

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 DEPARTMENT OF EARLY CHILDHOOD,
ET AL.,

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

**BRIEF AMICI CURIAE OF HISTORIANS OF
EDUCATION IN SUPPORT OF RESPONDENTS**

ADAM G. UNIKOWSKY
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6041

CAYMAN C. MITCHELL
CHRISTINA M. ISNARDI
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 891-1638

Counsel for Amici Curiae

HOWARD S. SUSKIN
Counsel of Record
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 923-2604
hsuskin@jenner.com

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INTEREST OF AMICI CURIAE¹

Amici are professional historians of American education. Their collective scholarship spans the origins of American public schooling, the early history of school choice, Catholic educational policy, and conservative activism in education.

Several amici supporting Petitioners ground their arguments in the history of American education, and in the history of Catholic schooling in particular. *See, e.g.*, Br. of Amicus Curiae the Catholic League for Religious and Civil Rights in Supp. of Pet. (“Catholic League Br.”) 6–16; Br. of Amici Curiae the Notre Dame Education Law Project et al. in Supp. of Pet. (“Notre Dame Br.”) 6, 22; Br. of Amici Curiae EdChoice, Inc. et al. in Supp. of Pet. (“EdChoice Br.”) 3. Amici herein write because the record those briefs present is incomplete. The historical record shows that conditions on public benefits are common and were not generally understood to implicate the Free Exercise Clause. To the contrary, nondiscrimination policies have *protected* religious liberty by ensuring that children from minority religions, including Catholic schoolchildren, had access to publicly funded schools. Catholic institutions, far from objecting to nondiscrimination policies in publicly funded schools, often demanded them. As such, upholding Colorado’s policy would be consistent with our Nation’s tradition.

Robert N. Gross earned his Ph.D. in United States History at the University of Wisconsin–Madison in

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

2013 and is the author of *Public vs. Private: The Early History of School Choice in America* (Oxford University Press, 2018), which documents how Catholic schools navigated the emerging legal divide between public and private education by arguing that their schools served the public good and accepting regulation in exchange for public benefits.

Adam Laats is SUNY Distinguished Professor of Education and History (by courtesy) at Binghamton University (State University of New York) and president-elect of the History of Education Society, the leading international academic organization of education history. He taught middle school and high school for ten years in Milwaukee, Wisconsin, and earned his Ph.D. in United States History at the University of Wisconsin–Madison in 2006. He is the author of six books, including *The Other School Reformers: Conservative Activism in American Education* (Harvard University Press, 2015), which received the History of Education Society Outstanding Book Award; *Fundamentalist U: Keeping the Faith in American Higher Education* (Oxford University Press, 2018); and *Mr. Lancaster's System: The Failed Reform That Created America's Public Schools* (Johns Hopkins University Press, 2024).

Ann Marie Ryan is Professor of Curriculum and Instruction at the University of Texas at San Antonio. Her research in the history of education specializes in examining intersections between Catholic schools and U.S. public education across the twentieth century. She is the author of *American Catholic Schools in the Twentieth Century: Encounters with Public Education Policies, Practices, and Reforms* (Rowman &

Littlefield, 2022), which examines how Catholic educators grappled with public educational policies, regulations, and reforms including standardization, accreditation, educational measurement, and federal funding.

SUMMARY OF ARGUMENT

In a line of cases culminating in *Carson v. Makin*, 596 U.S. 767 (2022), this Court held that if a state provides public funding to private schools, it cannot exclude *religious* schools. The second question presented by this Court asks whether *Carson* and its progeny prohibit funding programs only when a government excludes religious institutions explicitly. The court of appeals distinguished between excluding a religious school from a funding program *because* it is a religious school—which is clearly impermissible—and holding all participating schools, religious and secular alike, to a general condition of operation, which the court of appeals allowed. Pet. App. 21a–22a. Petitioners answer that this distinction is “an empty formalism.” Pet. Br. 34. Several of their amici agree, describing general nondiscrimination conditions as a recent device, supposedly adopted to accomplish covertly what this Court has forbidden states to do openly. Notre Dame Br. 4–5, 13–17; *see* Pet. Br. 35.

