neutral and generally applicable nondiscrimination requirement easily satisfies this standard. Just as a state may constitutionally condition tuition assistance on a private institution meeting curriculum standards, as many states do, *see, e.g.*, 20-A Me. Rev. Stat. §§ 2901(2), 2902, 4704, 6209; Ohio Rev. Code Ann. §§ 3301.16, 3310, it may also require compliance with neutral, generally applicable nondiscrimination standards.

The nondiscrimination requirement challenged in this case is facially neutral. It applies to all preschool providers and does not mention religion except to prohibit discrimination based on religious affiliation. *See* C.R.S. § 26.5-4-205(2)(b). It does not target religious practice, nor is it motivated by religious animus. Faith-based preschool providers that comply with the nondiscrimination requirement are welcome to participate in the UPK program and are currently receiving public funds. In the 2025-26 program year, nearly 80 faith-based providers participated in the UPK program, receiving more than \$9.5 million in state funding. Colo. Gov. Jared Polis, *Universal Preschool is For Everyone: Governor Polis Releases Statement on Colorado’s Successful Preschools* (July 6, 2026), <https://perma.cc/6QKC-BPHG>.

In addition, the UPK’s nondiscrimination requirement is generally applicable. It applies to all preschool providers that receive public funding under the UPK

program, without exception. *Every* preschool provider that participates in the program—whether public or private, religious or not—is prohibited from discriminating against children on the basis of their or their parents’ “race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.” C.R.S. § 26.5-4-205(2)(b). Simply put, a religious preschool provider that violates the nondiscrimination provision would receive the same treatment as a secular provider that discriminates. And although Petitioners suggest the UPK’s nondiscrimination requirement perpetuates religious discrimination, it in fact explicitly prohibits discrimination based on religion.

In *Masterpiece Cakeshop*, the Court understood that broad exceptions to antidiscrimination laws would result “in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.” 584 U.S. at 632. The same principle applies here: adopting Petitioners’ reasoning threatens to thrust society back into a long-rejected era of discrimination in schools justified by religious beliefs.

B. Ensuring that students with disabilities are adequately served by the program does not discriminate against religion.

Petitioners’ reliance on *Tandon v. Newsom*, 593 U.S. 61 (2021), also fails. They argue that the UPK’s nondiscrimination requirement is not generally applicable because it treats “comparable secular activity more favorably than religious exercise” in violation of *Tandon*. See Pet’rs’ Br. 36–43 (quoting *Tandon*, 593 U.S. at 62). Specifically, Petitioners argue that Colorado’s statutory requirements that participating

preschool providers reserve placements for preschoolers with disabilities and preschoolers from low-income families constitute unlawful discrimination in violation of the UPK’s nondiscrimination provision. *See* Pet’rs’ Br. at 38–39. Petitioners further argue, citing *Fulton v. City of Philadelphia*, that these placement criteria create a “system of exceptions” that undermines general applicability. *See* Pet’rs’ Br. 49.

But crucially, the non-discrimination requirements at issue have no exceptions for any provider, whether religious or non-religious. Moreover, federal and state governments have a long history of programs that prioritize students with disabilities and those from low-income families; such priorities are not comparable to denying equal opportunity to students based on their or their parents’ sexual orientation or gender identity.

Federal law requires that students with disabilities and students from low-income families have access to appropriate educational services. *See* 20 U.S.C. § 1400(d)(1)(A); 42 U.S.C. § 9831. Prior to the enactment of these federal requirements, including the Individuals with Disabilities Education Act, schools in the United States educated only one in five children with disabilities, and many states had laws specifically excluding children with disabilities. U.S. Dep’t of Educ., *A History of the Individuals with Disabilities Education Act* (2024), <https://perma.cc/8YH4-LD89>.

Similarly, programs providing preschool for children of low-income families, like Head Start, were designed to meet children’s educational, emotional, social, and health needs and to compensate for inequality in social and economic conditions. Admin. for Children & Families, U.S. Dep’t of Health and Human Services, *Head Start History* (2024),

<https://perma.cc/EV9H-VUGW>. Colorado’s statutory *protections* for children with disabilities and children from low-income families do not unlawfully prohibit access to UPK program providers based on disability or income. These protections and program specializations are not “exemptions” as contemplated by *Fulton* or *Tandon*. By Petitioners’ logic, any attempt to meet the special needs of students with disabilities would amount to discrimination against religion.

C. Because providers are not excluded on the basis of their religious character or religious use of funds, *Carson* does not apply.

