

No. 24-1267

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

ST. MARY CATHOLIC PARISH IN LITTLETON;
ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD;
DANIEL SHELEY; LISA SHELEY;
THE 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.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:23-cv-2079-JLK – Hon. John L. Kane

APPENDIX VOLUME I

Eric C. Rassbach
Mark L. Rienzi
Joseph C. Davis
Nicholas R. Reaves
Jordan T. Varberg
Amanda G. Dixon
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APPEAL,JD1,MJ CIV PP,TERMED

U.S. District Court - District of Colorado
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:23-cv-02079-JLK

St. Mary Catholic Parish in Littleton et al v. Roy et al
Assigned to: Judge John L. Kane
Demand: \$1,000
Case in other court: Tenth Circuit, 24-01267
Cause: 42:1983 Civil Rights Act

Date Filed: 08/16/2023
Date Terminated: 06/05/2024
Jury Demand: Both
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff**St. Mary Catholic Parish in Littleton**represented by **Amanda G. Dixon**

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*ATTORNEY TO BE NOTICED***Eric Christopher Rassbach**

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V.

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Date Filed	#	Docket Text
08/16/2023	<u>1</u>	COMPLAINT against All Defendants (Filing fee \$ 402, Receipt Number ACODC-9248227) Attorney Eric Christopher Rassbach added to party St. Bernadette Catholic Parish in Lakewood(pty:pla), Attorney Eric Christopher Rassbach added to party St. Mary Catholic Parish in Littleton(pty:pla), Attorney Eric Christopher Rassbach added to party the Archdiocese of Denver(pty:pla), filed by St. Mary Catholic Parish in Littleton, the Archdiocese of Denver, St. Bernadette Catholic Parish in Lakewood. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u>

		Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Civil Cover Sheet)(Rassbach, Eric) (Entered: 08/16/2023)
08/16/2023	2	SUMMONS REQUEST as to Lisa Roy by Plaintiffs St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton, the Archdiocese of Denver. (Rassbach, Eric) (Entered: 08/16/2023)
08/16/2023	3	SUMMONS REQUEST as to Dawn Odean by Plaintiffs St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton, the Archdiocese of Denver. (Rassbach, Eric) (Entered: 08/16/2023)
08/16/2023	4	Case assigned to Judge Robert E. Blackburn and drawn to Magistrate Judge S. Kato Crews. Text Only Entry (efoga,) (Entered: 08/16/2023)
08/16/2023	5	SUMMONS issued by Clerk. (Attachments: # 1 Summons, # 2 Magistrate Judge Consent Form) (efoga,) (Entered: 08/16/2023)
08/16/2023	6	CORPORATE DISCLOSURE STATEMENT. (Rassbach, Eric) (Entered: 08/16/2023)
08/16/2023	7	CORPORATE DISCLOSURE STATEMENT. (Rassbach, Eric) (Entered: 08/16/2023)
08/16/2023	8	CORPORATE DISCLOSURE STATEMENT. (Rassbach, Eric) (Entered: 08/16/2023)
08/16/2023	9	NOTICE OF CASE ASSOCIATION by Eric Christopher Rassbach on behalf of All Plaintiffs (Rassbach, Eric) (Entered: 08/16/2023)
08/16/2023	10	NOTICE of Entry of Appearance by Eric Christopher Rassbach on behalf of All Plaintiffs (Rassbach, Eric) (Entered: 08/16/2023)
08/16/2023	11	NOTICE of Entry of Appearance by Nicholas R. Reaves on behalf of All Plaintiffs Attorney Nicholas R. Reaves added to party Archdiocese of Denver, The(pty:pla), Attorney Nicholas R. Reaves added to party St. Bernadette Catholic Parish in Lakewood(pty:pla), Attorney Nicholas R. Reaves added to party St. Mary Catholic Parish in Littleton(pty:pla) (Reaves, Nicholas) (Entered: 08/16/2023)
08/16/2023	12	NOTICE of Entry of Appearance by Joseph Charles Davis on behalf of All Plaintiffs Attorney Joseph Charles Davis added to party Archdiocese of Denver, The(pty:pla), Attorney Joseph Charles Davis added to party St. Bernadette Catholic Parish in Lakewood(pty:pla), Attorney Joseph Charles Davis added to party St. Mary Catholic Parish in Littleton(pty:pla) (Davis, Joseph) (Entered: 08/16/2023)
08/16/2023	13	NOTICE of Entry of Appearance by Mark Leonard Rienzi on behalf of All Plaintiffs Attorney Mark Leonard Rienzi added to party Archdiocese of Denver, The(pty:pla), Attorney Mark Leonard Rienzi added to party St. Bernadette Catholic Parish in Lakewood(pty:pla), Attorney Mark Leonard Rienzi added to party St. Mary Catholic Parish in Littleton(pty:pla) (Rienzi, Mark) (Entered: 08/16/2023)
08/16/2023	14	MEMORANDUM RETURNING CASE by Senior Judge Blackburn. This case is randomly reassigned to Magistrate Judge Scott T. Varholak. All future pleadings should be designated as 23-cv-02079-STV. (athom,) (Entered: 08/16/2023)
08/16/2023	15	Magistrate Judge consent form issued pursuant to D.C.COLO.LCivR 40.1, direct assignment of civil actions to full time magistrate judges. (athom,) (Entered: 08/16/2023)
08/17/2023	16	SUMMONS Returned Executed by All Plaintiffs. Lisa Roy served on 8/16/2023, answer due 9/6/2023. (Rassbach, Eric) (Entered: 08/17/2023)
08/17/2023	17	SUMMONS Returned Executed by All Plaintiffs. Dawn Odean served on 8/16/2023, answer due 9/6/2023. (Rassbach, Eric) (Entered: 08/17/2023)

