RECORD NO. 24-1267

In The

United States Court of Appeals

For The Tenth Circuit

ST. MARY CATHOLIC PARISH IN LITTLETON, *et al.*,

Plaintiffs – Appellants,

v.

LISA ROY, *et al.*,

Defendants – Appellees.

On Appeal from the United States District
Court for the District of Colorado-Denver
Civil Action No. 1:23-CV-02079-JLK
Hon. John L. Kane

BRIEF OF AMICUS CURIAE EDCHOICE, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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STATEMENT OF AMICUS INTEREST[1]

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. The mission of EdChoice 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.

One of EdChoice's guiding principles is that education freedom requires education pluralism. It does parents little good to have a choice among multiple versions of the same educational content for their children. 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). Accordingly, EdChoice

[1] Pursuant to Fed. R. App. P. 29(a), counsel for amici represents that all parties consent to the filing of this brief and that no party, party's counsel, or person other than amici authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief.

submits this brief in support of Appellants St. Mary Catholic Parish in Littleton, St. Bernadette Catholic Parish in Lakewood, and Daniel and Lisa Sheley, whose participation in Colorado's Universal Preschool Program will offer families who accept Appellants' religious views on sexual orientation and gender identity an important option that meets their children's educational needs.

In response to 19th Century religious bigotry designed to force Catholic families into Protestant public schools, Catholic parochial education rapidly expanded to become a deep and rich American tradition. Indeed, traditional Catholic schools have been integral to school choice programs around the country that have generated data supporting the premise of Colorado's "mixed delivery" Universal Preschool Program, *i.e.*, that meaningful school choice promotes successful educational outcomes.

In short, inclusion of Catholic education among choices available to families is critical to the success of school choice programs. Excluding Catholics from Colorado's Universal Preschool Program both impinges religious liberty and undermines the mission of education freedom.

STATEMENT

The Colorado legislature enacted a Universal Preschool Program to "provide high-quality, voluntary preschool programming through a mixed delivery system for children throughout the state . . . ." Colo. Rev. Stat. § 26.5-4-202(1)(b). The "mixed delivery system" envisioned by the legislature includes a variety of program providers, specifically *private* program providers, so that parents may "select preschool providers for their children from as broad a range as possible within their respective communities." *Id.* at §§ 26.5-4-203(12), 26.5-4-204(2). Moreover, the Universal Preschool Program is available to "*every child* in the state . . . at no charge, during the school year preceding the school year in which the child is eligible to enroll in kindergarten." *Id.* at § 26.5-4-204(3)(a)(I).

Both statutes and Colorado Department of Early Childhood rules set out quality standards for program providers. *Id.* at § 26.5-4-205. Among them, each preschool provider must provide "children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability . . . ." *Id.* at § 26.5-4-205(2)(b) (referred to hereinafter as "equal opportunity mandate"), *see also* 8 Colo. Code Reg.

1404-1-4.110. Program providers must sign a Program Service Agreement that includes these equal opportunity provisions to participate in the program. Appellants' App. 1166.

Nonetheless, the Department is authorized to, and does, provide exceptions to many of the quality standards, including its equal-opportunity mandate. Specifically, the Department has issued regulations that list "provider matching criteria" outlining preferences preschool providers may use to make acceptance determinations. 8 Colo. Code Reg. 1404-1-4.110. Among the criteria, the Department allows "[f]aith-based providers" to prefer "members of their congregation," others to prefer children with disabilities, and still others to prefer children who are "a part of a specific community; having specific competencies or interests." *Id.* at (A)1, 4, 10. The Department finds some preferences and exceptions for admission acceptable, even if the provider bases those preferences on characteristics like faith, association, or specific interests.

The Department makes discretionary exceptions in addition to categorical ones. Program providers, for example, may request an individualized exception to serve only children of teen moms or children with specific disabilities. Appellants' App. 0832; Appellants' App. 1702.