Petitioners’ attempt to liken this case to *Carson v. Makin*, 596 U.S. 762 (2022), is inapposite. In *Carson*, this Court held states cannot wholly bar religious schools from the receipt of publicly funded tuition payments “*solely* because they are religious.” *Id.* at 781 (emphasis added). Here, unlike in *Carson*, faith-based preschool providers can receive *and are receiving* public funds from the State, and they are permitted to use those funds for the purpose of providing religious preschool education for students. Petitioners’ religious identity or practice is not what prevents them from receiving public funds; it is their insistence on participating in a public program but declining to abide by the neutral, unwaivable requirements of that program. Indeed, if a provider objects to a condition on the receipt of funding, “its recourse is to decline the funds. This remains true when the objection is that a condition may affect the [provider’s] exercise of its First Amendment rights.” *AID v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013). While religious schools are entitled to religious beliefs, values, and practices, the consequence of those beliefs, values,

and practices may be an inability to participate in publicly funded programs that have conflicting requirements.

The Petitioners now ask this Court to hold that any religious objection to the scope or requirements of a public program should override those requirements. Taking Petitioners' *Carson* argument to its logical end, religious entities would have a right to override any number of neutral, generally applicable quality, health, safety, programmatic, or fiscal responsibility criteria of a democratically enacted public program that spends taxpayer money. This unwieldy and expansive approach would upend programs throughout state and local governments. This Court should reject it.

A. The UPK's nondiscrimination requirement withstands strict scrutiny if it applies.

Even if this Court finds that the UPK's nondiscrimination requirement is not neutral or generally applicable, the provision should still be upheld because it passes strict scrutiny.

Colorado's interest in eliminating discrimination within publicly funded institutions is compelling. As demonstrated above, *supra* Section I.B, there can be no dispute that states have a compelling interest in eliminating discrimination. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982) (finding states have a "substantial interest" in protecting their citizens from "the political, social, and moral damage of discrimination"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (eliminating discrimination "plainly serves compelling state interests of the highest order"). Indeed, states have an even greater

interest in ensuring that publicly funded institutions do not discriminate. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance” discrimination).

Moreover, Colorado has a compelling interest in ensuring that all the State’s children have an equal opportunity to receive a publicly funded preschool education, free from discrimination. In the 2020 general election, Colorado voters, by a nearly two-to-one margin, approved the establishment of a dedicated source of funding for universal preschool programming, including additional preschool programming for children in low-income families and those at risk of entering kindergarten without being prepared to learn. *See* C.R.S. § 26.5-4-202(1)(a)(V). When enacting the UPK program, the Colorado General Assembly recognized that “Colorado voters in rural, urban, and suburban communities have demonstrated their strong commitment to expanding access to quality preschool for children regardless of their economic circumstances.” *Id.* If Petitioners succeed, some students, because of their or their parents’ identities, may have few desirable publicly funded preschool education options. The State has a compelling interest in eliminating this type of harmful discrimination against very young children. *See supra* Section I.B. The UPK’s nondiscrimination requirement furthers Colorado’s compelling interests in providing accessible publicly funded preschool to all children.

This Court’s decision in *Bob Jones University* is also instructive. There, private religious schools, including one university, challenged an IRS policy that made private schools with racially discriminatory admissions policies ineligible for tax-exempt status. The schools argued that their discriminatory policies qualified as protected free exercise based on sincerely held religious beliefs, not unlike the Petitioners in this case. See 461 U.S. at 579-585, 602-03. But this Court rejected the religious college’s challenge, finding that the government had a “compelling,” “fundamental,” and “overriding” interest in eliminating racial discrimination in education. *Id.* at 604.³

The UPK’s nondiscrimination requirement is also narrowly tailored. The requirement does not apply to religious providers that do not accept public funds under the UPK program. Further, faith-based providers are not barred from the preschool program due to religious status nor prohibited from engaging in religious activity. Schools—religious or non-religious—are only ineligible to participate in the preschool program if they insist on unlawfully discriminating against children and families in violation of the UPK’s nondiscrimination requirement. The provision is narrowly tailored because it is written to encompass discriminatory conduct within the confines of participation in a state funded program, and nothing more. See *Bob Jones Univ.*, 461 U.S. at 604 (finding “no less restrictive means are available” to eradicate discrimination in education than denying tax benefits (internal citation omitted)).

³ Because *Bob Jones University* was decided before *Smith*, the Court applied strict scrutiny rather than subjecting the IRS policy to review as a neutral law of general applicability.

Accordingly, even if this Court does not consider the UPK's nondiscrimination requirement neutral or generally applicable, this Court should uphold the requirement under a strict scrutiny standard.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted.

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