But the distinction the court of appeals drew is not a recent construction. It is a line American educational institutions have recognized, argued from, and organized themselves around for two centuries.

First, in the early republic, publicly funded schooling operated without denominational

preference. These policies were designed to give Catholic students access to schools from which they would otherwise have been excluded. Where school boards adopted these policies, as in Savannah, Catholic families participated. Where a board's stated commitment to non-denominational preference went unenforced, as in Philadelphia, the result was violence and the largest Catholic withdrawal from public education in the period. In other words, dating back to the early republic, nondiscrimination policies have been supported by and benefited Catholic students.

Second, from the 1870s through *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), religious institutions, including Catholic institutions, sought public benefits, including tax exemption and legal standing, by demonstrating that their schools served everyone and accepted public regulation. The Church's own counsel told this Court in *Pierce* that Oregon's parochial schools were "not in court complaining of any regulatory measure." The principle that all institutions that complied with public regulations could receive public funding was understood as *protecting* religious liberty.

Third, that pattern continued through the modern era. Catholic schools entered federal programs under the Elementary and Secondary Education Act and the Individuals with Disabilities Education Act subject to the assurances those statutes applied to them, and entered Milwaukee's voucher program subject to a statutory nondiscrimination condition.

Amici take no position on the first question presented, on whether a government may withhold

public funds from a religious school, on any matter of Catholic teaching, or on the sincerity of Petitioners' beliefs. What Amici offer is the historical record, which answers one of the historical claims at the center of Petitioners' case. The line the court of appeals drew between excluding a religious school and holding every participating school to a common condition is not a modern evasion of this Court's precedents. It is a distinction with two centuries of American educational practice behind it.

ARGUMENT

I. The historical record demonstrates that nondiscrimination conditions are a longstanding feature of publicly funded education.

History already has a place in this case. This Court's recent funding-program decisions rest in part on historical judgments: *Espinoza v. Montana Department of Revenue*, for example, examined the no-aid provisions of the nineteenth century and their origins, 591 U.S. 464, 480–82 (2020). Petitioners' amici invoke history in the same way, presenting the nineteenth century as a period in which public schooling served as an instrument of anti-Catholic hostility and Catholic schools as the refuge built in response. Catholic League Br. 6–16; Notre Dame Br. 22; EdChoice Br. 3.

Petitioners' amici thoroughly describe the founding-era record on whether public funds may be withheld from a religious school, *see, e.g.*, Br. of Amici Curiae Stephanie Barclay and Mark Storslee in Supp. of Pet. 5–20 (“Barclay & Storslee Br.”), as well as the Blaine-era movement to exclude denominational

schools from public funding, Catholic League Br. 6–16; EdChoice Br. 3, which this Court has already examined, *see Espinoza*, 591 U.S. at 480–82.

But this case is not about withholding funds or excluding schools; Colorado’s program admits religious providers. Petitioners’ amici are silent on the history that matters here: the history of the terms on which publicly funded schooling have operated. As described below, the practice of attaching operating conditions to publicly funded schooling generally, and the nondiscrimination condition in particular, reaches back to the first generation of American public schools, long before *Carson*. In the early Republic, that practice protected Catholic students’ access to public education and was not understood to infringe on the religious liberty of the Protestant schools that adhered to those conditions. That practice has persisted throughout American history, often with the enthusiastic support of the religious schools themselves.

A. Catholic families in the early Republic invoked nondiscrimination conditions, rather than exemptions, to secure access to publicly funded schools.