Yet the Department refuses to accommodate Appellants' religious exercise in requiring prospective students and their families to sign the Statement of Community Beliefs, which asks parents to "understand and accept [the school] community's worldview and convictions" and "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 Archdiocese of Denver, or be considered a counter-witness to Catholic doctrine or morals." Appellants' App. 1005-1006. These convictions and morals include Catholic teachings that the "givenness of . . . sexuality, in all aspects as male and female created in God's image and likeness is the basis for human dignity and identity" and "sexual expression contributes to human flourishing in . . . faithful, covenantal love between a man and a woman . . . ." *Id*. at 1005.

The district court concluded that Colorado was justified in excluding Catholic schools that insist on adhering to their religious views of sexual orientation and gender identity on the grounds of protecting the "quality" of preschool education and the "health and safety" of children participating in the program. Appellants' App. 0500-0502. In its view, because Appellants' request for accommodation relates specifically to the

equal opportunity mandate's sexual orientation and gender identity protections, the request targets a generally applicable rule, even as other providers were excused from other "health and safety" rules. *Id.*

SUMMARY OF ARGUMENT

In *Espinoza* and *Carson*, the Supreme Court held that the Free Exercise Clause prevents states from excluding religious providers from school choice programs. Now Colorado pursues the same exclusion through a confrontational "equal opportunity" mandate at odds with traditional Catholic views on sexual orientation and gender identity. The Free Exercise Clause protects religious school choice here every bit as much as in *Espinoza* and *Carson*. Colorado's "equal opportunity" mandate means inequality for Catholics and less opportunity for everyone.

Colorado allows many exceptions to its equal opportunity mandate that undermine its claim of "general applicability." When Colorado waives the mandate for schools targeting students based on socioeconomic class, disability status, and even race, but refuses a religious accommodation from the sexual orientation/gender identity mandate, it triggers strict scrutiny. If, as the district court says, the equal opportunity mandate relates to "health and safety" standards, the whole

mandate rises and falls as a unit. Colorado cannot adhere to its "health and safety" rationale for sexual orientation and gender identity against a request for religious accommodation when it readily jettisons that concern for schools who find the mandate inconvenient for other reasons.

The district court concluded that Colorado had a compelling interest in "ensuring eligible children and their families do not face discriminatory barriers to publicly funded preschool." Appellants' App. 0518. But refusing to allow a religious-exercise accommodation on the grounds that respecting Catholic doctrine on human sexuality and gender identity is "unsafe" or "unhealthy" is itself discrimination—and largely indistinguishable from historic discrimination Catholics have suffered from various attempts to homogenize American education. The Supreme Court has rejected such efforts and sided squarely with education pluralism.

Furthermore, contra the district court, Colorado cannot pass strict scrutiny simply by declaring "that children may not be denied" access to participating schools "based on specified discriminatory factors." Appellants' App. 0524. Rather, it must prove both that it needs to discriminate against religious exercise for a compelling reason and that its refusal to accommodate religion will advance its compelling interest. Refusing to

accommodate Appellants cannot advance the goal of creating more access by breaking down "discriminatory barriers." Instead, the record shows strict enforcement of the mandate will not create more schools or openings for students from LGBTQ families unwilling to accept Catholic doctrine. More likely, rejecting participation by Catholic schools will reduce the number of secular preschool openings for children from LGBTQ families because it will force all children to compete for fewer spots, including children from families who would have attended Catholic preschools if those schools had been allowed to participate.

The upshot is that the district court permitted the state to refuse an accommodation merely for the sake of rejecting Catholic doctrine. That is unfortunate for Catholic schools, to be sure, but even more tragic for families who accept Catholic doctrine who will be deprived access to Catholic preschool.

School choice programs are successful when parents have meaningful choices, not when states impose abstract "equal opportunity" mandates. Catholic schools have been critical to the success of education freedom for decades. Studies even show Catholic and other religious schools outperform other schools when it comes to teaching tolerance and civic

engagement. Colorado's equal opportunity mandate thus deprives the preschool marketplace of exactly the meaningful choices parents need for their children to succeed.

