

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 AMICI CURIAE EDCHOICE, INC., DEFENSE
OF FREEDOM INSTITUTE, WAGNER FAITH FREEDOM
CENTER, AND WISCONSIN INSTITUTE FOR LAW &
LIBERTY IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED BY THE PETITION

1. Whether proving a lack of general applicability under *Employment Division v. Smith* requires showing unfettered discretion or categorical exemptions for identical secular conduct.

2. Whether *Carson v. Makin* displaces the rule of *Employment Division v. Smith* only when the government explicitly excludes religious people and institutions.

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INTEREST OF AMICUS CURIAE¹

EdChoice is a nonprofit, nonpartisan 501(c)(3) organization that serves as a national leader in education-choice research, fiscal analysis, policy development, training, outreach, and legal defense. EdChoice’s mission is to advance education freedom and choice for all as a pathway to successful lives and a stronger society. EdChoice supports policies that afford families financial access to educational opportunities that best fit the needs of their children—whether public school, private school, charter school, home school, or any other learning environment.

The Defense of Freedom Institute for Policy Studies (“DFI”) is a national nonprofit organization dedicated to defending and advancing educational freedom and opportunities for every American family and student and to protecting their civil and constitutional rights. DFI was founded by former senior leaders of the U.S. Department of Education who are experts in education law and policy. As part of its mission, DFI litigates extensively on behalf of students, parents, faculty, and schools raising First Amendment challenges to governmental actions, including in support of Free Exercise rights like those at issue in this case.

Housed on the campus of Spring Arbor University, the Wagner Center serves as a national academic voice for freedom of thought, conscience, and religion.

¹ No party or its counsel authored any of this brief, and no person other than amici curiae, their members, or their counsel contributed monetarily to this brief.

Most importantly for this case, the Wagner Center works to preserve religious freedom and the freedom to educate, holding a significant interest in the preservation of constitutional rights.

Wisconsin Institute for Law & Liberty (WILL) is a public interest law and policy center dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. A significant focus of this mission includes advocating for educational freedom in Wisconsin and around the country.

Amici are interested in this case because they support education choice programs that allow families to choose educational opportunities, including religious education options, that best fit their children's needs. Education freedom requires education pluralism. Parents and their children benefit little from a choice among multiple versions of the same educational content and environment. As EdChoice's founder, Nobel laureate economist Milton Friedman, observed, the problem to be solved by education freedom is "an excess of conformity" and the solution "is to foster diversity" in education. Milton Friedman, *Capitalism and Freedom* 97 (1962).

Colorado's Universal Preschool Program has potential to provide education freedom to its families with preschool-aged children. But the program fails its promise—and violates the Constitution—when it discriminates against Catholic schools. Through its so-called "equal opportunity" mandate, the state dis-

favors Petitioners’ religious beliefs, homogenizes school options, and rejects pluralism.

Colorado’s discrimination is unfortunately of a piece with historical treatment of Catholic schools. As the Court well knows, blatant religious bigotry during the 19th century sought to force Catholic families into Protestant public schools. *Espinoza v. Mont. Dep’t of Rev.*, 591 U.S. 464, 482 (2020) (“The Blaine Amendment was ‘born of bigotry’ and ‘arose at a time of pervasive hostility to the Catholic Church and to Catholics in general’; many of its state counterparts have a similarly ‘shameful pedigree.’” (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–829 (2000))).

In response, Catholic parochial education expanded, nurturing the deep, rich American tradition it provides today. Traditional Catholic schools are integral to school choice programs around the country, generating experiential data supporting the premise of Colorado’s “mixed delivery” program, *i.e.*, that meaningful school choice promotes successful education outcomes. Studies show that Catholic and other religious schools outperform other schools in student academic achievement, higher education attainment, and tolerance and civic engagement.

Including Catholic education among choices available to families is critical to the success of school choice programs. Excluding it in favor of abstract anti-discrimination edicts (as the Tenth Circuit blessed below) impinges religious liberty and undermines education freedom.

STATEMENT

Shortly after the Court’s decision in *Carson v. Makin*, 596 U.S. 767 (2022), Colorado established its “Universal Preschool Program” “[t]o provide children in Colorado access to voluntary, high-quality, universal preschool services free of charge in the school year before a child enrolls in kindergarten.” Pet.App.195a; Colo. Rev. Stat. §§ 26.5-4-201 *et seq.* It covers the cost of fifteen hours per week of preschool services for all Colorado children. Pet.App.51a. The statute directs the Department of Early Childhood to “establish by rule the quality standards that each preschool provider must meet to receive funding through the [program].” Colo. Rev. Stat. § 26.5-4-205(1)(a). “The department may prohibit a preschool provider that fails to meet one or more of the quality standards from participating in the preschool program.” Colo. Rev. Stat. § 26.5-4-205(1)(b)(I).

Colorado purports that this program allows a “[m]ixed delivery system.” Pet.App.193a. But under the “quality standards” statute and rules, “[e]ligible preschool providers must ensure that children receive an equal opportunity to enroll and receive universal 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[.]” 8 Colo. Code Reg. 1404-1 § 4.110(B); Colo. Rev. Stat. § 26.5-4-205(2)(b).