In the early Republic, nondiscrimination policies were not understood to infringe on the religious liberty of religious schools. Instead, they served to protect the religious liberty of religious minorities by ensuring they could freely access publicly funded institutions while adhering to their faith. Two examples, in Savannah, Georgia and Philadelphia, Pennsylvania, illustrate the point. In both, the choice presented was between revising the terms on which the school served every pupil and exempting the

objectors—and in both, Catholic families pressed for the common rule.

Savannah’s free school society—later designated by statute to educate the county’s poor children at public expense—required daily Bible reading. However, under rules adopted at its founding, pupils were assembled each Sunday and sent to whatever church was “designated by their parents or guardians.”² The choice of religion belonged to the family. When the president of Savannah’s Hibernian Society wrote to the board in 1824 asking that Catholic pupils be permitted texts of their own and be sent to their own church, the school’s directors answered that any denominational preference had been unintended and that they respected freedom of conscience. They then invited a Catholic representative to inspect the school. He found the school’s religious practices generally unobjectionable, with one exception: catechisms teaching the specific doctrines of four Protestant denominations. The directors removed those catechisms; not for Catholic pupils, but from every classroom.³

² Rules of the Savannah Free School Society rules 27, 30 (Dec. 9, 1816), in *Savannah Free School Society rules, minutes, and accounts*, MS 689, Ga. Hist. Soc., Savannah, Ga., transcribed in Southern Charities Project, Univ. of Warwick; Act of Dec. 22, 1832, *Acts of the Gen. Assembly of Ga.*, 15 (1832), (requiring poor children within two miles of Savannah entitled to the poor school fund to be educated at the Savannah free school, and directing the justices of the inferior court of Chatham County to pay their tuition to the Directress).

³ Board Minutes (Mar. 22, 1824), in *Savannah Free School Society rules, minutes, and accounts*, MS 689, Ga. Hist. Soc., Savannah, Ga., transcribed in Southern Charities Project, Univ. of Warwick. The Hibernian Society of the City of Savannah was

By contrast, when publicly funded religious schools did not adhere to nondiscrimination practices, the result was religious conflict. Philadelphia's experience is instructive. In 1834, Philadelphia's school board decreed that public schools would eliminate all religious observances, concluding that "our Public Schools can be continued as a *public good*; and in prohibiting the introduction of religious forms in them, this Board will invade the rights of *none*, but on the contrary, by so doing, it will maintain the rights of *all*."⁴ Catholic leaders endorsed this policy. Bishop Francis Kenrick agreed in 1839 that public schools must "allow no religious exercise or instruction whatever," and in 1843 endorsed "the entire separation of Religion from public education, as the only just system for schools in which the children of all denominations mingle together."⁵ Kenrick preferred public schools that included religious teaching, but he accepted religion-free schools over schools that imposed Protestant beliefs on Catholic children.⁶

incorporated in 1812 for the relief of indigent and exiled Irishmen. Act of Dec. 10, 1812, *Acts of the Gen. Assembly of Ga.*, 53 (1812).

⁴ A Protestant and Native Philadelphian, *The Truth Unveiled, or, a Calm and Impartial Exposition of the Origin and Immediate Cause of the Terrible Riots and Rebellion in Philadelphia, on May 6th, 7th and 8th, A.D. 1844*, 20 (Baltimore: Metropolitan Tract Society, 1844) (emphasis in original).

⁵ Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1840*, 8 Hist. Educ. Q. 40, 50, 93 (1968).

⁶ *Id.* at 57.

In practice, however, Philadelphia's public schools continued to require students to read from the King James Bible despite the board's rules. Faced with Catholic complaints, the board attempted a middle course: the readings would continue, but individual children could opt out. Catholic leaders declined that accommodation. They pressed instead for the rule the board had already adopted to be enforced in every classroom.⁷ Catholic families took the same position in practice. In one publicized episode, all the Catholic children in a classroom left together when the teacher began reading the King James Version rather than excuse themselves individually. The teacher complained that the presence of sectarian instruction had made her school unmanageable, owing to the disorder resulting from children's fighting.⁸

In May 1844, the dispute moved from school-board meetings to the streets. Protestant and Catholic militias battled for months. The city declared martial law. At least thirty houses were burned, churches were set alight, and at least fourteen people were killed.⁹ After the riots, Kenrick and other Catholic leaders turned to building a separate network of Catholic schools, and Catholic families increasingly left Philadelphia's public schools. That departure is the largest instance of Catholic withdrawal from public education during this period. As this episode demonstrates, nondiscrimination provisions were promoted not as an infringement of the school's

⁷ *Id.* at 69.

