

In the
United States Court of Appeals
for the
Tenth Circuit

ST. MARY CATHOLIC PARISH IN LITTLETON; ST. BERNADETTE CATHOLIC PARISH IN
LAKEWOOD; LISA SHELEY; DANIEL SHELEY; ARCHDIOCESE OF DENVER,

Plaintiffs-Appellants,

v.

LISA ROY, in her official capacity as Executive Director of the
Colorado Department of Early Childhood; DAWN ODEAN, in her official capacity
as Director of Colorado's Universal Preschool Program,

Defendants-Appellees.

*Appeal from a Decision of the United States District Court for the District of Colorado - Denver
Case No. 1:23-CV-02079-JLK · Honorable John L. Kane, Senior U.S. District Judge*

**BRIEF OF *AMICI CURIAE* THE CONSCIENCE PROJECT,
ANDY ABOLS, KARINA RAMIREZ, ANA KAREN MEIER, JILL HALL AND
MELISSA DE LA CRUZ IN SUPPORT OF APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

The Conscience Project is a nonprofit, tax-exempt organization that does not issue stock and has no parent corporation.

Dated: August 21, 2024

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INTEREST OF AMICI CURIAE¹

THE CONSCIENCE PROJECT advances freedom of conscience and the right to practice one's faith free from interference by the government through public education that includes insightful commentary and legal analysis as well as in filing amicus briefs in key religious freedom and free speech cases.

Amici Catholic Parents, listed and described below, attest to the crucial role of faith in the exercise of their role as primary educators of their young children, their desire to enroll their children in a Catholic preschool and the costs of Colorado's exclusion of these schools from the state's Universal Preschool Program ("UPK Colorado").

ANDY ABOLS says that he and his wife Gina, parents of five children ranging in age from eight months to ten years old, are "scrambling to protect our children – we're getting crushed." Having to pay out of pocket for their three-year-old to attend preschool at St. Mary's is a worrying drain on the family's finances.

Andy has been in sales his "entire career." He currently works as an account executive for a software company in the drone business. Gina is a stay-at-home mother. "Every month we take our paycheck, we divide it. First comes our tithing,

¹ *Amici* state that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. All statements made by *amici* foster and adoptive parents are on file with counsel for *amici curiae*.

then the mortgage, then it's food/bills and education for the kids. Anything left we use for fun or extracurriculars, but that's not a lot."

Reese, the Abols' eight-year-old daughter, has spina bifida. Andy says Reese is "very much a centerpiece of our family." He adds: "We're in Colorado pretty much only because Reese's medical needs are covered by Medicaid better here than any other state." He's frustrated that St. Mary's is not part of the UPK Colorado program. "I'm paying for preschool instead of saving that money. I'm moving backwards to protect our children's minds and instill virtue. Which I'm glad to do, but I shouldn't have to." Andy adds that he believes that forming children in virtue and love is "a good" for society.

Andy is thankful for the community of support they have found at St. Mary's in Littleton, Colorado. The Abols chose to go to St. Mary's because the parish has "great young Catholic families just like us." The family's "social life is centered around the church itself. All of our friends attend Mass." On the weekends, the Abols are part of a Lord's Day group where they get together with other families. "It's kind of comical. You might have a handful of adults and like 40 kids, and we come together as a small community to worship the Lord, build friendships and probably destroy somebody's house for the weekend – as children tend to do."

When talking about the education of his children, Andy says that "our faith is critical." He adds that he "absolutely trusts" St. Mary's, explaining that "they're

just a lot more tender with the kids” than the other private schools his older children attend and “they have the compassion that our special needs family needs.”

The Abols are thankful that preschool at St. Mary’s “integrates stories from the Bible” as part of classroom teaching. Andy emphasizes that “St. Mary’s prioritizes virtue and faith” and attributes this to “a clear difference in our children who have gone to preschool at St. Mary’s versus our children who have gone elsewhere.”

In addition to paying for preschool, three of the Abols children attend private school. Andy and Gina would love to send all their children to Catholic schools, but it's too expensive. Two of the Abols children are enrolled in a charter school that “doesn't dabble in the realm of politics or anything along those lines.” Their ten-year-old son has learning disabilities and goes to a hybrid school where he homeschools with Gina a few days a week.