Although the mandate requires all participating preschools to give all families an “equal opportunity”

to receive services regardless of the enumerated characteristics, the Department’s rules allow exceptions from the mandate. The Department allows Head Start providers to prefer applicants based on their family’s income level. Pet.App.35a–36a (citing 8 Colo. Code Reg. 1404-1 § 4.109(A)(3)). And it allows preschool providers to reserve placements for children who have a disability. *Id.* (citing 8 Colo. Code Reg. 1404-1 § 4.109(A)(4)). And under a regulatory “catchall” exemption, preschools can “grant preference to an eligible child” based on “the child and/or family being a part of a specific community.” Pet.App.9a; 8 Colo. Code Reg. 1404-1 § 4.109(A)(10). This “catchall” exemption, the Department’s representative explained, could allow schools to restrict admission to prefer “gender-nonconforming children” and “the LGBTQ community.” Pet.App.353a–355a.

Petitioners the Archdiocese of Denver—which oversees thirty-four Catholic preschools in Colorado—St. Mary Catholic Parish in Littleton, and St. Bernadette Catholic Parish in Lakewood provide preschool services with a mission of partnering with families “to bring [their] child to encounter Jesus Christ and the truths of [the] Catholic faith through their intellectual, spiritual, moral, and human formation.” Pet.App.235a; Pet.App.10a–11a. In providing preschool services, these schools “adhere[] to Catholic faith, morals, [and] the building up of Catholic culture within the school.” Pet.App.11a. Teachers, staff, and parents of children attending the schools must sign a “Statement of Community Beliefs” affirming that they will live in accordance with the Catholic Church’s teachings. *Id.* Relevant here, Petitioners be-

lieve in the Catholic Church’s teachings regarding human sexuality and gender identity, and it is “vital” to their mission that families at their schools do not actively oppose those teachings. Pet.App.235a; Pet.App.240a.

Petitioners Daniel and Lisa Sheley are parishioners at St. Mary Catholic Parish in Littleton, and two of their children currently attend St. Mary’s preschool. Pet.8. They wish to participate in the program. Pet.App.10a–11a.

Petitioners perceive their admissions policies, which follow their sincere religious beliefs about human sexuality and gender identity, to conflict with Colorado’s “quality standards,” namely the “equal opportunity” mandate. Accordingly, in a letter to the Governor, they sought religious accommodations from the mandate so that they could participate in the program yet also admit only families who agree with the Catholic Church’s teachings on gender and sexuality. Pet.App.11a–13a; Pet.App.283a. The Department sent a reply that it would not exempt Petitioners from the mandate and that “no provider may discriminate against children or families in violation of state statute.” Pet.App.12a–13a; Pet.App.289a–290a. Petitioners are therefore unable to participate in the program unless they compromise their religious beliefs.

SUMMARY OF THE ARGUMENT

Colorado’s “Universal Preschool Program” offers public support for parents to send their children to preschool. Pet.App.188a; Pet.App.193a. But the pro-

gram is universal in name only. Although it purports to foster a “[m]ixed delivery system” providing parents a diverse array of education options for their children, Pet.App.193a, it excludes religious providers through its confrontational “equal opportunity” mandate at odds with Catholic (and other religious) beliefs regarding human sexuality and gender. As a condition of participating in the program, all providers must sign a Program Service Agreement, under which they must agree to adhere to all “quality standards,” including a requirement to “provide eligible children an equal opportunity to enroll and receive preschool services regardless of ... sexual orientation [or] gender identity, ... as such characteristics and circumstances apply to the child or the child’s family.” Pet.App.6a–7a (quoting Colo. Rev. Stat. § 26.5-4-205(2)(b)).

Petitioners sought a religious accommodation from that “equal opportunity” mandate regarding their admissions policies, which follow their sincere religious beliefs about human sexuality and gender identity. Pet.App.11a–13a. Colorado refused to provide an accommodation that would allow Petitioners to participate in the program without violating their religious practices. *Id.*; Pet.App.289a–290a. That exclusion violates the free-exercise rights of many religious providers and families that would use public benefits for religious education.

Colorado’s constitutional violation is clear under *Carson v. Makin*, 596 U.S. 767 (2022), which sets out the categorical constitutional rule that states cannot exclude religious institutions from private education

choice programs because of their religious exercise. That precedent squarely applies here: Colorado’s exclusion of religious institutions because of their faith-based policies about human sexuality and gender violates the Free Exercise Clause. *Carson* must apply, lest its holding give way every time a state seeks to impose its own worldview on religious schools, putting them to the choice of either altering the religious content of their educational mission or else losing out on a government benefit.

The Tenth Circuit, however, said that *Carson* applies only where laws “target[] ‘religious status’ and ‘religious use’ on the explicit basis that they were religious and not secular.” Pet.App.21a. According to the court, “[t]he restrictions imposed by the nondiscrimination requirement universally cover enrollment policies and conduct, but they are not a targeted burden on religious use” because “preschools funded through UPK may use those funds to educate students on matters of faith.” Pet.App.22a. And the program is distinguishable from *Carson*, the court said, because *some* religious schools participate in Colorado’s program. Pet.App.21a.

That holding misses the whole point of *Carson*. The Free Exercise Clause prohibits discrimination based on “religious use,” 596 U.S. at 786–87, which includes Petitioners’ faith-based admissions policies. *Carson* emphasized that the Clause does not distinguish between prohibitions based on religious “status” or religious “use,” *id.*, and it certainly does not condone distinguishing among different religious uses. *See id.* at 787–88 (“Any attempt to give effect to

such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism.”). Excluding disfavored religious practices from school choice programs fails under the Free Exercise Clause just like excluding disfavored religious curriculum failed in *Carson*.