⁸ *Id.* at 65.

⁹ *Id.* at 74–76.

religious liberty but as a means of avoiding religious strife and protecting Catholic students from compelled religious observance.

A note on scope bears repeating here, because the surrounding record is easily conflated. Other amici document at length the funding of religious schools by state and federal governments in the Founding era and early republic. As stated above, Amici do not address that record and take no position on it. It bears on whether public funds may be withheld from a religious school. The record Amici present bears on a different question: the terms under which publicly funded schooling was conducted, and how Catholic institutions responded to those terms. Nor do Amici rely on the later nineteenth-century movement to exclude “sectarian” schools from public funding. See *Espinoza*, 591 U.S. at 481–82. Amici’s evidence is neither of those histories. It is the history of Catholic communities themselves demanding that publicly funded education be nondiscriminatory—a demand Bishop Kenrick articulated and Savannah’s school board honored—and of Catholic schools thereafter seeking public benefits by demonstrating compliance with the conditions attached to them.

B. Catholic institutions sought public benefits by demonstrating that they served everyone and accepted public regulation (1870s–1925).

The Catholic schools built in the decades after 1844 grew rapidly. By the late nineteenth century, parochial schools in many large northeastern cities

educated between 20 and 40 percent of students.¹⁰ As these schools became mass-attended institutions, they entered a new relationship with the state, one in which Catholic leaders consistently argued that their schools served the public good, accepted public regulation, and were entitled to public benefits in return. Petitioners' argument in this case—that they are constitutionally entitled to receive taxpayer funds *without* adhering to Colorado's nondiscrimination condition—is novel.

Beginning in the 1870s, in disputes over tax exemptions, Catholic schools proudly embraced their nondiscrimination policies. Instead of arguing that religious liberty principles entitled them to obtain tax exemptions even without nondiscrimination policies, many Catholic schools argued they were eligible for public benefits *because* of their nondiscrimination policies.

For example, Rhode Island had authorized the inspection of tax-exempt private educational institutions since 1854. When the State later moved to strip private schools, including Catholic schools, of that exemption in the 1870s, Catholic officials responded not by disclaiming public oversight but by embracing it. Their schools, the officials argued, were “free public schools,” already subject to state inspection, mass attended, and “gratuitously opened to all, without distinction of sect.”¹¹ In Ohio, Archbishop John Purcell sued to enjoin the collection

¹⁰ Robert N. Gross, *Public vs. Private: The Early History of School Choice in America* 62–104 (2018).

¹¹ *Saint Joseph's Church v. Assessors of Taxes of Providence*, 12 R.I. 19, 20 (1878).

of taxes assessed on Cincinnati's Catholic parochial schools, claiming they were tax exempt. The trial record showed that those schools were "open for the admission of children of parents of all denominations."¹²

As John O'Grady, later the longtime executive director of the National Conference of Catholic Charities, wrote in 1916: "All private institutions are, in a sense, public beneficiaries. By reason of the public service which they discharge, the State exempts them from taxation. It has, therefore, a right to see that they discharge their social function in a proper and reasonable manner."¹³

Catholic school leaders carried this principle through the early twentieth century. For example, they embraced, and often pushed for, state curricular standards and agreed to accreditation by public school committees. Diocesan school officials frequently argued that if their schools met the same curricular requirements as the public schools', it would raise standards, better attract parents, ease the process of transferring between Catholic and public schools, and stave off hostile state attempts to harass Catholic education. "Catholic parents [have] expected the same type of education from us that the children of their neighborhood receive in the public school across the street," the Reverend George Johnson of Catholic University wrote in 1925. Surveying the previous decades of Catholic school attitudes toward state regulation, he acknowledged that "[w]e have accepted

¹² *Gerke v. Purcell*, 25 Ohio St. 229, 231 (1874).