The Supreme Court has rejected overt exclusion of "sectarian" schools from programs providing families with tuition assistance. This Court should not permit Colorado to achieve the same objective through its discriminatory "equal opportunity" mandate.

ARGUMENT

I. In View of Secular Exceptions to the Equal Opportunity Mandate, Colorado's Refusal to Accommodate Appellants' Religious Exercise Amounts to Unlawful Discrimination

Much of the district court's analysis centered on whether the equal opportunity mandate is "generally applicable" and thus subject to rational basis under *Smith*. But in finding general applicability, the court glossed over several exceptions that render rejection of Appellants' request for religious accommodation suspect. In *Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2021), 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 *Smith*. If, as here, officials decide "which reasons for not complying with the policy are worthy of solicitude," those exceptions trigger strict scrutiny. *Id*. at 533, 537.

A. Secular exceptions to the equal opportunity mandate undermine any claim that it is generally applicable

Colorado law and the Department create numerous exceptions that put officials in the position of deciding which reasons for departing from the equal opportunity mandate are "worthy of solicitude." While the equal opportunity mandate forbids discrimination because of "race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability," the Department's practices and policies afford exceptions it deems worthy.

For example, the Department already allows Head Start program providers to prefer applicants based on their family's income level. Appellants' App. 0747; Appellants' App. 0813-0814. Testimony at trial established that the Department would also allow entire programs to serve only children "of color from historically underserved areas." Appellants' App. 0821-0822. The Department also welcomes programs devoted only to children who have a disability. Appellants' App. 0814. And, as the district court addressed at some length, the Department allows religious

schools to prefer its co-religionists, parishioners, or congregants. Appellants' App. 0814; 0514-0516.

Appellants' 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 the Department—can expect accommodation, while Appellants cannot. Thus, the Department picks which "discriminatory factors" warrant exception and the whole scheme thereby fails the test for general applicability.

B. Secular exceptions specifically for sexual orientation and gender identity protections are unnecessary for strict scrutiny to apply, and in any event the record suggests such exceptions are likely

The district court concluded that accommodations for programs focusing on underprivileged, minority, and disabled children did not undermine general applicability because none touched on the specific categories implicated by Appellants' request for accommodation—Catholic religious views on sexual orientation and gender identity. But given the overall rationale for the equal opportunity mandate, the government's

willingness to abide exceptions for some admissions policies betrays the same sort of discrimination called out in *Fulton*.

In particular, the statutory waiver authorization demands that "each preschool provider meet all quality standards relating to health and safety," Colo. Rev. Stat. § 26.5-4-205(1)(b)(I), which means no waivers for "health and safety" standards. The district court in turn concluded that the equal opportunity mandate is a non-waivable "health and safety" standard on the theory that "discrimination can be harmful, both mentally and physically, for LGBTQ children and children from LGBTQ families." Appellants' App. 0500-0501. Concluding that the equal opportunity mandate constitutes a "health and safety" standard is highly questionable, as the district court did not meaningfully address Appellants' contention that "health and safety" refers only to physical conditions at the preschool. Appellants' App. 0501.

Regardless, by declaring that the equal opportunity mandate embodied health and safety standards, the district court equated the significance of each category protected by the mandate. So, protection against economic discrimination, disability discrimination, religious discrimination, race discrimination and sexual orientation/gender identity

discrimination *all* protect children's health and safety. Further, if the waiver statute bars exceptions for the equal opportunity mandate, it does so based on a rationale of equal "health and safety" concerns covering *all* protected categories. The Department's exceptions for admissions policies focused on wealth, race, and disability equally implicate the "health and safety" standard it uses to justify refusing Appellants' requested accommodation. The "general applicability" of the whole mandate, therefore, rises or falls as a unit.

The district court averted that obvious connection, however, by recalibrating the state's interests in each protected category within the equal opportunity mandate, saying "the specific State interests . . . are distinct depending on the basis for discrimination." Appellants' App. 0508. Here the district court inexplicably declared some rationale *besides* health and safety justified the sexual orientation and gender identity protections, citing evidence of greater need for preschool services for children of LGBTQ families. Appellants' App. 0508-0509. But if *access* is the justification for the equal opportunity mandate, the statutory ban on exceptions from "health and safety" rules does not apply.