Even ignoring *Carson*, Colorado’s program still creates free-exercise problems because it permits secular exceptions to its “equal opportunity” mandate—exceptions for schools favoring disadvantaged socioeconomic classes, individuals with disabilities, and even minority races—but not religious exercise exceptions. Colorado’s system of exceptions and discretion undermine any claim that the rule is “generally applicable,” and Colorado’s refusal to grant Petitioners a religious exception fails under strict scrutiny.

Finally, the Tenth Circuit props up Colorado’s program as a “model,” but in reality, Colorado is picking denominational favorites in the name of furthering “equal opportunity.” The truth is that school choice programs are successful when parents have meaningful choices that include Catholic and other religious education. Other states—not Colorado—have modeled how to achieve that success. Religious schools, and Catholic schools in particular, have been critical to the success of education freedom for decades. Excluding them based on their religious exercise not only offends the Constitution but also deprives the education marketplace of choices parents need for their children to succeed.

ARGUMENT

I. Colorado’s “Equal Opportunity” Universal Pre-K Mandate Unconstitutionally Discriminates Against Religious Exercise.

Carson v. Makin identifies a categorical constitutional rule for states providing education benefits: They may not exclude religious schools because of their religious exercise—whether the exclusion is based on their religious “status” or their religious “use” of the state funds—without triggering strict scrutiny. 596 U.S. 767, 778–81 (2022). Right after *Carson*, Colorado codified its Universal Preschool Program along with its militant “equal opportunity” mandate that conflicts with Petitioners’ religious beliefs. Colorado’s exclusion of Petitioners from its program falls directly under *Carson*’s rule because the reason for Petitioners’ exclusion is that their faith-based policies relating to human sexuality and gender identity conflict with Colorado’s “equal opportunity” mandate.

A. *Carson*, not *Smith*, applies.

1. For education-benefit programs, *Carson* supplies a categorical rule against exclusions rooted in religious exercise.

Some constitutional-rights cases require individualized analysis under general frameworks. *See, e.g., Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, 584 U.S. 617, 625 (2018) (holding that government officials’ animus toward religion violated the baker’s rights). Others develop into categories from which widely applicable doctrinal rules emerge. *See, e.g.,*

Am. Legion v. Am. Humanist Ass’n, 588 U.S. 29, 60–63 (2019) (describing the approach to cases involving prayer before legislative session under the Establishment Clause).

That distinction is important here, as free-exercise doctrine has developed under different branches. The standard from *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), applies in a broad array of cases where a more specific rule either is unavailable or has not yet emerged. It works, for example, to evaluate the application of COVID restrictions on gatherings by religious groups and to assess zoning laws. *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam); *Mount Elliott Cemetery Ass’n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999).

Yet *Smith* does not fit where another, more directly applicable rule applies. For example, when a case involves government-compelled education that conflicts with parents’ religious upbringing of their children, the Court applies *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See, e.g., Mahmoud v. Taylor*, 606 U.S. 522, 550–64 (2025) (“When the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny.”). Or when a case involves an employment dispute between a religious employer and minister, the Court applies *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 751–58, 762 (2020) (“When a school with

a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.”). In such cases, courts need not consider anew how the state action fares under *Smith*'s standard for religion-neutral, generally applicable laws.

In that vein, *Carson* has announced such a category-specific rule that applies where a state excludes religious schools from an education-benefit program because of the school's religious uses of those benefits. After *Espinoza v. Montana Department of Revenue* established that education-choice programs cannot exclude schools based on their “status” as religious, 591 U.S. 464, 475–78 (2020), *Carson* held that education-choice programs likewise cannot exclude schools based on their intended religious “uses” of program funds. 596 U.S. at 786–87. “Regardless of how the benefit and restriction are described,” Maine's restriction on its tuition assistance program violated the Free Exercise Clause because it “exclude[d] otherwise eligible schools on the basis of their religious exercise.” *Id.* at 789.

The categorical approach to free-exercise claims in education-benefits cases makes sense because “[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” *Carson*, 596 U.S. at 787 (quoting *Our Lady of Guadalupe Sch.*, 591 U.S. at 769). *Carson* rejected the contention that states could

withhold benefits from religious schools that refused to alter their religious character and instruction to comply with the states' preferences. *Id.* Where the clash of worldviews arises as to education benefits, free-exercise rights prevail.

Free-exercise claims also have unique force in education-benefits cases because instruction in a worldview cannot be neutral, making *Smith* irrelevant to that context. Compelling schools to adopt “worldly influences in terms of attitudes, goals, and values” will necessarily “substantially interfer[e] with the religious development” of the children at the school. *Mahmoud*, 606 U.S at 549 (quoting *Yoder*, 406 U.S. at 218). That is why this Court has recognized that directing the religious upbringing of children “is not merely a right to teach religion in the confines of one’s home.” *Id.* at 547. Instead, the religious upbringing of children is at issue in all education programs because, “[d]ue to financial and other constraints,” many parents ‘have no choice’ but to use the education-benefits programs from the state. *Id.* (quoting *Morse v. Frederick*, 551 U. S. 393, 424 (2007)). That unique risk is why *Carson* applies a categorical rule against excluding religious uses of education benefits.

Nothing about Colorado’s sexual orientation and gender identity “equal opportunity” mandate takes it outside of *Carson*’s rule. To be clear, St. Mary’s does not exclude LGBTQ families as such; rather, it requires admitted students and families to adhere to its religious practices, including those concerning human sexuality and gender identity. Religious exercise in the delivery of education is the core issue; the impact

on admissions is incidental. So, while many recent cases have presented a conflict between traditional religious beliefs and practices concerning human sexuality and gender identity and LGBTQ antidiscrimination laws, the rule applicable to education-benefits cases is still the best fit. Under *Carson*, states may not exclude religious schools from private choice programs because of their religious uses, including their policies as to sexual orientation and gender identity grounded in sincere theological belief.