¹³ John O'Grady, *State Supervision of Catholic Institutions*, Ecclesiastical Rev. 10, 12 (July 1916).

[state] standards insofar as they affect the curriculum, grading, textbooks.”¹⁴ Indeed, by the 1920s, twenty-three states had passed laws requiring local school committees to certify or inspect private schools, and more required courses on the Constitution, civics, patriotism, and English as the official language of instruction in the school. Three states mandated that private school teachers obtain the same occupational license as those in public schools.¹⁵

The clearest expression of this posture came in 1925, when Oregon attempted to abolish private schools entirely, culminating in this Court’s landmark decision in *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

In *Pierce*, William Guthrie, representing the Catholic schools of Oregon before this Court as counsel for the Society of the Sisters of the Holy Names of Jesus and Mary, with the support of the National Catholic Welfare Conference, submitted a 156-page appendix listing state laws regulating private schools and wrote: “At the outset, it should be clearly understood that the private and parochial schools of Oregon are not in court complaining of any

¹⁴ George Johnson, *The Need of a Constructive Policy for Catholic Education in the United States*, Nat’l Catholic Educ. Ass’n Bull. No. 22, at 59–60 (1925). Johnson would later lead the National Catholic Educational Association.

¹⁵ See Charles N. Lischka, *Private Schools and State Laws: The Text as Well as a Classified Summary of All State Laws Governing Private Schools, in Force in 1924*, 102–08 (Washington, D.C.: National Catholic Welfare Conference, 1924).

regulatory measure.”¹⁶ Catholic schools, he continued, “are, and long have been, subject to inspection by the State Superintendent of Public Instruction, and anything prejudicial to the public welfare could easily have been prevented by proper and reasonable supervisional regulation.”¹⁷ The existing regulatory framework, Guthrie argued, showed “how far the control of the state over private education may reasonably extend and how unnecessary it is to suppress all private and parochial schools.”¹⁸

Thus, the Church did not argue in *Pierce* that Catholic schools should be free from public regulation. It argued that Catholic schools were already regulated, already serving the public good, and that the regulatory framework was the foundation of their legal survival.

C. The pattern continued through the modern era (1930s–present).

The institutional posture documented above—in which Catholic schools cast their proud compliance with public conditions as their basis for government support rather than as a violation of religious liberty—continued through the mid-twentieth century and into the modern era. It took new forms as Catholic schools navigated the Great Depression,

¹⁶ Brief on Behalf of Appellee, *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (No. 583), reprinted in *Oregon School Cases: Complete Record*, 223, 257 (1925) (emphasis omitted).

¹⁷ *Id.* at 271.

¹⁸ *Id.* at 232.

the postwar expansion, and the emergence of federal education funding.

During the Great Depression, public and Catholic schools cooperated to educate children despite challenging economic conditions. In rural communities, Catholic public schools offered instructional support in publicly funded schools with mostly state-qualified teachers who were members of Catholic religious communities, with assurances that religion would be taught outside the school day. By 1937, there were upwards of 340 Catholic public schools across 17 states and 30 dioceses.¹⁹

Not surprisingly, given the complicated church-state relationship these schools created, local and national groups raised concerns. In response, in a 1948 memorandum, the National Catholic Welfare Conference advised dioceses to adhere to their agreements “to the letter,” advising that “care should be taken to point out clearly that the schools are public schools.”²⁰ In other words, participation in public programs required compliance with public conditions.