Andy values a Catholic education, noting that “our faith teaches us to love everyone because we're all children of God. And that's the premise that we start with at a private Catholic school – no matter what, we're all sinners.” At the same time, he explains, “there is objective truth given to us by God, that we were created a certain way to be beautiful in his eyes, and for the world.” Thanks to St. Mary’s

preschool, Andy says “our kids came home well-rounded, beautiful little people, understanding what God teaches about loving everyone.”

If UPK Colorado provided for three-year old Lily’s preschool education, Andy would use the savings to “go towards the betterment of our family as a whole.” They could think about moving to a larger house. “We're quite literally bursting at the seams as the kids get older.” And then a greater need comes to mind. This fall Reese is scheduled for a double ankle surgery in Florida. Andy estimates that travel and medical expenses will be close to \$5000. Even if Andy only had an extra \$2,500, he says, "that gets me halfway to Florida to help better my daughter's life.”

KARINA RAMIREZ and her husband Rogelio are from Littleton, Colorado and attend St. Mary’s Catholic Church. The couple have six children and a beautiful and strong marriage. It wasn’t always that way.

They married in their early twenties. Although both Karina and Rogelio were baptized in the Catholic Church, neither grew up particularly connected to their faith, so they just went to a Justice of the Peace to be married. After 10 years of marriage and with two young children, their marriage hit a rough patch. “My husband was an alcoholic at the time, and we ended up separating,” Karina explains.

The separation was hard for Rogelio. He reached out to the local Catholic church, started attending services and, according to Karina, “had a very fast, profound conversion.” After almost three years of being separated, Rogelio convinced Karina to start going to church with him. The couple eventually reconciled, both Karina and Rogelio were fully confirmed in the Catholic faith and seven years ago they were married in a religious ceremony. Today, the Ramirez family is deeply involved in their church, St. John’s Catholic Church in Longmont, Colorado. “I am constantly feeding our priests, at least once or twice a week for sure,” says Karina. She and Rogelio lead the parish’s Hispanic choir and a volunteer cleaning crew. Rogelio has voluntarily painted the parish school.

Growing in their Catholic faith has changed the way Karina and Rogelio think about their role as parents. “When we started learning about Catholicism and what it implies,” reflects Karina, “we had to change a lot of the things that we were currently doing.” Karina says that when she was first married, “I was always on the pill or something because I didn't want to have any more kids.” Practicing their faith more seriously has meant that they have become “open to life” and now have four more children.

Living their faith more fully drew Karina and Rogelio to take a closer look at Catholic education. They pulled their older children out of the public school and

enrolled them in their parish school. "It has been the best thing we've done," says Karina. Two of their younger children attended their parish preschool and Karina looks forward to the youngest two doing so as well.

Karina is thankful that St. John's school teaches in a way consistent with the family's Catholic faith. She thinks that her preschoolers are "at an age where they absorb everything" and is thankful that her small children are not exposed to confusing ideas about human sexuality at such a young age. This, Karina says, "definitely inclined me to invest in Catholic education for them."

Karina works full-time for a lumber company. Rogelio is self-employed as a house painter. "We're not able to travel or take family vacations," she says. "Our cars are pretty old and beat up, but they get us around." During the long Colorado winters, Rogelio's work slows down. "That's where we start to struggle financially," says Karina. At first, the idea of enrolling their children in their parish school seemed out of reach. Karina recalls thinking: "Oh my gosh, I can't afford that, I can't do that. And that's for rich people."

Given their financial needs, the Ramirez family has qualified for a government-sponsored tuition assistance program that helps cover the cost of

sending two of their younger children to St. Mary's preschool.² "We didn't know this was an option for us, the non-wealthy families," says Karina. Many lower-income families, however, are ineligible for the program and need assistance from the UPK Colorado program in order to afford the school.

Karina has seen how their Catholic preschool reinforces in her younger children the Catholic faith she holds dear. "They're taking them to Mass at least once a month. They're teaching them about Mary and Jesus, and all these extra things that reinforce your faith, plus your basics that you would learn in any other school. I have a five-year-old who says he wants to be a priest already. God knows where this will lead him, but the fact that he is five and has said in numerous occasions that he wants to be a priest is a beautiful thing."