08/17/2023	18	ORDER SETTING DEADLINE FOR FILING ELECTION CONCERNING CONSENT/NON-CONSENT TO MAGISTRATE JURISDICTION FORM AND SETTING SCHEDULING CONFERENCE. Consent Form due by 9/20/2023 . Scheduling Conference set for 10/4/2023 at 11:15 AM before Magistrate Judge Scott T. Varholak in Courtroom A402 of the Alfred A. Arraj United States Courthouse, 901 19th Street, Denver, Colorado. At least 21 days in advance of the scheduling conference, the parties shall meet and attempt to agree upon a scheduling order pursuant to Fed. R. Civ. P. 26(f). Proposed Scheduling Order due by 9/27/2023 . Please see attached Order for additional information. By Magistrate Judge Scott T. Varholak on 8/17/2023. (trvo,) (Entered: 08/17/2023)
08/18/2023	19	WAIVER OF SERVICE Returned Executed by St. Mary Catholic Parish in Littleton, Archdiocese of Denver, The, St. Bernadette Catholic Parish in Lakewood. Lisa Roy waiver sent on 8/16/2023, answer due 10/16/2023. (Rassbach, Eric) (Entered: 08/18/2023)
08/18/2023	20	WAIVER OF SERVICE Returned Executed by St. Mary Catholic Parish in Littleton, Archdiocese of Denver, The, St. Bernadette Catholic Parish in Lakewood. Dawn Odean waiver sent on 8/16/2023, answer due 10/16/2023. (Rassbach, Eric) (Entered: 08/18/2023)
08/22/2023	21	CONSENT to Jurisdiction of Magistrate Judge by Plaintiffs Archdiocese of Denver, The, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton All parties do not consent.. (Rassbach, Eric) (Entered: 08/22/2023)
08/23/2023	22	CASE REASSIGNED. All parties do not consent. This case is randomly reassigned to Judge John L. Kane and drawn to Magistrate Judge Scott T. Varholak. All future pleadings should be designated as 23-cv-02079-JLK. (Text Only Entry) (trvo,) (Entered: 08/23/2023)
08/25/2023	23	NOTICE of Entry of Appearance of <i>Nicole S. Rust</i> by Nicole Siobhan Rust on behalf of Dawn Odean, Lisa Roy Attorney Nicole Siobhan Rust added to party Dawn Odean(pty:dft), Attorney Nicole Siobhan Rust added to party Lisa Roy(pty:dft) (Rust, Nicole) (Entered: 08/25/2023)
08/25/2023	24	NOTICE of Entry of Appearance of <i>Grant T. Sullivan</i> by Grant T. Sullivan on behalf of Dawn Odean, Lisa Roy Attorney Grant T. Sullivan added to party Dawn Odean(pty:dft), Attorney Grant T. Sullivan added to party Lisa Roy(pty:dft) (Sullivan, Grant) (Entered: 08/25/2023)
08/25/2023	25	NOTICE of Entry of Appearance of <i>Ryan K. Lorch</i> by Ryan K. Lorch on behalf of Dawn Odean, Lisa Roy Attorney Ryan K. Lorch added to party Dawn Odean(pty:dft), Attorney Ryan K. Lorch added to party Lisa Roy(pty:dft) (Lorch, Ryan) (Entered: 08/25/2023)
08/25/2023	26	RESPONSE to 9 Notice of Case Association by Defendants Dawn Odean, Lisa Roy. (Lorch, Ryan) (Entered: 08/25/2023)
08/25/2023	27	REPLY to 26 Response, 9 Notice of Case Association by Plaintiffs Archdiocese of Denver, The, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 08/25/2023)
08/28/2023	28	MINUTE ORDER. On August 16, 2023, Plaintiffs filed a Notice of Related Case 9 . When the case was reassigned to me on August 23, 2022, I followed the procedure set out in D.C.COLO.LCivR 3.2(d). Based on the requisite conferral and the present filings in the implicated cases, it was determined that the facts and claims of the two cases are not sufficiently related to warrant special assignment or transfer. Ordered by Judge John L. Kane on 8/28/2023. Text Only Entry (jlksec) (Entered: 08/28/2023)