Regardless, the *Fulton* analysis does not permit courts to erase a system of exemptions that triggers heightened scrutiny by reference to justifications for the exemptions. The justifications are relevant only in the application of strict scrutiny.

Moreover, the state admitted at one point that, while it will not permit participation by Catholic schools who require students' families to "accept" their doctrines on sexual orientation and gender identity, it may approve a provider pledging to serve only LGBTQ students. Appellants' App. 0820. That is blatant religious discrimination. Yet the district court smoothed over that divot in the state's "general applicability" theory by crediting the bare assertion that the Department could never do anything to violate the equal opportunity mandate. Appellants' App. 0513. Left unexplored was the precise question whether the state would consider discrimination *in favor of* children from LGBTQ families to be a violation of the equal opportunity mandate.

In any event, the Department's policies favoring groups based on wealth, race and disability status demonstrate its willingness to depart from the equal opportunity mandate when doing so suits it. Accordingly,

the Court should not treat the equal opportunity mandate as a "generally applicable." It should instead apply strict scrutiny.

II. Refusing religious accommodations for Catholics is an ineffective and unlawful way to create opportunities for LGBTQ families

The district court credited the state with a compelling interest in "ensuring eligible children and their families do not face discriminatory barriers to publicly funded preschool." Appellants' App. 0518. But that argument simply updates a centuries-old cultural habit of objecting to Catholic religious practices in the context of education. Here, the objection to Catholic participation is dressed up as concern for "discrimination" and "health and safety." But no matter how camouflaged, a state interest that boils down to disagreement with Catholic doctrine isn't even legitimate, much less compelling.

Besides, refusing an accommodation to appellants cannot advance the state's asserted goal of ensuring discrimination-free access to high-quality preschool because it will not create more schools or more openings for LGBTQ students at Catholic schools or at existing schools. A religious-exercise accommodation for appellants, by contrast, will expand options for *all* preschool students.

A. American history is replete with discrimination against Catholic education, which the Supreme Court has now firmly rejected in favor of education pluralism

Horace Mann, the Massachusetts Board of Education Secretary from 1837-1848, propelled the "common school" movement to create a system that would advance Protestantism and "Americanize" Catholic immigrants by homogenizing education. John Jeffries & James Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297-298 (2001). Common schools, for example, imposed daily reading of the King James Bible. Catholics and other religious groups who objected faced school expulsion and violence. *Id.* By allowing and imposing only one religion, Mann said schools could avoid acting "as an umpire between hostile religious opinions." Horace Mann, Twelfth Annual Report of the Secretary of the Board of Education of Massachusetts 117 (1849). So, while public schools today are often considered religion-neutral, the "common school" movement itself was hostile and discriminatory towards minority religions—principally Catholicism.

The bookend to Mann's effort to homogenize religious education via Protestant common schools was the movement to bar public funds from supporting Catholic private schools. In 1875, James G. Blaine, who had

just finished a six-year tenure as Speaker of the House, introduced a federal constitutional amendment barring tax revenues from coming "under the control of any religious sect," *i.e.*, from funding Catholic schools. The federal effort failed, but in a time of "pervasive hostility" toward Catholics, his movement took hold at the state level, leading to many "Blaine Amendments" in state constitutions that prohibit government aid "for the benefit" of religious schools. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

The Supreme Court has invalidated use of Blaine Amendments to homogenize private education by excluding religious institutions from participating in state-funded programs. First, the Court rejected a state policy denying churches the opportunity to participate in grants for playground resurfacing. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458, 466 (2017). Next, it nullified a regulation barring religious schools from participating in a tax credit scholarship program for students attending private schools. *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 486-487 (2020); *see also id.* at 501-503 (Alito, J., concurring) (recounting the history of "bigoted" anti-Catholic Blaine Amendments and "common" public schools that sought to "inculcate a form of 'least-common-denominator Protestantism'").