² The Ramirez family participates in the Colorado Child Care Assistance Program ("CCCAP"), a program that supports low-income children and families in Colorado by offsetting the cost of child care for children from birth through age 13. During trial, a representative from Appellant Archdiocese explained key attributes of the CCCAP and the Denver Preschool Program, a similar program for residents of Denver, as compared to UPK Colorado. Because of these attributes, the Archdiocese has concluded that it is "comfortable" with its schools participating in these programs. See Trial Transcript at 61-65. The trial court held that it was "not inconsistent" for Appellant Preschools to "simultaneously believe that the UPK Program requirements conflict with their beliefs but that those of the Denver Preschool Program and the CCCAP provision do not." Trial Court Opinion at 28. The court added that "[t]his ruling did not determine how the Denver Preschool Program and CCCAP agreements should be interpreted. It merely concluded that Plaintiff Preschools were not prevented from bringing this suit because they had signed the other agreements." *Id.*

Karina is also grateful for the strong communication she has with teachers at the preschool. “That is something that I don't feel like I ever got within the public school.... They're always involved and we're not waiting for a parent-teacher conference to get updates.”

Karina and Rogelio have encouraged other Hispanic families to consider enrolling their children in the parish preschool. “I know we have some families who have grown in their faith because they're able to access this Catholic education again, because as parents, they get us involved,” reflects Karina.

She believes removing discrimination from access to the UPK Colorado program will encourage other lower-income Hispanic families to enroll their children in St. Mary's preschool.

ANA KAREN MEIER and her husband, Franklin Skinner, have five children and live in Aurora, Colorado. Franklin works as a loan processor for a car dealership and Ana Karen is a stay-at-home mother. They lost a child during pregnancy last year and Ana is expecting a baby this fall.

Ana Karen's four eldest children attend Catholic schools in Aurora. They enrolled their eldest daughter at St. Therese Catholic Classical School, serving

students from pre-school through eighth grade, when she started fourth grade.³ She suffered intense bullying when she attended their local public school. As Ana Karen recalls, “My daughter started hating school. She didn't want to get up. She would cry, she would throw fits, she would make us be late. She would not do her classwork or homework. She just hated school.” Despite reaching out to school administrators and teachers, the bullying continued. Ana Karen was indignant. “I took her out and then I said to myself, ‘It doesn't matter from now on how much I have to sacrifice. I'm not putting her through that another year.’”

When they chose to send their daughter to St. Therese’s, Ana Karen and Franklin also decided to enroll their son in preschool there. “I couldn't afford the whole day. I had to do a half day for him. And it was a struggle because now I have to find time to pick him up or find somebody to pick him up at 12:00,” Ana Karen recalls. The results were impressive: “When you compare [him] to my other kiddos that couldn't attend preschool, he right now is testing two grades higher.”

Franklin was “very skeptical” about paying for private schooling, says Ana Karen. “I know how stressful it could have been on him, because he's the one in

³ St. Therese is one of 36 preschools under the authority of the Office of Catholic Schools for the Archdiocese of Denver. The Archdiocese has determined that its preschools cannot in good conscience sign the Program Service Agreement or operate their preschools consistent with the requirements of UPK Colorado’s “equal opportunity” mandate and have communicated to its preschools that they were not to enter into any agreement for UPK Colorado. See Trial Court Opinion at 20-21.

charge of paying every bill, home bills, groceries, rent, car payment, moving back and forth.” But after that year, attending school meetings, and seeing how happy the children were, Franklin changed his mind.

For the past six years, Ana Karen and Franklin have sacrificed in order to send their children to Catholic school. “We have struggles. We can't have fancy dinners, we can't go out to restaurants. We can't go to the theaters every time we see a movie we want, because we need to put that money aside for the school, let alone for preschool.” But the sacrifice has been worth it. The school community at St. Therese’s has “been amazing” for Ana Karen and her family. “It's just more than the school. It's like a family with the teachers, the students.”

Ana Karen and Franklin couldn't afford the cost of tuition when it came time for their now-eight-year-old to attend preschool. “I think he would've benefited a lot more,” says Ana Karen. “We probably would've saved so much time in that pre-K. Him getting used to coloring, writing, speaking, numbers, letters – it would've helped him a lot.” Fortunately, using COVID subsidies they were able to send their now six-year-old daughter to pre-school at St. Therese. “She was fortunate,” says Ana Karen. “There was no way we could afford it.”