08/29/2023	29	MINUTE ORDER Pursuant to the reassignment of this matter to Judge Kane [See # 22], the scheduling conference and associated deadlines set at 18 Order are VACATED. SO ORDERED, by Magistrate Judge Scott T. Varholak on 8/29/2023. Text Only Entry (stvlc4,) (Entered: 08/29/2023)
09/13/2023	30	AMENDED COMPLAINT against Dawn Odean, Lisa Roy Attorney Eric Christopher Rassbach added to party Daniel Sheley(pty:pla), Attorney Eric Christopher Rassbach added to party Lisa Sheley(pty:pla), filed by St. Mary Catholic Parish in Littleton, Archdiocese of Denver, The, St. Bernadette Catholic Parish in Lakewood, Daniel Sheley, Lisa Sheley. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L)(Rassbach, Eric) (Entered: 09/13/2023)
09/13/2023	31	NOTICE of Filing Amended Pleading re 30 Amended Complaint,, by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton (Attachments: # 1 Exhibit A)(Rassbach, Eric) (Entered: 09/13/2023)
09/13/2023	32	MOTION for Preliminary Injunction by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18)(Rassbach, Eric) (Entered: 09/13/2023)
09/14/2023	33	MINUTE ORDER. The Court has reviewed the Amended Complaint and Plaintiffs' Motion for Preliminary Injunction. The parties' proposed briefing schedule for the Motion is acceptable to the Court, but additional case management matters must be discussed promptly. This case is set for a Status Conference at 10:30 a.m. on Thursday, September 21, 2023, before Judge John L. Kane in Courtroom A802 on the 8th Floor of the Alfred A. Arraj U.S. Courthouse, 901 19th Street, Denver, Colorado. Attorneys with decision-making authority must be present at the Status Conference and should be prepared to discuss the timing of the preliminary injunction hearing, any need for discovery, and the procedure to be followed for final resolution of the case. Ordered by Judge John L. Kane on 9/14/2023. Text Only Entry (jlksec) (Entered: 09/14/2023)
09/20/2023	34	NOTICE of Entry of Appearance of <i>Virginia R. Carreno</i> by Virginia R. Carreno on behalf of Dawn Odean, Lisa Roy Attorney Virginia R. Carreno added to party Dawn Odean(pty:dft), Attorney Virginia R. Carreno added to party Lisa Roy(pty:dft) (Carreno, Virginia) (Entered: 09/20/2023)
09/21/2023	35	MINUTE ENTRY for Status Conference proceedings held before Judge John L. Kane on 9/21/2023. Court Reporter: Kevin Carlin. (babia) (Entered: 09/21/2023)
09/21/2023	36	ORDER Re: Initial Discovery. A hearing is set for December 19, 20, and 21, 2023, beginning at 9:00 a.m. each day , at which I will hear either Plaintiffs' pending Motion for Preliminary Injunction or will conduct a bench trial on Plaintiffs' claims. The parties are DIRECTED to file, on or before November 16, a status report . ORDERED by Judge John L. Kane on 9/21/2023. (angar,) (Entered: 09/21/2023)
09/29/2023	37	TRANSCRIPT of Status Conference held on 09/21/2023 before Judge Kane. Pages: 1-25. NOTICE - REDACTION OF TRANSCRIPTS: Within seven calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal identifiers from the electronic transcript of the court proceeding. If a Notice of Intent to Redact is not filed within the allotted time, this transcript will be made electronically available after 90 days. Please see the Notice of Electronic Availability of Transcripts document at www.cod.uscourts.gov.

		Transcript may only be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber prior to the 90 day deadline for electronic posting on PACER. (kcarl,) (Entered: 09/29/2023)
10/06/2023	38	MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' Amended Complaint</i> by Defendants Dawn Odean, Lisa Roy. (Attachments: # 1 Exhibit Declaration of Dawn Odean, # 2 Exhibit Declaration of Jesse Burne, # 3 Exhibit Attachment 1 to Declaration of Jesse Burne, # 4 Exhibit Attachment 2 to Declaration of Jesse Burne, # 5 Exhibit Declaration of Elsa Holguin, # 6 Exhibit Attachment 1 to Declaration of Elsa Holguin, # 7 Exhibit Attachment 2 to Declaration of Elsa Holguin)(Sullivan, Grant) (Entered: 10/06/2023)
10/10/2023	39	MOTION to Stay <i>Discovery Pending a Ruling on the Motion to Dismiss</i> by Defendants Dawn Odean, Lisa Roy. (Attachments: # 1 Exhibit Plaintiffs' First Discovery Requests, # 2 Exhibit Declaration of Amanda Brubaker dated 10.10.23, # 3 Exhibit Declaration of Dawn Odean dated 10.10.23, # 4 Exhibit Declaration of Bonnie Smith dated 10.10.23) (Rust, Nicole) (Entered: 10/10/2023)
10/19/2023	40	NOTICE of Entry of Appearance by Amanda G. Dixon on behalf of All Plaintiffs Attorney Amanda G. Dixon added to party Archdiocese of Denver, The(pty:pla), Attorney Amanda G. Dixon added to party Daniel Sheley(pty:pla), Attorney Amanda G. Dixon added to party Lisa Sheley(pty:pla), Attorney Amanda G. Dixon added to party St. Bernadette Catholic Parish in Lakewood(pty:pla), Attorney Amanda G. Dixon added to party St. Mary Catholic Parish in Littleton(pty:pla) (Dixon, Amanda) (Entered: 10/19/2023)
10/20/2023	41	MINUTE ORDER. Plaintiffs are DIRECTED to file a Response to Defendants' Motion to Stay Discovery Pending a Ruling on the Motion to Dismiss 39 on or before October 23, 2023. Any Reply in Support of Plaintiffs' Motion shall be filed by noon on October 25, 2023. ORDERED by Judge John L. Kane on 10/20/2023. Text Only Entry (angar,) (Entered: 10/20/2023)
10/20/2023	42	BRIEF in Opposition to 38 MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' Amended Complaint</i> filed by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 10/20/2023)
10/23/2023	43	BRIEF in Opposition to 39 MOTION to Stay <i>Discovery Pending a Ruling on the Motion to Dismiss</i> filed by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10)(Rassbach, Eric) (Entered: 10/23/2023)
10/24/2023	44	NOTICE of Supplemental Authorities re: 42 Brief in Opposition to Motion, by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton (Attachments: # 1 Exhibit 1)(Rassbach, Eric) (Entered: 10/24/2023)
10/24/2023	45	REPLY to Response to 39 MOTION to Stay <i>Discovery Pending a Ruling on the Motion to Dismiss</i> filed by Defendants Dawn Odean, Lisa Roy. (Attachments: # 1 Exhibit 1 - Notices of Depositions, # 2 Exhibit 2 - Darren Patterson Christian Academy v. Roy 23CV01557 Scheduling Order)(Carreno, Virginia) (Entered: 10/24/2023)
10/27/2023	46	First MOTION for Protective Order by Defendants Dawn Odean, Lisa Roy. (Attachments: # 1 Proposed Order (PDF Only) Proposed Protective Order (also emailed to Chambers))(Lorch, Ryan) (Entered: 10/27/2023)