Finally, the Court quashed a statute precluding "sectarian" schools from participating in a generally available program providing families with tuition assistance. *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 789 (2022). Critically, the Court observed that Maine's town-tuitioning program was designed to promote pluralism: "[I]t is simply not the case that these schools, to be eligible for state funds, must offer an education that is equivalent—roughly or otherwise—to that available in the Maine public schools." *Id.* at 784.

Those cases, and the religious pluralism they protect, are relevant here. When the Department forces even religious schools to sign the Program Service Agreement as a condition of participating in the Universal Preschool Program and thereby deny their own religious teaching, Appellants are faced with the same choice as the church daycare in *Trinity Lutheran*—participate in a government program *or* pursue religious inculcation through education, not both. *Trinity Lutheran*, 582 U.S. at 450; *see also Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U. S. 732, 734 (2020) ("educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of a private religious school's mission.").

Furthermore, as in *Espinoza*, the Department's refusal to afford Appellants an accommodation 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. In *Espinoza,* the Court was particularly concerned that the revenue rule enforcing the Blaine amendment "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." *Espinoza*, 591 U.S. at 476. And it rejected the argument that excluding religious schools somehow promotes religious freedom "because the infringement of religious liberty here broadly affects both religious schools and adherents," *i.e.*, "families who children attend or hope to attend" religious schools. *Id.* at 485-486.

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.*

In sum, the Supreme Court has embraced parental rights to education pluralism and rejected exclusion of religious providers. Invoking yet more reasons to exclude religious schools from public education support wholly undermines "mixed delivery" and perpetuates Horace Mann's and James G. Blaine's long-discredited, homogenous views of what constitutes a properly formed and educated citizen.

B. The rationale for refusing an accommodation does not advance a cognizable compelling interest

The district court's rationale for refusing to accommodate the Appellants' religious beliefs is a dressed-up rejection of Catholic doctrine that harms even students from LGBTQ families. It therefore fails.

1. Colorado's stated interest in rejecting an accommodation amounts to rejection of Catholic doctrine

The district court held that Colorado's denial of a religious accommodation survives even strict scrutiny because it advances the state's

objective in "(1) ensuring eligible children and their families do not face discriminatory barriers to publicly funded preschool and (2) protecting children from discrimination." Appellants' App. 0518. The court also cited trial testimony to elaborate the point "that children would have *access* to preschool programs of their choosing and that best fit their family's needs without experiencing discrimination" and "that eligible children can grow to their maximum ability and are not put in an *unsafe or unhealthy* environment." *Id.* (emphasis added).

While trying to mask anti-religious animus, the district court's focus on protecting children from "an unsafe or unhealthy environment" ultimately reveals it. According to the district court, the equal opportunity mandate "limit[s] a school's discretion to deny equal access to eligible children because doing so potentially threatens the health and safety of preschoolers." Appellants' App. 0501. So, in the court's view, the state can refuse to tolerate Catholic doctrine on human sexuality and gender identity in the Universal Preschool Program because it is "unsafe." That is as direct an acknowledgement of religious discrimination as one is likely to find.

2. Colorado does not create more opportunity for children from LGBTQ families by refusing Appellants' requested accommodation

The district court also erred in concluding that the no-accommodation policy materially advances the state's asserted compelling interests.

First, the district court reduced strict scrutiny analysis to mere rational-basis review, as evidenced by its incorrect statement that the state's "circumstantial evidence" and "common sense" suffice to pass strict scrutiny. Appellants' App. 0524. It even announced that "[w]hen the State is footing the bill, it has a compelling interest in deciding that children may not be denied this experience based on specified discriminatory factors." Appellants' App. 0524.

That formulation of strict scrutiny cannot be correct, for it grants the state carte blanche to condition participation in public benefits programs in the name of preventing "discrimination." The whole point of strict scrutiny is to examine whether the state demonstrates a specific compelling need to burden a particular religious exercise.

The district court cited *Norwood v. Harrison,* 413 U.S. 455 (1973), to support its view that the state automatically has an overriding interest in refusing to fund private discrimination in education. Appellants' App.