Unlike other preschools in Aurora, students at St. Therese’s attend Mass with the other school children and have “prayer partners” in older grades. Ana

Karen thinks the preschoolers at St. Therese's are more polite and respectful than their peers at other schools.

Ana Karen trusts the teachers and staff at St. Therese's. When asked whether she would consider another preschool for her younger daughter, she was resolute. "I don't feel safe to the point that I would take her to a public school. I want to leave her somewhere where I can call a community, a home where I know where she's going to be. I know she's taken care of."

Ana Karen considers excluding Catholic preschools from the UPK Colorado program to be a form of religious discrimination. "It feels like discrimination, like a personal attack, like trying to hold you back."

JILL HALL and her husband Brian were married in 2006 and have five children. The couple struggled with infertility for several years at the beginning of their marriage. On their way to New Zealand to help with earthquake recovery, they learned that Jill was pregnant. "We were thrilled," recalls Jill. Another child was born while they were out of the country, "but we really missed home and we missed Colorado so we said, 'Let's move back home.'"

"Moving back home was a shock," says Jill. Housing prices in Colorado had skyrocketed. "We lived in my parents' basement for a little over a year, saving up enough down payment to move back into a home, and we had another baby in between there." During that year Jill and Brian tried to save up to buy their own

home. “We really didn't have a ton of money after that, but we just kept saying, ‘Well, if we were renting someplace right now, there would be no way that we could afford anything in the Denver area.’ So we kind of took it on the chin and kept going.”

The Halls learned about the preschool program at Our Lady of Lourdes in Denver. When they enrolled their first child, the Halls received tuition assistance through the Denver Preschool Program.⁴ But after the family moved out of the city, they were no longer eligible. To cover the costs of preschool, Jill started a business of her own as a florist. “I hoped that would help supplement the education [costs] and all of the fees and everything that goes with it.”

Today, the Halls' three oldest attend Our Lady of Lourdes full-time but they are unable to afford to send their three-year-old to preschool. Jill says: “I get really frustrated because I know that my other kids at this age were able to go to preschool and were ready for kindergarten. They knew what to expect, they were excited, they were probably better students because they knew how to listen.”

Preschool at Our Lady of Lourdes helped Jill’s three eldest children “learn about how to go to Mass and Adoration and the big things.” The teachers and

⁴ See supra note 2 (trial court’s consideration of Catholic preschools that participate in the Denver Preschool Program).

administrators at the preschool tell parents: "You are the first educator of your children. We are here to supplement."

The Halls' oldest son has several learning disorders and the preschool teachers often consulted Jill and Brian. "That was a huge benefit for his learning long-term. We could look at those things and zero in on them pretty quickly. It was a huge stepping stone for us in our learning process of how to help our child."

Our Lady of Lourdes school, remarks Jill, is "authentically Catholic." "When you first come into any part of the school, they let you know the mission of the school is to have a personal relationship with Jesus Christ and to nurture that."

Jill says she is sad and disappointed that Our Lady of Lourdes is unable to participate in the UPK Colorado program. "I feel like we've been excluded from something that should be for every kid." She adds: "I'm not choosing something so extreme. I'm choosing just a faith, and here I'm being punished for that."

MELISSA DE LA CRUZ has been with her husband Antonio for 13 years. They met while working at Sears during high school. Today they are the proud parents of four children ages 12, 9, 5, and 4.

Melissa attended Catholic high school. Antonio attended the local public schools. Both she and Antonio were raised Catholic. All the children attend Wellspring school, the parish school for St. Bernadette in Littleton, Colorado. It's

been wonderful to be at Wellspring, says Melissa. “My kids are thriving. They're happy. They love the school culture. They love their teachers. I love it here.”

Several years ago, Melissa worked for Catholic Charities as an early education specialist. “I just would hear a lot of different stories about what happened in public school systems.” She adds, “I love my kids being safe, but I don't agree with the [security resource officers] that are in public schools. I don't want my kids policed. That's why I chose to keep my kids in a private school setting, where I obviously have more teacher-to-parent interaction.”

Melissa chose to send her children to Catholic schools so they would “have the same faith that I have, to know that if they do have a problem, they can turn to God, turn to their religion, turn to the church... Within the school, I know that they're also learning morals and values and how to treat others, how to have respect, how to communicate.” She knows that Wellspring teaches its students very traditional Catholic teachings. “I am completely OK with that.”