10/27/2023	47	REPLY to Response to 38 MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' Amended Complaint</i> filed by Defendants Dawn Odean, Lisa Roy. (Attachments: # 1 Exhibit 1 - Supplemental Declaration of Dawn Odean, # 2 Exhibit 2 - Supplemental Declaration of Jesse Burne)(Lorch, Ryan) (Entered: 10/27/2023)
10/30/2023	48	ORDER Denying Defendants' Motion to Stay Discovery (ECF Np. 39 and Motion for Protective Order (ECF 46), by Judge John L. Kane on 10/30/2023.(angar,) (Entered: 10/30/2023)
11/01/2023	49	MOTION for Leave to <i>File a Surreply in Opposition to Defendants' 38 MOTION to Dismiss for Lack of Jurisdiction Plaintiffs' Amended Complaint</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit Proposed Surreply, # 2 Exhibit Supplemental Declaration of Elias Moo, # 3 Exhibit Supplemental Declaration of Nicholas Reaves, # 4 Exhibit Defendants' answers to Plaintiffs' First Set of Interrogatories)(Rassbach, Eric) (Entered: 11/01/2023)
11/03/2023	50	ORDER granting 49 Plaintiffs' Motion for Leave to File a Surreply in Opposition to Defendants' Motion to Dismiss (ECF No. 38). Plaintiffs are directed to file the surreply and any exhibits as a new docket entry in CM/ECF on or before Tuesday, November 7, 2023. Ordered by Judge John L. Kane on 11/3/2023. Text Only Entry(jlksec) (Entered: 11/03/2023)
11/03/2023	51	SURREPLY re 38 MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' Amended Complaint</i> filed by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit Supplemental Declaration of Elias Moo, # 2 Exhibit Supplemental Declaration of Nicholas Reaves, # 3 Exhibit Defendants' Answers to Plaintiffs' First Set of Interrogatories)(Rassbach, Eric) (Entered: 11/03/2023)
11/06/2023	52	NOTICE of Entry of Appearance of <i>J. Gregory Whitehair</i> by James Gregory Whitehair on behalf of Dawn Odean, Lisa Roy Attorney James Gregory Whitehair added to party Dawn Odean(pty:dft), Attorney James Gregory Whitehair added to party Lisa Roy(pty:dft) (Whitehair, James) (Entered: 11/06/2023)
11/14/2023	53	RESPONSE to 44 Notice of Supplemental Authorities, by Defendants Dawn Odean, Lisa Roy. (Attachments: # 1 Exhibit Plaintiffs' Answers to Interrogatories, # 2 Exhibit Reuters Article)(Rust, Nicole) (Entered: 11/14/2023)
11/15/2023	54	MOTION to Withdraw as Attorney by <i>Ryan Lorch</i> by Defendants Dawn Odean, Lisa Roy. (Lorch, Ryan) (Entered: 11/15/2023)
11/16/2023	55	MINUTE ORDER granting 54 Motion to Withdraw as Counsel. Attorney Ryan K. Lorch is withdrawn and his NEFs terminated. The parties are advised that future Motions to Withdraw as Counsel need to state the reason for the withdrawal. Defendants continue to be represented by Attorneys Virginia Carreno, Niki Rust, Grant Sullivan, and J. Gregory Whitehair, by Judge John L. Kane on 11/16/2023. Text Only Entry(angar,) (Entered: 11/16/2023)
11/16/2023	56	STRICKEN Joint STATUS REPORT by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit Declaration of Elias Moo, # 2 Exhibit Odean Deposition Transcript, # 3 Exhibit Roy Deposition Transcript)(Rassbach, Eric) Modified on 11/21/2023 to show as stricken pursuant to 59 Order (angar,). (Entered: 11/16/2023)
11/16/2023	57	NOTICE of <i>Withdrawal of Defendants' Electronic Signature on Joint Status Report</i> by Defendants Dawn Odean, Lisa Roy (Attachments: # 1 Exhibit Exhibit 1 Joint Status