An alternative rule would be easily circumvented, as states could evade the Free Exercise Clause by constructing neutral-sounding rules requiring adherence to the states' worldview on any matter, no matter how antithetical to religious schools' foundational beliefs. If *Carson* is to have any meaning, its categorical rule must apply here just as much as it applied in *Carson*.

2. The Tenth Circuit erred when it limited *Carson* to exclusions that use magic words to target religion.

The Tenth Circuit erred by limiting *Carson* to barriers that impose a “targeted burden” on the “explicit basis” that the schools’ “status” or “use” is “religious and not secular.” Pet.App.21a–22a. Yet Colorado’s infringement on religious exercise is a “burden on religious use” because Petitioners are losing the otherwise-available education benefit due to the conflict between their faith-based admissions policy and Colorado’s “equal opportunity” mandate. And participation by some religious providers does not render the equal opportunity mandate an “incidental” burden on

religion. Under *Carson* and related precedents, exclusion of providers with religious objections to Colorado’s preferred view of sexual orientation and gender identity violates the Free Exercise Clause.

1. First, the Tenth Circuit misstated the rule under *Carson*. In the Tenth Circuit’s view, *Carson* applies only where laws “target[] ‘religious status’ and ‘religious use’ on the explicit basis that they [a]re religious and not secular.” Pet.App.21a (citation omitted); see also Pet.App.22a (“when a particular religious practice is alleged to be infringed incidentally, rather than religious status or use being specifically targeted, the Supreme Court requires that the law at issue be neutral and generally applicable.”). But by requiring such “magic words” before applying the doctrine, the court made the same mistake as Maine made in *Carson*. 596 U.S. at 784–85.

In *Carson*, Maine argued that its exclusion of religious schools from the town-tuitioning program was permissible because “the public benefit Maine is offering is a free public education,” not “tuition assistance payments to be used at approved private schools.” 596 U.S. at 782. The Court rejected that argument, explaining that a state cannot avoid the First Amendment “simply by redefining” the program. *Id.* at 785. The Court’s “holding in *Espinoza* turned on the substance of free exercise protections” and “applies fully whether the prohibited discrimination is in an express provision ... or in a party’s reconceptualization of the public benefit.” *Id.* A state’s exclusion of a school from a public benefit “on the basis of [its] religious exercise” requires strict scrutiny. *Id.* at 789.

The constitutional violation under *Carson* does not arise merely from “target[ing]” on the “explicit basis” of religion. Pet.App.21a. Rather, the violation comes from “penaliz[ing] the free exercise” of religion by excluding private actors who would otherwise participate in a public-benefits program because of their religious exercise. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017) (citation omitted).

In this case, the only basis for Colorado’s exclusion of Petitioners from its program is Petitioners’ religious exercise—specifically, their faith-based admissions policy rooted in their religious beliefs about human sexuality and gender. See Pet.App.10a–13a. No material distinction exists between the exclusion of religious schools based on their enforcement of religious policies and the exclusion in *Carson* “based on the religious use that they would make of [state funding] in instructing children.” 596 U.S. at 787 (citation omitted). The Tenth Circuit erred by declining to apply *Carson* simply because the words of the exclusionary policy did not include the word “religious.”

2. Second, the Tenth Circuit also attempted to distinguish *Carson*, *Espinoza*, and *Trinity Lutheran* on the theory that Colorado “did not exclude faith-based preschools” because it “welcomed” the ones whose beliefs were consistent with the “equal opportunity” mandate. Pet.App.21a. That ground for distinction is unfounded.

In the Tenth Circuit’s estimation, Colorado “has not been ‘intolerant of religious beliefs’” because “[m]any faith-based preschools—including Catholic

preschools under the Catholic Charities of the Archdiocese of Denver—currently participate in UPK.” Pet.App.28a. But such “denominational favoritism” itself is a violation of Petitioners’ free-exercise rights. *Carson*, 596 U.S. at 787; *see also Cath. Charities Bur., Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 248–49 (2025). And under *Carson*, it is not a reason to apply *Smith* instead.

Just because some religious providers are participating in the program does not mean that the “equal opportunity” mandate only “incidentally” burdens Petitioners’ religious exercise, Pet.App.22a. Indeed, just as the Court in *Carson* cautioned against trying to distinguish between religious “status” and “use” restrictions, the same risk attends to the Tenth Circuit’s attempt to distinguish between explicit and practical “religious use” restrictions: “Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism.” *Carson*, 596 U.S. at 787. Colorado does not mitigate the free-exercise violation by bragging that its policy prefers some religious providers over others.

Indeed, Colorado and the Tenth Circuit appear to assume that picking acceptable worldviews has no effect on religious use. That assumption is false because education affects religion whenever it tells what “attitudes, goals, and values” are acceptable. *Mahmoud*, 606 U.S. at 552. When Colorado demands its views on sexuality, some religions will agree while others will not. If picking between religious values were not dis-

crimination, then every state could suppress free exercise under the reasoning that some religions agree with the state's values. That is why *Carson* categorically forbids discrimination against religious use when enforcing the Free Exercise Clause.

The Tenth Circuit erred by failing to apply *Carson* to Colorado's exclusion of Petitioners from its program. Correctly applying that case, the constitutional violation is clear. Colorado's application of its "equal opportunity" mandate excludes the Petitioners from the program based on their religious exercise in violation of the Free Exercise Clause.