Sending all their children to private school involves a big financial commitment. “With the times right now, groceries are so expensive. Gas is so expensive. Anything you do is basically expensive,” says Melissa. “This year has also been very tough on us. We haven't been able to go on vacation. We actually had a summer vacation plan and we had to cancel it.” Melissa thinks excluding Wellspring from UPK Colorado “isn't fair.”

To lower tuition expenses, Melissa decided to work as the operations manager at Wellspring. “What I make at the school is not what I could be possibly making at another employer. But it means giving me a discount on my tuition.” Melissa is thankful for this chance to be able to send her youngest to preschool, but says there are “a lot of families out there that would love to have their kids go to a school like the ones that we have here and that aren't able to because they aren't able to pay. I know that a lot of families have left because of the cost of pre-K.”

STATEMENT OF THE CASE

In 2022, Colorado’s Department of Early Childhood established a universal preschool program to provide all preschoolers with 15 hours of free education per week at a private or public school of their parents’ choice in the year before kindergarten. Colo. Rev. Stat. §§ 26.5-4-201, *et seq.* Colorado’s Universal Preschool Program (“UPK Colorado”) uses a “mixed-delivery system of preschool providers” which combines school and community-based preschool providers and is funded using both public and private money. Colo. Rev. Stat. § 26.5-4- 203(12).

Schools that wish to participate in the program must agree to “provide eligible children an equal opportunity to enroll and receive 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.” *Id.* § 26.5-4-205(2)(b). Colorado’s

Department of Early Childhood adopted this same language in regulations governing the program and has also included this in the Program Service Agreement providers must sign. *See* 8 Colo. Code Reg. 1404- 1:4.109.

Appellants – the Archdiocese of Denver, two Catholic preschools and the parents of a preschool child -- contend that, by conditioning participation in the UPK Program on compliance with this mandate, namely the sexual-orientation and gender-identity aspects of the requirement, Colorado excludes many parents from receiving a generally available public benefit in violation of their rights guaranteed by the Free Exercise Clause of the First Amendment to the U.S. Constitution.

SUMMARY OF ARGUMENT

Amici parents are representative of the many Catholic parents with preschool-aged children in Colorado who have taken up their rights and responsibilities as primary educators of their children by choosing to send their children to Catholic schools, including to preschools like Appellant schools. These parents understand that educating their children includes forming their children in the faith and regard Catholic schools as perfect partners in this endeavor. Some *amici* parents are able to send their children to Catholic preschools, although doing so involves making many sacrifices. Others are not able to afford the cost of the preschool program of their choice without access to the funds available under UPK Colorado.

Amici parents want to send their children to Catholic preschools like those run by Appellant preschools precisely because these schools operate consistent with Catholic teaching. They object to Colorado’s mandate that conditions participation in UPK Colorado on it agreeing to operate in ways that are inconsistent with these schools’ religious message.

Once Colorado chose to adopt UPK Colorado, it could not exclude schools based on their religious exercise unless strict scrutiny has been satisfied. It has not. Colorado has failed to establish that the state’s alleged interests in decreasing discrimination and removing discriminatory barriers to preschool access is compelling nor how this interest is served by excluding Catholic preschools and limiting parental choice.

I. *Amici* Catholic families recognize their role as the primary educators of their children and their right to select the best educational fit

“Train up a child in the way he should go, and when he is old he will not depart from it.”⁵ For many Catholic parents, Proverbs 22:6 is powerful guidance for the weighty task of parenting. They are keenly aware that even as their child grows, parents remain the lens through which their child views what she learns, especially as she ponders the meaning and significance of the education she receives.

⁵ Proverbs 22:6, <https://bible.usccb.org/bible/proverbs/22>

The Catholic Church has long taught that parents are both the first and the primary educators of their children, a role that must be recognized and respected in society. Pope Paul VI, in his 1965 *Declaration on Christian Education*, explained this teaching when he said, “Since parents have given children their life, they are bound by the most serious obligation to educate their offspring and therefore must be recognized as the primary and principal educators.”⁶

The truth of parents as primary educators has also been affirmed in the Catechism of the Catholic Church: “Parents have the first responsibility for the education of their children.”⁷ The Catechism continues, observing that “As those first responsible for the education of their children, parents have the right to choose a school for them which corresponds to their own convictions. This right is fundamental.”⁸

Consistent with their obligation and right to live out their authority as primary educators of their children, *amici* families desire to send their young children to Catholic preschools.