		Report Draft)(Rust, Nicole) (Entered: 11/16/2023)
11/16/2023	58	RESPONSE to 57 Notice (Other) by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 11/16/2023)
11/21/2023	59	MINUTE ORDER. The Court has reviewed the parties' Joint Status Report 56 , the Notice of Withdrawal of Defendants' Electronic Signature on the Joint Status Report 57 , and Plaintiffs' Response to that Notice 58 . The purpose of filing the Status Report <i>jointly</i> was for the parties to fully confer on each matter and to advise the Court of their agreements and remaining disputes. When a party's positions and arguments are not disclosed to another party in their entirety, the conferral and joint filing are inadequate and pointless. As a result, the Joint Status Report 56 is STRICKEN. The parties are directed to fully confer, keeping in mind their duties under Federal Rule of Civil Procedure 1, and to jointly file a Status Report addressing the previously specified topics on or before November 27, 2023. Ordered by Judge John L. Kane on 11/21/2023. Text Only Entry (jlksec) (Entered: 11/21/2023)
11/21/2023	60	LETTER by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 11/21/2023)
11/21/2023	61	MOTION for Summary Judgment <i>or, in the Alternative, for a Preliminary Injunction</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16)(Rassbach, Eric) (Entered: 11/21/2023)
11/27/2023	62	Joint STATUS REPORT by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit Supplemental Declaration of Elias Moo)(Rassbach, Eric) (Entered: 11/27/2023)
11/28/2023	63	NOTICE of Entry of Appearance <i>for Janna K. Fischer</i> by Janna K. Fischer on behalf of Dawn Odean, Lisa Roy Attorney Janna K. Fischer added to party Dawn Odean(pty:dft), Attorney Janna K. Fischer added to party Lisa Roy(pty:dft) (Fischer, Janna) (Entered: 11/28/2023)
11/30/2023	64	MOTION to Withdraw as Attorney <i>by Grant Sullivan</i> by Defendants Dawn Odean, Lisa Roy. (Sullivan, Grant) (Entered: 11/30/2023)
11/30/2023	65	ORDER on the Parties' Joint Status Report (ECF NO. 62). The parties will complete fact discovery this week, expert discovery will be permitted as stated above, and a bench trial on the final merits will be held on January 2, 3, and 4, 2024, beginning at 9:30 a.m. each day. The previously scheduled setting for December 19, 20 and 21, 2023, is VACATED, and Plaintiffs' initial Motion for Preliminary Injunction (ECF No. 32) is DENIED AS MOOT. ORDERED by Judge John L. Kane on 11/30/2023.(angar,) (Entered: 11/30/2023)
12/01/2023	66	MINUTE ORDER granting 64 Motion to Withdraw as Counsel. Attorney Grant T. Sullivan is withdrawn and his NEFs terminated. Ordered by Judge John L. Kane on 11/30/2023. Text Only Entry(angar,) (Entered: 12/01/2023)
12/04/2023	67	MOTION for Extension of Time to <i>Provide Expert Reports of Dr. Amy Tishelman and Dr. Abbie Goldberg, and Non-Retained Expert Disclosure</i> by Defendants Dawn Odean, Lisa

		Roy. (Attachments: # 1 Proposed Order (PDF Only) Proposed Order Granting Motion for Extension of Time to Provide Expert Reports...)(Rust, Nicole) (Entered: 12/04/2023)
12/05/2023	68	ORDER granting 67 Unopposed Motion for Extension of Time to Provide Expert Reports of Dr. Amy Tishelman and Dr. Abbie Goldberg and Non-retained Expert Disclosures. Defendants' expert reports of Dr. Amy Tishelman and Dr. Abbie Goldberg and non-retained expert disclosures are due on or before December 8, 2023. Plaintiffs' deadline for any objection to Defendants' expert disclosures is extended to December 14, 2023. Ordered by Judge John L. Kane on 12/5/2023. Text Only Entry(jlksec) (Entered: 12/05/2023)
12/06/2023	69	NOTICE of Entry of Appearance by Jordan T. Varberg on behalf of All Plaintiffs Attorney Jordan T. Varberg added to party Archdiocese of Denver, The(pty:pla), Attorney Jordan T. Varberg added to party Daniel Sheley(pty:pla), Attorney Jordan T. Varberg added to party Lisa Sheley(pty:pla), Attorney Jordan T. Varberg added to party St. Bernadette Catholic Parish in Lakewood(pty:pla), Attorney Jordan T. Varberg added to party St. Mary Catholic Parish in Littleton(pty:pla) (Varberg, Jordan) (Entered: 12/06/2023)
12/07/2023	70	NOTICE of Entry of Appearance by Andrew Martin Nussbaum on behalf of The Jewish Coalition for Religious Liberty, et al. Attorney Andrew Martin Nussbaum added to party The Jewish Coalition for Religious Liberty, et al. (pty:am) (Nussbaum, Andrew) (Entered: 12/07/2023)
12/07/2023	71	MOTION to File Amicus Brief by Amicus The Jewish Coalition for Religious Liberty, et al.. (Attachments: # 1 Brief of Amici Curiae)(Nussbaum, Andrew) (Entered: 12/07/2023)
12/08/2023	72	BRIEF in Support of 38 MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' Amended Complaint</i> filed by Defendants Dawn Odean, Lisa Roy. (Attachments: # 1 Exhibit Elias Moo Deposition Transcript Excerpts, # 2 Exhibit Tracy Seul Deposition Rough Transcript Excerpts, # 3 Exhibit Avery Coats Deposition Rough Transcript Excerpts, # 4 Exhibit Plaintiffs' Supplemental Answers to Defendants' First Set of Interrogatories, # 5 Exhibit CCCAP Provider Information Letter, # 6 Exhibit DPP 22-23 Provider Renewal Agreement Excerpts, # 7 Exhibit Lisa Sheley Deposition Rough Transcript Excerpts, # 8 Exhibit UPK Draft Rules)(Carreno, Virginia) (Entered: 12/08/2023)
12/14/2023	73	MOTION to Exclude <i>Expert Testimony</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Proposed Order (PDF Only) Proposed Order Granting Plaintiffs' Motion to Exclude Defendants' Expert Witness Testimony (also emailed to Chambers))(Rassbach, Eric) (Entered: 12/14/2023)
12/15/2023	74	MOTION for Leave to Appear <i>Remotely - Defendants' Unopposed Motion to Permit Remote Witness Testimony at Bench Trial January 2-4, 2024</i> by Defendants Dawn Odean, Lisa Roy. (Rust, Nicole) (Entered: 12/15/2023)
12/15/2023	75	RESPONSE to 38 MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' Amended Complaint (Supplemental)</i> filed by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4) (Rassbach, Eric) (Entered: 12/15/2023)
12/18/2023	76	ORDER granting 74 Defendants' Unopposed Motion to Permit Remote Witness Testimony at Bench Trial January 2-4, 2024. Dr. Goldberg will be allowed to testify via remote means. Counsel are directed to contact my Courtroom Deputy via email (Bernique_Abiakam@cod.uscourts.gov) for instructions on how to proceed with the VTC and to test the equipment prior to the trial. The attached instructions as well as tips should