B. Under *Carson*, Colorado's "equal opportunity" exclusion violates free-exercise rights of religious schools and parents.

Underlying *Carson* is the fundamental principle that religious schools must be allowed to operate and instruct their students in line with their faith. 596 U.S. at 787. Religious schools, including the Petitioner Catholic institutions here, have the right to participate in education choice programs while remaining firm in pursuit of their educational mission in accord with their religious beliefs, including by requiring students and their families to agree to adhere to the school's views on human sexuality and gender identity. And parents, including Petitioners Daniel and Lisa Sheley, have the right to educate their children through such religious inculcation.

The Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes reli-

gious observers from otherwise available public benefits.” *Carson*, 596 U.S. at 778; see also *Trinity Lutheran*, 582 U.S. at 462 (striking down program’s religious exclusion that “effectively penalizes the free exercise” of religion (citation omitted)). So, when a State puts religious schools to the choice of participating in private choice programs or keeping their religious values, their policies “must be subjected to the ‘most rigorous’ scrutiny.” *Trinity Lutheran*, 582 U.S. at 466 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Forcing religious schools to agree to broad “antidiscrimination” mandates as a condition of participating in school choice programs does exactly that: Schools like Petitioners may adhere to religious values *or* participate in a government program, not both.

Carson was unequivocal that a state’s administration of a school choice benefit that “offer[s] tuition assistance that parents may direct to the public or private schools of *their* choice ... is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient’s religious exercise.” 596 U.S. at 785 (emphasis in original). Furthermore, as in *Espinoza*, Colorado’s refusal to include the Petitioner education providers also affects the religious practices and education of *families* who must choose between education integral to their religious exercise and participation in a government-benefits program. 591 U.S. at 476 (explaining that the challenged exclusion “also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school”).

The impact on families is especially important because families—not churches, and certainly not the state—have the *a priori* duty and right to educate their children. *See id.* at 486 (“Drawing on ‘enduring American tradition,’ we have long recognized the rights of parents to direct ‘the religious upbringing’ of their children.” (citation omitted)). Naturally, “[m]any parents exercise that right by sending their children to religious schools, a choice protected by the Constitution.” *Id.* Religious schools are especially important when public schools “inculcate a worldview that is antithetical to what [parents] teach at home.” *Id.* at 508 (Alito, J., concurring). In such cases, government-supported choice programs “provide[] necessary aid for parents who pay taxes to support the public schools but who disagree with the teaching there.” *Id.* (Alito, J., concurring).

Colorado’s exclusion of Petitioner education providers because the providers’ religious policies conflict with Colorado’s “equal opportunity” mandate cannot stand under *Carson*.

II. Colorado’s “Equal Opportunity” Mandate Is Not Generally Applicable and Fails Strict Scrutiny.

Colorado’s “equal opportunity” mandate also fails under the Free Exercise Clause because it permits some non-religious accommodations but *not* Petitioners’ religious exercise. As in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), where the government refused to accommodate religious beliefs about human sexuality in the name of preventing LGBTQ discrimination while permitting other non-religious accommo-

dations, Colorado’s “equal opportunity” mandate is not generally applicable and fails strict scrutiny.

A. The mandate is not generally applicable.

Colorado affords regulatory exceptions from its “equal opportunity” mandate and grants discretion to the Department, which renders the mandate not generally applicable under *Fulton*. The Tenth Circuit erred by focusing only on whether Colorado affords non-religious accommodations to the sexual orientation and gender identity mandate specifically.

1. Exceptions from the mandate trigger strict scrutiny.

In *Fulton*, where the Court awarded Catholic Social Services accommodation from a rule requiring foster-placement agencies to accept same-sex couples as prospective foster parents, the Court held that a system of exceptions from a no-discrimination rule makes it *not* generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). When officials decide “which reasons for not complying with the policy are worthy of solicitude,” those exceptions trigger strict scrutiny of the policy as applied to religious exercise. *Fulton*, 593 U.S. at 533, 537.

That is exactly the case here. The “equal opportunity” mandate forbids preschool providers from discrimination in enrollment because 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,” Pet.App.6a–7a (quoting Colo. Rev. Stat. § 26.5-4-205(2)(b)). But the Department’s regulatory exemptions afford “worthy” exceptions to that mandate, while excluding religious ones. In particular, Colorado allows Head Start providers to prefer applicants based on their family’s income level. Pet.App.35a–36a (citing 8 Colo. Code Reg. 1404-1 § 4.109(A)(4)), and it welcomes preschool providers devoted only to children who have a disability. *Id.* (citing 8 Colo. Code Reg. 1404-1 § 4.109(A)(3)).

Petitioners’ requests for accommodation so that they may teach only those who accept their sincere religious beliefs on sexual orientation and gender identity are materially indistinguishable. Each of these types of schools seemingly runs afoul of the “equal opportunity” mandate. Yet some programs—*i.e.*, those preferred by Colorado—can expect accommodation, while Petitioners cannot. Thus, Colorado picks which factors warrant exception, and the whole scheme thereby fails the test for general applicability. *Fulton*, 593 U.S. at 534–38.

Compounding the problem, the Department also exercises discretion under its regulatory “catchall” exemption for preschools to “grant preference to an eligible child” based on “the child and/or family being a part of a specific community.” Pet.App.9a; 8 Colo. Code Reg. 1404-1 § 4.109(A)(9). Although the Department opined in its letter rejecting Petitioners’ accommodation request that “no provider may discriminate against children or families in violation of state statute,” Pet.App.289a–290a; Pet.App.12a–13a, the Department’s authority under this “catchall” exemption

tells a different story. As the Department’s representative explained, the catch-all exception could allow schools to restrict their admission to prefer “gender-nonconforming children” and “the LGBTQ community.” Pet.App.353a–355a.