⁶ Declaration on Christian Education, *Gravissimum Educationis*, October 28, 1965, https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html.

⁷ Catechism of the Catholic Church, 539, <https://www.usccb.org/sites/default/files/flipbooks/catechism/539/>

⁸ Id. at 540, <https://www.usccb.org/sites/default/files/flipbooks/catechism/540/>

According to *amici* Andy Abols, faith “is critical” for him and his wife Gina when it comes to the education of their five children. Similarly, *amici* Ana Karen Meier considers the decision to send her children to Catholic school a “spiritual” one. And *amici* Melissa de la Cruz has always hoped to offer her four children the same Catholic education that she received as a child.

Amici Karina Ramirez reflects that when she and her husband Rogelio “started learning about Catholicism and what it implies, we had to change a lot of the things that we were currently doing.” This has included enrolling her school-aged children in Catholic school. And *amici* Jill Hall adds that teachers and staff at Our Lady of Lourdes regard their work not as replacing but as “supplementing” what she and her husband Brian give their children.

II. Catholic schools are bound to operate consistent with the teachings of the Church on matters of human sexuality

In *Gravissimum Educationis*, the Second Vatican Council’s Declaration on Christian Education, Pope Paul VI proclaimed that “Holy Mother Church must be concerned with the whole of man's life, even the secular part of it insofar as it has a bearing on his heavenly calling. Therefore she has a role in the progress and development of education.”⁹

⁹ Second Vatican Council, “Declaration on Christian Education, *Gravissimum Educationis*, Oct. 28, 1965, https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html.

The U.S. Conference of Catholic Bishops echo this sentiment today, explaining that education remains critically important for the Catholic Church, helping “in the formation of the human person by teaching how to live well now so as to be able to live with God for all eternity.”¹⁰ The bishops continue by asserting that “Our schools serve both the faith community and society by educating children, young people and adults to contribute to the common good by becoming active and caring members of the communities, cities, and nation in which they live.”¹¹

Recent guidance from the Vatican’s Congregation for Catholic Education impresses upon *all* Catholic educational institutions that “every official act of the school must be in accordance with its Catholic identity.”¹² This instruction is to apply across all academic subjects, not just religion class, because “there is no

¹⁰ United States Conference of Catholic Bishops, Catholic Education, <https://www.usccb.org/committees/catholic-education#:~:text=Our%20schools%20serve%20both%20the,nation%20in%20whi ch%20they%20live> (last visited Aug. 17, 2024).

¹¹ Id.

¹² Congregation for Catholic Education, *The Identity of the Catholic School for a Culture of Dialogue*, https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_catheduc_doc_20220125_istruzione-identita-scuola-cattolica_en.html.

separation between time for learning and time for formation, between acquiring notions and growing in wisdom.”¹³

The Archdiocese of Denver takes these guidances seriously and has made clear that Catholic schools in the archdiocese are to be “‘sanctuaries of education’ supporting parents and empowering families to lead their children to encounter and be rescued by Jesus Christ and have abundant life, here on earth and in heaven, for the glory of the Father.”¹⁴ And, as explained by the head of the Archdiocese’s Office of Catholic Schools, this mission is viewed as “serv[ing] the family [and] . . . parents in their duties as primary educators or principal educators of their children.” She added that for schools to fulfill their mission, parents must therefore understand that mission and “desire to teach it within their family, to promote it, to defend it, and [to] have their children formed in . . . a Catholic worldview.”¹⁵

Of particular relevance in this case, the Archdiocese has produced guidance on sexual orientation and gender identity, *Splendor of the Human Person: A Catholic Vision of the Person and Sexuality*, which serves as a “basic outline for addressing issues of the human person, sexuality and gender for use within parishes and schools in the Archdiocese of Denver.” The guidance explains that

¹³ Id.

¹⁴ See Trial Court Order at 21.

¹⁵ Id.