¹⁹ James T. Cronin & Francis J. Donohue, *Catholic Public Schools in the United States*, Fordham Univ. Inst. of Cath. Rsch., 4–5 (1937).

²⁰ National Catholic Welfare Conference Memorandum, Catholic Public Schools, Reverend Francis P. Keough, Chairman, National Catholic Welfare Council, February 25, 1948, box 7, folder “Catholic Public Schools Survey 1948,” NCWC/USCC Executive Department/Office of the General Secretary, Records, Catholic University of America Special Collections, Washington, D.C. (emphasis omitted).

In the postwar baby boom, both public and Catholic school leaders recognized the need for additional funding. Although historically opposed to federal involvement in education, American Catholic Church leaders warmed to a limited federal role by the early 1960s. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, conditioned every form of federal financial assistance, including federal education funds, on nondiscrimination. The Elementary and Secondary Education Act of 1965 (“ESEA”), Pub. L. No. 89-10, 79 Stat. 27, passed in April 1965, provided for federal funds to flow to students in private schools, including Catholic schools. Participation in ESEA opened the possibility of further federal funding, including the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, later renamed the Individuals with Disabilities Education Act (“IDEA”) in 1990. Nondiscrimination requirements attached to ESEA and IDEA have governed Catholic schools’ participation in those federal programs since 1965 and 1975, respectively. When enacted in 1965, ESEA was understood as a victory for religious education, with one Catholic news outlet declaring that “all schools are an integral part of American education.”²¹ Those nondiscrimination assurances were understood as necessary for participation in a federal benefits program, not impositions on religious liberty.

Vatican II (1962–1965) formed the institutional context in which Catholic schools expanded their partnerships with public institutions. The Council’s

²¹ *Aid to Pupils*, Catholic Advocate Vol. 14, No. 49, at 4 (Nov. 25, 1965).

Declaration on Christian Education, *Gravissimum Educationis* (1965), affirmed the Church's commitment to education as a service to the broader human community and emphasized an "inalienable right to an education."²² The Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes* (1965), oriented the Church toward engagement with secular institutions.²³ In the decades following, Catholic schools in the United States entered new publicly funded programs, accepted new regulatory conditions, and deepened their engagement with public educational institutions at the federal, state, and local level.

The 1970s and 1980s brought declining enrollments, departures of religious sisters from teaching, and financial strain. The call for school-choice reform gathered momentum in urban centers. One of the first pilots was the Milwaukee Parental Choice Program, established in 1989. Wisconsin's 1995 amendment extending the program to religious schools, Wis. Stat. § 119.23, conditioned participation on compliance with Title VI's prohibition on discrimination on the basis of race, color, or national origin. 42 U.S.C. § 2000d. When the program was challenged, the Wisconsin Supreme Court held in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), that the modified program did not violate the Establishment Clause, noting that participating schools were required to comply with § 2000d as a

²² Pope Paul VI, "Declaration on Christian Education, *Gravissimum Educationis*," Holy See (Oct. 28, 1965).

²³ Pope Paul VI, "Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*," Holy See (Dec. 7, 1965).

condition of receiving voucher funds.²⁴ Petitioners' amici hold out Milwaukee as a model of education choice, *see* EdChoice Br. 32–33, without noting the statutory nondiscrimination condition under which religious schools entered it.

In Ohio, a parallel movement produced the Pilot Project Scholarship Program, enacted in 1995 and effective in 1996, Ohio Rev. Code §§ 3313.976, 3313.977, which required participating private schools to agree not to discriminate on the basis of race, religion, or ethnic background. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002). Religious schools dominated in participation in this program, with 46 of the 56 participating schools being religious institutions. This Court upheld the program in *Zelman*. *Id.* at 655. The United States Conference of Catholic Bishops submitted an amicus brief supporting the program, arguing that programs distributing public education aid “on the basis of neutral, secular criteria that neither favor nor disfavor religion,” and making aid “available to all potential beneficiaries on a nondiscriminatory basis,” do not violate the Establishment Clause.²⁵ Amici note the distinction: the USCCB’s argument concerned the neutrality of the aid’s distribution rather than conditions imposed on participating schools.