So, in short, Colorado’s Universal Preschool Program creates a system where bureaucrats may bless participation by schools that practice discrimination in admissions in agreement with the prevailing ethos on gender and sexuality, but not schools that limit admission to families holding contrary views based on sincere religious commitments. That system is the very definition of one where “the government . . . decide[s] which reasons for not complying with the policy are worthy of solicitude,” *Fulton*, 593 U.S. at 537. The “equal opportunity” mandate, therefore, is not generally applicable.

The Tenth Circuit concluded otherwise because, in its view, an exception that *prefers* rather than *punishes* certain characteristics does not count in the general-applicability analysis. Pet.App.36a–37a. The disability and income-level preferences, it said, “are not exceptions to the nondiscrimination requirement” because they “do not speak in general terms about ignoring disability status or income level” but rather “specifically concern children who *have* a disability or *are* low-income” in order “to help preschools comply with federal laws that specifically protect disabled and low-income children.” Pet.App.37a–38a.

How categorical allowances for schools focusing on low-income and disabled children “do not speak in

general terms about ignoring disability status or income level,” the court did not explain. But the broad import of the decision below is clear enough: According to the Tenth Circuit, benign discrimination—or discrimination that favors people that the government prefers—is not discrimination at all. But a purported distinction between discrimination that *prefers* (benign), and discrimination that *punishes* (malignant), is mere wordplay, as discrimination necessarily favors some groups and disfavors others. *Cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208–09 (2023) (“[P]referring members of any one group for no reason other than race or ethnic origin’ ... [i]s ‘discrimination for its own sake,’ which ‘the Constitution forbids’” (citation omitted)). *Fulton* affords no basis for tolerating sophistry with respect to religious exercise that the Court rejected with respect to racial preferences.

The Tenth Circuit also cleared the Department’s discretion to permit exemptions, concluding that “[i]n practice,” “[n]one of the[] approved preferences concern sexual orientation or gender identity or otherwise implicate the nondiscrimination provision in admissions.” Pet.App.32a. But *Fulton* established that “[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, *regardless whether any exceptions have been given.*” 593 U.S. at 537 (emphasis added). It did not matter that “the Commissioner has never granted one” because the mere existence of a discretionary exception “invite[s]” the government to choose among requested accommodations. *Id.* (citation omitted).

To underscore the point, while the Department represented in response to Petitioners’ request for accommodation that “no provider may discriminate against children or families in violation of state statute,” Pet.App.289a–290a; *see* Pet.App.12a–13a, it revealed in its testimony that it would, in fact, entertain exceptions from the “equal opportunity” mandate for schools organized around LGBTQ preferences. Pet.App.353a–355a. Such policy elasticity, responsive to the government’s preferences of the moment, defeats any argument of general applicability.

2. The Tenth Circuit erred by considering only whether the program permitted exceptions from the mandate as to sexual orientation and gender identity.

Fulton emphasized that “[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” 593 U.S. at 534. The Tenth Circuit erroneously narrowed the comparability scope to consider only exceptions to the sexual orientation and gender identity portions of the mandate. Pet.App.35a–42a.

Despite acknowledging that “[e]ach of the eight equal-opportunity requirements seeks to remove barriers to access experienced by children with different protected characteristics,” Pet.App.38a, the Tenth Circuit declared that it “must examine the way each part of the nondiscrimination requirement is intended to promote equal access” because, in the court’s estimation, “all discrimination is not the

same.” Pet.App.39a (citation omitted). And it concluded that “[a]llowing some schools to ignore the nondiscrimination requirement with respect to sexual orientation and gender identity would undermine the government’s interest in erasing barriers to equal access caused by social stigma in a way that the IEP and Head Start preferences simply do not.” *Id.*

But that distinction ignores Colorado’s entire rationale for the “equal opportunity” mandate. Colorado “believes the statutory equal-opportunity requirement implicates the health and safety of preschool children.” Pet.App.61a. Its exceptions for admissions policies focused on wealth and disability therefore equally implicate the “health and safety” standard it uses to justify refusing Petitioners’ requested accommodation regarding sexual orientation and gender identity. The “general applicability” of the whole mandate—as to “race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability,” Colo. Rev. Stat. § 26.5-4-205(2)(b)—rises or falls as a unit. In other words, either those equal-opportunity demands are necessary for advancing health and safety or they are not.

Because Colorado readily jettisons its interest in the equal-opportunity mandate to accommodate schools who find the mandate inconvenient for other reasons, it cannot deny a request for religious accommodation from the mandate as to sexual orientation and gender identity without being subject to strict scrutiny.

B. Colorado’s broad interest in protecting equal access to education does not justify excluding religious education providers.

Colorado justifies its “equal opportunity” mandate by reference to its interest in “protecting equal access to preschool education for Colorado children.” Pet.App.47a; Pet.App.140a (stating that Colorado’s proffered interests are “ensuring eligible children and their families do not face discriminatory barriers” and “protecting children from discrimination”). The Tenth Circuit accepted this broad articulation of the state’s interest. Pet.App.47a (concluding that the government’s stated interest was “extraordinarily weighty”). But under *Fulton*, “[t]he question ... is not whether the [state] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [Petitioners.]” 593 U.S. at 541. Colorado has failed to satisfy that standard.