“[i]t is essential that Catholics, particularly those working for the Church in parishes and schools, as well as the young people to whom the Church ministers in [its] parishes and schools, receive formation in the Church’s teaching on the human person and sexuality.”¹⁶ Consistent with this guidance, the Office of Catholic Schools has developed detailed guidance for Archdiocesan schools to “implement policies that are consonant with Christian anthropology’s view of the person.”¹⁷ The guidance adds that “[s]chools should avoid validating or affirming the premises of ‘gender ideology,’ even indirectly by silence or inaction.”¹⁸

The Archdiocese also requires parents of children enrolling in the Archdiocese’s schools to sign a “Statement of Community Beliefs” in which they agree to “refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the School, and the Church in the

¹⁶ Trial Court Order at 22 (citing Archdiocese of Denver, *Splendor of the Human Person : A Catholic Vision of the Person and Sexuality* at 6, https://personandidentity.com/wp-content/uploads/2021/08/The-Splendor-of-the-Human-Person_AOD.pdf).

¹⁷ See Archdiocese of Denver, Office of Catholic Schools, *Guidance for Issues Concerning the Human Person and Sexual Identity* at 2, 9-12, <https://s3.documentcloud.org/documents/23218852/guidance-for-issues-concerning-the-human-person-and-sexual-identity.pdf>.

¹⁸ *Id.*

Archdiocese of Denver, or be considered a counter-witness to Catholic doctrine or morals.”¹⁹

Amici families assent to such guidance. Specifically, in light of the tender age of their preschool children, these parents do not want to them to certain themes regarding human sexuality. At the same time, they want their children to embrace the Catholic Church’s teachings on the nature of the human person.

Amici Andy Abols embraces the Church’s teaching on the nature of the human person. He and his wife Gina are pleased that St. Mary’s is committed to sharing this vision with their students. *Amici* Ana Karen Meier says that in light of her young children “being so little and not being to really understand,” she wants to shield them from ideology. And *amici* Jill Hall considers including ideology that conflicts with Catholic teaching into the preschool setting is a “huge red flag.”

III. Denying *amici* families financial assistance because they desire a Catholic education violates their free exercise rights

As the Supreme Court explained recently in *Carson v. Makin*, courts should apply exacting judicial review when the government denies a public benefit “based on a recipient’s religious *exercise*.” 596 U.S. 767, 785 (2022). Colorado didn’t have to subsidize private preschools, but once it did so, “it cannot disqualify some private schools solely because they are religious”— or because they engage in

¹⁹ Trial Court Order at 21-22.

religious exercise. *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464, 487 (2020); see also *Carson*, 596 U.S. at 784-88.

Should this court ignore *Carson*'s guidance and instead rely on the discredited standard articulated in *Employment Div., Dept. of Human Resources of Ore. v. Smith*,²⁰ those aspects of the mandate that apply to sexual orientation and gender identity cannot survive judicial review. Under *Smith*, strict scrutiny applies when the government “burden[s] [the plaintiff’s] sincere religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’”²¹

First, the mandate is not generally applicable. Colorado has both categorical and individualized exceptions. Specifically, the state has acknowledged it allows schools to discriminate based on disability, religious affiliation, and income.²² A state official even testified that preschools could give preferences to historically marginalized communities or even to LGBTQ students and families.²³ Also a “catch-all” practice, which has since been formalized via regulation at 8 Colo. Code Reg. 1404-1:4.110(A)(10), allows preschools to request individual

²⁰ See *Fulton v. City of Philadelphia*, 593 U.S. 522, 543, 545 (2021) (wherein five sitting justices expressed skepticism of *Smith*).

²¹ *Smith*, 494 U. S. 872, 879-81 (1990).

²² Appellants’ Opening Brief at 26.

²³ *Id.* at 26-27.

exemptions.²⁴ Such generalized and individualized exemptions clearly render Colorado’s policy not “generally applicable.”

Second, the mandate is not neutral. “Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” *Fulton*, 593 U.S. at 533; see also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. 617, 638-39 (2018) and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). This neutrality requirement bars government actions that directly or in their effects evidence religious hostility. *Lukumi*, 508 U.S. at 535. State officials have compared Appellant preschools to segregation academies of the south and branded millennia-old religious beliefs as bigotry.²⁵ Such offensive comments are similar those the Court in *Masterpiece* found demonstrated “clear and impermissible hostility.” *Masterpiece*, 584 U.S. at 634-35 (government officials had compared traditional Christian beliefs on the nature of marriage “to defenses of slavery and the Holocaust”). And, perhaps most crucially, by universally subsidizing preschool

²⁴ *Id.* at 32-34.