		be reviewed prior to the hearing. Ordered by Judge John L. Kane on 12/18/2023. Text Only Entry (Attachments: # 1 Tips for Remote Log In)(jlksec) (Entered: 12/18/2023)
12/18/2023	77	RESPONSE to 61 MOTION for Summary Judgment <i>or, in the Alternative, for a Preliminary Injunction</i> DEFENDANTS RULE 56(d) MOTION TO DENY PLAINTIFFS MOTION FOR SUMMARY JUDGMENT TO ALLOW DEFENDANTS TO CONDUCT NECESSARY DISCOVERY AND DEFENDANTS RESPONSE TO PLAINTIFFS ALTERNATIVE MOTION FOR A PRELIMINARY INJUNCTION, WITH TRIAL BRIEF filed by Defendants Dawn Odean, Lisa Roy. (Attachments: # 1 Exhibit 1 - Declaration of Virginia Carreno, # 2 Exhibit A - to Virginia Carreno Declaration, # 3 Exhibit B - to Virginia Carreno Declaration, # 4 Exhibit C - to Virginia Carreno Declaration, # 5 Exhibit 2 - Moo Deposition Transcript, # 6 Exhibit 3 - Response to Statement of Undisputed Facts, # 7 Exhibit 4 - Draft Rules, # 8 Exhibit 5 - Odean Deposition Transcript, # 9 Exhibit 6 - Masten Article, # 10 Exhibit 7 - Shonkoff Article, # 11 Exhibit 8 - Thoma Article 2021, # 12 Exhibit 9 - Thoma Article 2019, # 13 Exhibit 10 - Joyce Article, # 14 Exhibit 11 - Cox Article, # 15 Exhibit 12 - Sutherland Article, # 16 Exhibit 13 - Goldberg Article, # 17 Exhibit 14 - Goldberg Preschool Article, # 18 Exhibit 15 - Goldberg Smith Article, # 19 Exhibit 16 - Coats Deposition Transcript, # 20 Exhibit 17 - Seul Deposition Transcript, # 21 Exhibit 18 - Sheley Deposition Transcript, # 22 Exhibit 19 - CCCAP Agreement, # 23 Exhibit 20 - DPP Agreement, # 24 Exhibit 21 - Wilkinson Article, # 25 Exhibit 22 - Daly Article, # 26 Exhibit 23 - Jenkins Article, # 27 Exhibit 24 - Tishelman Article, # 28 Appendix A - Trial Brief)(Fischer, Janna) (Entered: 12/18/2023)
12/22/2023	78	Unopposed MOTION for Leave to Appear <i>Remotely - Plaintiffs' Unopposed Motion to Permit Remote Witness Testimony at Bench Trial January 2-4, 2024</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 12/22/2023)
12/22/2023	79	Exhibit List <i>Unified Exhibit List for All Parties</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 12/22/2023)
12/22/2023	80	Witness List by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 12/22/2023)
12/22/2023	81	Witness List by Defendants Dawn Odean, Lisa Roy. (Rust, Nicole) (Entered: 12/22/2023)
12/26/2023	82	ORDER granting 78 Plaintiffs' Unopposed Motion to Permit Remote Witness Testimony at Bench Trial January 2-4, 2024. Ms. Avery Coats will be allowed to testify via remote means. Counsel are directed to contact my Courtroom Deputy via email (Bernique_Abiakam@cod.uscourts.gov) for instructions on how to proceed with the VTC and to test the equipment prior to the trial. Please review the instructions as well as tips docketed with Order 76 prior to the hearing. Ordered by Judge John L. Kane on 12/26/2023. Text Only Entry(jlksec) (Entered: 12/26/2023)
12/27/2023	83	RESPONSE to 73 MOTION to Exclude <i>Expert Testimony</i> filed by Defendants Dawn Odean, Lisa Roy. (Whitehair, James) (Entered: 12/27/2023)
12/28/2023	84	NOTICE of Entry of Appearance of <i>Helen L. Norton</i> by Helen L. Norton on behalf of Dawn Odean, Lisa Roy Attorney Helen L. Norton added to party Dawn Odean(pty:dft), Attorney Helen L. Norton added to party Lisa Roy(pty:dft) (Norton, Helen) (Entered: 12/28/2023)
12/28/2023	85	DESIGNATION OF DEPOSITION TESTIMONY of <i>Dawn Odean</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 12/28/2023)