²⁴ *Jackson v. Benson*, 218 Wis. 2d 835, 902 n.29, 578 N.W.2d 602, 631 n.29 (1998) (citing Wis. Stat. § 119.23(2)(a)4).

²⁵ Brief of the United States Conference of Catholic Bishops as Amicus Curiae in Support of Petitioners at 4, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751), 2001 WL 1480726.

At each inflection point—the acceptance of state inspection in the 1870s, the embrace of accreditation and curricular standards in the early twentieth century, entry into federal programs in the 1960s, and voucher participation in the 1990s—Catholic schools accepted new regulatory conditions attached to public benefits. Across each of these programs the design was the same: public funds carried conditions, and nondiscrimination was among the most common. Colorado’s program is the latest iteration of that design, not a departure from it.

II. The record answers the historical claims at the center of Petitioners’ case.

The record documented above answers three historical claims now before the Court.

First, Petitioners call the distinction the court of appeals drew between excluding a religious school from a program and holding every participating school to a common condition “an empty formalism.” Pet. Br. 34; *see* Pet. App. 21a-22a. History says otherwise. Throughout American history, *conditions* on public participation were sharply differentiated from *exclusions from* public participation.

Second, Petitioners’ amici describe general nondiscrimination conditions on publicly funded education as a modern device, adopted to evade this Court’s recent decisions. Notre Dame Br. 13–17; *see* Pet. Br. 35. Not so. As described above, nondiscrimination conditions on publicly funded schooling date back to the early Republic. Catholic schools have received federal education aid subject to nondiscrimination requirements since 1965 under ESEA and since 1975 under what is now IDEA. Milwaukee’s voucher program, the program

Petitioners' amici hold out as a model, conditioned participation on compliance with 42 U.S.C. § 2000d, in 1995, and Catholic schools joined on those terms. These conditions predate *Carson* by decades, and in their earliest forms by more than a century.

Third, Petitioners' amici present withdrawal from a conditioned public program as the traditional posture of religious schooling. The record contains no such tradition. Catholic schools have participated in publicly funded programs carrying a wide range of conditions for over a century, conditions touching enrollment, staffing, curriculum, accreditation, and multiple categories of nondiscrimination. Amici are not aware of any established practice of Catholic institutions withdrawing rather than accepting conditions of that kind. The one large-scale Catholic departure from public education documented above ran in the opposite direction; Catholic families in Philadelphia left public schools because a nondiscrimination commitment was *abandoned*, not because one was imposed.

CONCLUSION

Petitioners describe the line between excluding a religious school and holding every participating school to a common condition as an empty formalism. The historical record does not support that characterization. American governments have attached terms to publicly funded schooling since the first generation of public schools, and religious institutions—Catholic institutions above all—have not merely tolerated those terms but invoked them. They sought tax exemption by showing their schools were open to all without distinction of sect. They embraced inspection, accreditation, and curricular

standards. They told this Court in *Pierce* that they were not in court complaining of any regulatory measure, and rested the survival of their schools on the regulatory framework itself. They entered federal programs and voucher programs on the conditions those programs carried.

Across that record, the distinction Petitioners call empty was the distinction religious schools themselves relied upon: exclusion was the injury they fought, and conditions were the terms on which they participated. Colorado's program admits religious providers and asks of them what it asks of everyone else. That is not a modern evasion of this Court's precedents. It is the arrangement under which religious education has sought and received public support for two centuries.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ADAM G. UNIKOWSKY
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6041

CAYMAN C. MITCHELL
CHRISTINA M. ISNARDI
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 891-1638

HOWARD S. SUSKIN
Counsel of Record
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 923-2604
hsuskin@jenner.com

Counsel for *Amici Curiae*