²⁵ See *Id.* at 36, 51.

services but excluding Appellant preschools, Colorado has discouraged religious exercise and thus has not acted with “substantive neutrality.”²⁶

Whether this court follows *Carson* or *Smith*, strict scrutiny applies to this court’s review of the mandate. Consequently, Colorado has the burden to prove that excluding Appellant preschools “serve[s] a compelling interest and [is] narrowly tailored to that end.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). It has failed on both prongs.

First, a generalized interest in “decreasing discrimination” based on sexual orientation and gender identity and “removing discriminatory barriers to preschool access” is not judicially cognizable. See e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023) (generalized goals like eliminating discrimination may be “commendable,” but “they are not sufficiently coherent for purposes of strict scrutiny” because “it is unclear how courts are supposed to measure” them, and even if they could be measured, “how is a court to know when they have been reached[?]”). Nor is it sufficient to rise to

²⁶ See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990) (neutrality principle requires government to “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”), <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=2059&context=law-review>.

the level of a “compelling interest.” See e.g., *Fulton*, 593 U.S. at 542 (observing Philadelphia’s in the equal treatment of same-sex prospective foster parents and foster children “cannot justify denying CSS an exception for its religious exercise.”). Furthermore, it is highly doubtful that “affirming” a child’s transgender identity improves mental health outcomes.²⁷ Such questionable evidence regarding adolescents has even less probative value when dealing with preschoolers.

Second, excluding Catholic preschools from UPK Colorado won’t impact the number of preschools *already available* to LGBTQ families. Whereas excluding Catholic preschools takes options away from Catholic families like *amici* families. The Supreme Court in *Fulton* came to a similar conclusion, noting that “[m]aximizing the number of foster families” is an “important goal[],” but “[i]f anything, including” a Catholic foster agency “seems likely to increase, not reduce, the number of available foster parents.” 593 U.S. at 541-42.

Astonishingly, the trial court used the success of Catholic education to bolster the state’s claims, arguing that “[i]f religious schools in fact provide the best academic experience, the State’s interest in removing discriminatory barriers for publicly funded preschool education is even more significant.” Trial Court

²⁷ See The Cass Review: Final Report at 31 (April 2024), (a recent systematic review showing “no clear evidence that social transition in childhood has any positive or negative mental health outcomes, and relatively weak evidence for any effect in adolescence.”), <https://perma.cc/D74A-2263>.

Opinion at 79. The Supreme Court, in a recent case also involving the state of Colorado, rejected this circuit’s assertion that the very “uniqueness” of the services by a wedding website designer could justify the state’s attempt to conscript her voice to disseminate the government’s preferred message. See *303 Creative v. Elenis*, 600 U.S. 570 (2023). The Court held that such a rule “would not respect the First Amendment; more nearly, it would spell its demise.” *Id.* at 592. Similarly, forcing Appellant preschools to accept and affirm views in conflict with what these schools teach would significantly interfere with their message. Such government interference with constitutionally-protected rights cannot continue.

The trial court asserted that Appellants “miss, however, the irony in valuing choice for religious schools and their students—but not for LGBTQ+ children and families.” Trial Court Order at 79, n 40. This is an unfair accusation. Appellants and *amici* families protest the exclusion of Catholic schools from participating in UPK Colorado because of these schools’ fidelity to Catholic teaching. There is nothing “ironic” in demanding that a generally available public benefit be free of religious discrimination.

CONCLUSION

For the sake of the families hoping to offer their young children a Catholic preschool education and in order to remedy Colorado's unconstitutional restrictions on UPK Colorado, *amici* respectfully request this Court to reverse the decision below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 32(a)(7)(B) and 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 6,426 words, excluding the parts of the brief exempted by Rule 32(f).

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CERTIFICATE OF DIGITAL SUBMISSION

Counsel for *Amici Curiae* The Conscience Project, Andy Abols, Karina Ramirez, Ana Karen Meier, Jill Hall And Melissa De La Cruz In Support of Appellants hereby certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rule of Appellate Procedure 25(a)(5).

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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