12/28/2023	86	DESIGNATION OF DEPOSITION TESTIMONY of <i>Lisa Roy</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 12/28/2023)
12/28/2023	87	DESIGNATION OF DEPOSITION TESTIMONY of <i>Avery Coats</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 12/28/2023)
12/28/2023	88	OBJECTIONS to <i>Defendants' Designations of Deposition Testimony</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 12/28/2023)
12/28/2023	89	DESIGNATION OF DEPOSITION TESTIMONY of <i>Lisa Sheley</i> by Defendants Dawn Odean, Lisa Roy. (Whitehair, James) (Entered: 12/28/2023)
12/28/2023	90	DESIGNATION OF DEPOSITION TESTIMONY of <i>Elias Moo</i> by Defendants Dawn Odean, Lisa Roy. (Whitehair, James) (Entered: 12/28/2023)
12/28/2023	91	DESIGNATION OF DEPOSITION TESTIMONY of <i>Tracy Seul</i> by Defendants Dawn Odean, Lisa Roy. (Whitehair, James) (Entered: 12/28/2023)
12/28/2023	92	DESIGNATION OF DEPOSITION TESTIMONY of <i>Avery Coats</i> by Defendants Dawn Odean, Lisa Roy. (Whitehair, James) (Entered: 12/28/2023)
12/28/2023	93	OBJECTIONS to <i>Plaintiffs' Designated Deposition Testimony</i> by Defendants Dawn Odean, Lisa Roy. (Whitehair, James) (Entered: 12/28/2023)
12/29/2023	94	REPLY to Response to 61 MOTION for Summary Judgment <i>or, in the Alternative, for a Preliminary Injunction</i> filed by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Rassbach, Eric) (Entered: 12/29/2023)
12/30/2023	95	ORDER ON DEFENDANTS' MOTION TO DISMISS (ECF NO. 38), PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF NO. 61), AND PLAINTIFFS' MOTION TO EXCLUDE DEFENDANTS' EXPERT WITNESS TESTIMONY (ECF NO. 73). Granting in part 38 Motion to Dismiss for Lack of Jurisdiction - The Archdiocese of Denver is DISMISSED as a party to this case; Denying 61 Motion for Summary Judgment; Denying Defendants' corresponding request pursuant to Federal Rule of Civil Procedure 56(d); Denying 73 Motion to Exclude, by Judge John L. Kane on 12/30/2023. (babia) (Entered: 12/30/2023)
01/02/2024	96	MINUTE ENTRY for Bench Trial - Day 1 proceedings held before Judge John L. Kane held on 1/2/2024. Court Reporter: Kevin Carlin. (babia) (Entered: 01/02/2024)
01/02/2024	97	AMENDED MINUTE ENTRY for Bench Trial - Day 1 proceedings held before Judge John L. Kane. Amended re 96 . Court Reporter: Kevin Carlin. (babia) (Entered: 01/03/2024)
01/03/2024	98	MINUTE ORDER re: Amendment to Docket # 95 . By Judge John L. Kane on 1/3/2024. (norlin,) (Entered: 01/03/2024)
01/03/2024	99	AMENDED ORDER ON DEFENDANTS' MOTION TO DISMISS (ECF NO. 38), PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF NO. 61),AND PLAINTIFFS' MOTION TO EXCLUDE DEFENDANTS'EXPERT WITNESS TESTIMONY (ECF NO. 73) by Judge John L. Kane on 1/3/2024. (norlin,) (Entered: 01/03/2024)