0526 n. 43. But that case was about *racial* discrimination, and the Court in *Norwood* expressly observed that the Constitution "places no value on discrimination as it does on the values inherent in the Free Exercise Clause." *Norwood,* 413 U.S. at 469-470. The district court failed to respect those free-exercise values in conducting its compelling interest analysis.

In any event, no evidence shows that denying the requested accommodation to Catholic schools would translate into discrimination-free "access to preschool programs," Appellants' App. 0518, for children from LGBTQ families. The district court cited trial testimony supposedly supporting the Department: "LGBTQ+ families often have fewer options when looking for early childhood education," and "LGBTQ+ parents are about twice as likely to live in poverty, which may affect a family's options for transportation," both of which "put[] them at risk for inadequate outcomes." Appellants' App. 0521. Even if such evidence could substantiate concern for whether LGBTQ families have access to preschool generally, it does not justify rejecting an accommodation for Catholic preschools.

The district court's theory was that, once denied an accommodation, Catholics will set aside their longstanding doctrines on sexual orientation and gender identity and take the state's money. Multiple times the court

suggested that rejecting the accommodation was the Department's way of getting children from LGBTQ families into Catholic schools. Appellants' App. 0523-0524. Indeed, it stressed that the academic excellence of religious schools generally (and Appellants specifically) made "the State's interest in removing discriminatory barriers for publicly funded preschool education . . . even more significant." Appellants' App. 0523.

Yet 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." Appellants' App. 1160-1161. And because the Colorado legislature imposed no limit on the number of program participants, participating Catholic preschools would not absorb spots that could have been available at secular preschools. Permitting Catholic preschools to participate with an accommodation is not a zero-sum game vis-à-vis secular preschools.

Indeed, it is more likely that the Department's no-accommodation policy will *reduce* the number of students from LGBTQ families who can benefit from the Universal Preschool Program with a non-Catholic provider. Again, the only limit on the program's capacity for students is the number of willing providers with open seats. So, by denying Appellants their requested accommodation and thereby excluding them from the program, the state reduces the number of program providers available to all families. With fewer providers, children from LGBTQ families must compete with children from families who would have used state assistance to attend a Catholic preschool if one had been available. As a result, many families of all types may be out of luck.

The district court speculated in a footnote that excluding Catholic schools will make "more money . . . available" for other schools and thereby "create additional opportunities" for children from LGBTQ families. Appellants' App. 0522 n. 39. But it cited no evidence supporting that theory—which is unsurprising since the Department never made such an argument. Speculation about indirect outcomes fails the cardinal rule of compelling interest analysis that the policy in question must

demonstrably advance the government's stated interest. *See Fulton v. City of Philadelphia, Pennsylvania,* 593 U.S. 522, 541-542 (2021).

That leaves the Department in the position of excluding Catholic providers for the sake of excluding Catholic doctrine, not for providing greater "non-discriminatory access" to children of LGBTQ families. Unless accepting Catholic doctrine on sexual orientation and gender identity is itself an "inadequate outcome" for all children, no evidence connects the Department's objectives to its refusal to accommodate Appellants. And the Supreme Court has made it clear that 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).

That principle surely applies to free exercise just as much as free speech. It would make zero sense to say that, on one hand, Appellants have a free exercise right to demand that those it educates accept Catholic views on sexual orientation and gender identity, but then insist on the other that the state has a compelling interest in preventing that same religious exercise in service of preventing "discrimination."

Accordingly, no compelling interest justifies the Department's no-accommodation policy.

C. Concrete religious pluralism, not a rigid, abstract "equal opportunity" diktat, produces successful school choice programs affording universal opportunity

Colorado chose to enact its Universal Preschool Program because 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 reflect a common conclusion: 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 "The 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 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, Education Finance and Policy (2011) 6(2) at 207.

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). *See id.* at 19–23.

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,* Journal of Catholic Education, 25(1), 109–132 (2022)).

Thus, meaningful education pluralism—which includes traditional Catholic providers—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 judgment should be reversed.

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Respectfully submitted,

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