In *Fulton*, the Court ruled that Catholic Social Services was entitled to a religious accommodation from a rule requiring it to certify same-sex couples as foster parents because the government’s interest “in the equal treatment of prospective foster parents and foster children” “cannot justify denying CSS an exception for its religious exercise” where the government had “no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.” 593 U.S. at 542. Colorado has not even tried to meet that standard, instead relying on the same broad interest in ensuring “equal access” for all that was insufficient in *Fulton*.

Just like in *Fulton*, “[t]he creation of a system of exceptions” from the mandate “undermines the [state’s] contention that its non-discrimination policies can brook no departures.” 593 U.S. at 542. Because Colorado’s stated interest in “protecting equal access” does not justify its refusal to accommodate Catholic schools’ religious objection to the “equal opportunity” mandate while permitting other exceptions, Colorado fails strict scrutiny.

Not only does Colorado’s “equal access” rationale fail to justify denial of a religious accommodation, but when applied to Catholic schools, its “equal opportunity” mandate undermines the cause of access to students of all beliefs. The only way the mandate could create more opportunities for children from LGBTQ families is if Catholic schools would bite the bullet and tolerate disobedience as the price of participation. But no evidence supports an outcome where the no-accommodation policy provides children from LGBTQ families state-funded entrée to Catholic schools. To the contrary, the Archdiocese issued a letter directing all parishes and their preschool programs not to enter into any agreements with the state for the Universal Preschool Program because, without a religious exemption, doing so would be “contrary to [their] beliefs on the human person, which would ultimately compromise the integrity of [their] Catholic schools’ mission.” Pet.App.280a–82a.

Critically, the only limit on the program’s capacity for students is the number of willing providers with open seats, so Colorado’s refusal to accommodate religious providers is more likely to *reduce* the overall

number of education providers—to the detriment of all Colorado families, including LGBTQ families. With fewer providers, children from families that would have used state assistance to attend a Catholic preschool if one had been available will compete with families attending other schools. A policy that reduces the number of available seats leaves the Department in the position of excluding Catholic providers not for the sake of providing greater “non-discriminatory access” to children of LGBTQ families, but only for the sake of excluding Catholic doctrine.

That is why Colorado’s “antidiscrimination” objection to Catholic schools is merely another way of saying that the state disagrees with Catholic doctrine concerning human sexuality and gender. As the Tenth Circuit observed, “the Department has made every effort to encourage faith-based preschools to participate in UPK short of granting them an unlawful exemption from the nondiscrimination requirement.” App.42a. In other words, the Department welcomed only those schools that would find the Department’s worldview no burden to their religious beliefs. And that is no surprise given that Colorado has characterized Petitioners’ sincere religious-accommodation request as “seeking permission to discriminate.” Resp. C.A. Br. 8. Even more revealing, the district court upheld the equal opportunity mandate as protection of “the health and safety of preschoolers.” Pet.App.119a.

In other words, according to the decisions below, the state can refuse to tolerate Catholic doctrine on human sexuality and gender identity because it is

“unsafe.” That is as direct an acknowledgement of religious discrimination as one is likely to find, and a state has no legitimate, much less compelling, interest in “eliminat[ing] ideas that differ from its own.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 598 (2023).

III. True “Model” School Choice Programs Respect Religious Pluralism.

The Tenth Circuit lauded Colorado’s program as a “model” because “forty faith-based preschools” participate. Pet.App.42a. But the court also acknowledged that the program excluded other religious education providers—the Petitioners—based on their sincere religious exercise. *See* Pet.App.11a–14a. School choice programs that allow parents the choice from all education options—including all religious education options—are successful. Catholic schools in particular make important contributions to students, families, and communities.

A. Other states’ education choice programs allow all religious education options.

Precisely to identify model education choice programs, EdChoice developed the Friedman Index (named for Nobel laureate Milton Friedman), a comprehensive measure of the availability of private K–12 educational choice across the United States. Ben Scafidi, Colyn Ritter, *The 2026 EdChoice Friedman Index* (Feb. 2026), <https://tinyurl.com/yh2fvzw6>. The Friedman Index shows that true education freedom requires not only universal student eligibility and funding but also a setting that welcomes *all* educa-

tion-provider options. As the Friedman Index demonstrates, school choice programs are successful when parents have meaningful choices, not when states impose abstract nondiscrimination mandates. *Id.* That principle extends to preschool programs, as well.

Florida, a pioneer and leader in school choice, provides universal, state-funded preschool through its Voluntary Prekindergarten Program. Fla. Code §§ 1002.51 *et seq.* The program serves all families, regardless of income and imposes no “antidiscrimination” mandates as to human sexuality and gender identity. *See* Fla. Code § 1002.55; Fla. Code § 1002.53. More than 3.1 million children have benefitted from Florida’s program since it began in 2005. *What is Florida’s Voluntary Prekindergarten Education Program (VPK)*, Fla. Dep’t of Educ., <https://tinyurl.com/fmjmmfw3> (last accessed July 1, 2026). Many religious education providers, including Catholic providers, participate in the Voluntary Preschool Program as well as in Florida’s other highly successful K–12 education choice programs. *See Private School Directory*, Fla. Dep’t of Educ., <https://tinyurl.com/4aah7w49> (last accessed July 1, 2026). And private schools that cater to LGBTQ students also participate in Florida’s education choice programs. *See, e.g.,* Annie Martin and Leslie Postal, ‘LGBTQ’ Awareness Training Offered to Private Schools that Accept State Scholarships, *Orlando Sentinel* (Oct. 7, 2020), <https://tinyurl.com/d3fmbnr5>. Other states likewise provide state funding for families to pay for private religious preschool without antidiscrimination provisions. *See, e.g.,* Ala. Code § 26-24-23 *et seq.*; Ind. Code § 12-17.2-7.2 *et seq.*

Still more states provide state funding for parents' private *K–12* education choices without imposing “antidiscrimination” mandates. Of the 35 states with *K–12* education choice programs that the Friedman Index identifies, *Friedman Index* at 6–7, the only states with restrictions like Colorado's are Maine, Maryland, and Vermont. Me. Rev. Stat. 5 § 4602; H.B. 200 § R00A03.05 (Md. 2023); Vt. Admin. Code § 7-1-3:2223.2. Indeed, many states expressly say that a participating private school “shall not be required to alter its creed, practices, admissions policy or curriculum in order to accept students whose parents pay tuition or fees from” an education choice program. Ariz. Stat. § 15-2404(C); *see also, e.g.*, Ala. Code § 16-6J-5(f); S.C. Code § 59-8-150(F); Tenn. Code § 49-6-2609(c); Tenn. Code § 49-6-3508(c); Tex. Educ. Code § 29.368(b); W.Va. Code § 18-31-11(d).

Education-choice programs also thrive in Wisconsin—home of the oldest and one of the largest school voucher programs in the country—because parents may choose religious education unfettered by antidiscrimination mandates like Colorado's. *See* Marge Pitrof, *Milwaukee Voucher Program Turns 25: The History*, WUWM (Nov. 17, 2014), <https://tinyurl.com/cbadsu5m>; Wis. Stat. § 119.23. After the legislature expanded it to include religious schools, the number of participating schools sharply increased between 1995 and 1998, according to data from the Wisconsin Legislative Fiscal Bureau. Russ Kava, Wis. Legis. Fiscal Bur., *Milwaukee Parental Choice Program* (Jan. 2003), <https://tinyurl.com/359dmmpf>. <https://bit.ly/3QBhvdw>. A program that served only 300 students in its first year—and was serving over

1,200 students in its sixth year after including religious schools—has now grown to provide education choice to nearly 30,000 students. Martin F. Lueken, *Fiscal Effects of School Choice* 219–20 (Nov. 2021), <https://tinyurl.com/23v9mtz5>; *MPCP Facts and Figures for 2025–26*, Wis. Dep’t of Pub. Instruction, <https://tinyurl.com/558d9wdk> (last accessed July 1, 2026). And despite years of political change in a purple state, school choice programs have remained something that a vast majority of Wisconsin legislators and voters agree on.

Programs that welcome all providers (including religious ones) and provide a robust education market are the true models.

B. Concrete religious pluralism produces successful school choice programs.

When parents have the resources to choose the best education providers for their kids, education outcomes improve. Studies of choice programs throughout the country overwhelmingly show that choice leads to measurable educational benefits for many students, is neutral for others, and harms none. The 2024 edition of EdChoice’s research compendium reports that “[t]he number of studies that find null or positive effects from school choice significantly outweigh that of studies that find negative effects.” EdChoice, *The 123s of School Choice* 5 (2024).

Those results presuppose meaningful choices, *i.e.*, choices among providers of educational content not available in traditional public schools—especially Catholic schools. For starters, Catholic schools have

for decades pursued a social-justice mission to educate disadvantaged urban students, regardless of whether they are Catholic. To that end, “many Catholic schools have been eager participants in targeted school voucher programs when they have been launched.” Julie Trivitt & Patrick Wolf, *School Choice and the Branding of Catholic Schools*, *Educ. Fin. & Pol’y* 6(2), 207 (2011).

Catholic school participation has made a critical difference in the success of voucher programs. As one study concluded, “[t]here is little doubt that [Catholic schools] are a pivotal element of the supply side of voucher-fueled education markets.” *Id.* Indeed, that same study (which surveyed participants in a Washington, D.C. pilot voucher program) found that Catholic schools offer so many desirable characteristics—including academic rigor, discipline, and non-proselytizing religious instruction—that “Catholic schools . . . draw large numbers of voucher students from non-Catholic families.” *Id.* at 231.

Catholic schools also provide a critical education option for all parents because they inculcate political tolerance and civic engagement. A recent statistical meta-analysis examining the association between private schools and four civic outcomes (political tolerance, political participation, civic knowledge and skills, and voluntarism and social capital) showed that private schools boost civic outcomes for students over comparably situated public school students. See M. Danish Shakeel, Patrick J. Wolf, et al., *The Public Purposes of Private Education: A Civic Outcomes Meta-Analysis*, 36 *Ed. Psych. Rev.* 40 (2024).

Critically, religious private schools were particularly more likely to be associated with better civic outcomes. *See id.* at 23. And some studies included in the meta-analysis even showed a “Catholic school civic advantage.” *Id.* at 33 (citing Coleman, J. S., & Hoffer, T., *Public and Private High Schools: The Impact of Communities* (1987); Macedo, S., *Diversity and Distrust: Civic Education in a Multicultural Democracy* (2000); and Prud’homme, J., *The Potential of Catholic Schools: Public Virtues Through Private Voucher*, *J. Cath. Educ.*, 25(1), 109–132 (2022)).

Thus, meaningful education pluralism—which includes traditional Catholic providers like Petitioners—improves student test scores, attainment, and socialization alike. Such concrete results offer more students far more opportunity and better odds than Colorado’s abstract “equal opportunity” mandate—the only real promise of which is exclusion of the most successful genre of private schools in the education-freedom era.

CONCLUSION

The Court should reverse the Tenth Circuit.

Respectfully submitted,

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