01/03/2024	100	MINUTE ENTRY for Bench Trial - Day 2 proceedings held before Judge John L. Kane on 1/3/2024. Court Reporter: Kevin Carlin. (babia) (Entered: 01/03/2024)
01/04/2024	101	MINUTE ENTRY for Bench Trial - Day 3 proceedings held before Judge John L. Kane completed on 1/4/2024. ORDERED: Counsel shall submit proposed findings of fact and conclusion of law by January 26, 2024. Court Reporter: Kevin Carlin. (babia) Modified on 1/4/2024 to add docket text (babia). (Entered: 01/04/2024)
01/04/2024	102	STIPULATION AND ORDER GOVERNING THE CUSTODY AND DISPOSITION OF TRIAL EXHIBITS, DEPOSITIONS, TRANSCRIPTS, AND PAPERS by Judge John L. Kane on 1/4/2024. (babia) (Entered: 01/04/2024)
01/08/2024	103	TRANSCRIPT of Bench Trial held on 01/02/2024 before Judge Kane. Pages: 1-180. NOTICE - REDACTION OF TRANSCRIPTS: Within seven calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal identifiers from the electronic transcript of the court proceeding. If a Notice of Intent to Redact is not filed within the allotted time, this transcript will be made electronically available after 90 days. Please see the Notice of Electronic Availability of Transcripts document at www.cod.uscourts.gov. Transcript may only be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber prior to the 90 day deadline for electronic posting on PACER. (kcarl,) (Entered: 01/08/2024)
01/09/2024	104	TRANSCRIPT of Bench Trial held on 01/03/2024 before Judge Kane. Pages: 181-372. NOTICE - REDACTION OF TRANSCRIPTS: Within seven calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal identifiers from the electronic transcript of the court proceeding. If a Notice of Intent to Redact is not filed within the allotted time, this transcript will be made electronically available after 90 days. Please see the Notice of Electronic Availability of Transcripts document at www.cod.uscourts.gov. Transcript may only be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber prior to the 90 day deadline for electronic posting on PACER. (kcarl,) (Entered: 01/09/2024)
01/09/2024	105	ORDER granting 71 Motion for Leave to File Amicus Brief on Behalf of Amici Curiae, The Jewish Coalition for Religious Liberty, The Rocky Mountain District Lutheran Church Missouri Synod, and The Colorado Association of Private Schools. The document is accepted as filed. Ordered by Judge John L. Kane on 1/9/2024. Text Only Entry(jlksec) (Entered: 01/09/2024)
01/09/2024	106	TRANSCRIPT of Bench Trial held on 01/04/2023 before Judge Kane. Pages: 373-489. NOTICE - REDACTION OF TRANSCRIPTS: Within seven calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal identifiers from the electronic transcript of the court proceeding. If a Notice of Intent to Redact is not filed within the allotted time, this transcript will be made electronically available after 90 days. Please see the Notice of Electronic Availability of Transcripts document at www.cod.uscourts.gov. Transcript may only be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber prior to the 90 day deadline for electronic posting on PACER. (kcarl,) (Entered: 01/09/2024)
01/16/2024	107	<i>Defendants'</i> ANSWER to 30 Amended Complaint,, by Dawn Odean, Lisa Roy.(Rust, Nicole) (Entered: 01/16/2024)
01/26/2024	108	Proposed Findings of Fact <i>and Conclusions of Law</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 01/26/2024)

01/26/2024	<u>109</u>	Proposed Findings of Fact <i>and Conclusions of Law</i> by Defendants Dawn Odean, Lisa Roy. (Carreno, Virginia) (Entered: 01/26/2024)
03/01/2024	<u>110</u>	NOTICE <i>Regarding Post-Trial Developments</i> by Defendants Dawn Odean, Lisa Roy (Carreno, Virginia) (Entered: 03/01/2024)
03/01/2024	111	MINUTE ORDER. If Plaintiffs wish to respond to Defendants' Notice Regarding Post-Trial Development <u>110</u> , they may do so before March 8, 2024. Ordered by Judge John L. Kane on 3/1/2024. Text Only Entry (jlksec) (Entered: 03/01/2024)
03/07/2024	<u>112</u>	RESPONSE to <u>110</u> Notice (Other) by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Rassbach, Eric) (Entered: 03/07/2024)
04/22/2024	<u>113</u>	NOTICE re <u>110</u> Notice (Other) by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton (Rassbach, Eric) (Entered: 04/22/2024)
05/13/2024	<u>114</u>	NOTICE of Supplemental Authorities by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton (Attachments: # <u>1</u> Exhibit 1)(Rassbach, Eric) (Entered: 05/13/2024)
05/20/2024	<u>115</u>	RESPONSE to <u>114</u> Notice of Supplemental Authorities by Defendants Dawn Odean, Lisa Roy. (Carreno, Virginia) (Entered: 05/20/2024)
06/04/2024	<u>116</u>	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF JUDGMENT by Judge John L. Kane on 6/4/2024. It is ORDERED that Plaintiffs' Claims Two and Three and the part of Claims One, Four, and Six that rely on the application of Paragraph 18(B) are DISMISSED AS MOOT. It is ORDERED that Judgment SHALL ENTER in favor of Plaintiffs and against Defendants on Plaintiffs' fifth claim with respect to only the religious-affiliation aspect of the equal-opportunity requirement. On all other issues and claims brought in this case, Judgment SHALL ENTER in favor of Defendants and against Plaintiffs. (babia) (Entered: 06/04/2024)
06/05/2024	<u>117</u>	FINAL JUDGMENT in favor of St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton, Daniel Sheley, Lisa Sheley against Dawn Odean, Lisa Roy on Plaintiffs fifth claim with respect to only the religious-affiliation aspect of the equal-opportunity requirement. Civil Case Terminated by Clerk on 6/5/2024. (babia) (Entered: 06/05/2024)
06/07/2024	<u>118</u>	Unopposed MOTION for Extension of Time to <i>File for Fees and Costs</i> by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton. (Attachments: # <u>1</u> Proposed Order (PDF Only))(Rassbach, Eric) (Entered: 06/07/2024)
06/10/2024	119	MINUTE ORDER granting <u>118</u> Plaintiffs' Unopposed Motion for Extension of Time to File for Fees and Costs. Any petition for attorney fees or submission of a proposed bill of costs by Plaintiffs shall be filed on or before August 5, 2024, if no appeal is filed in this case, or within 30 days after the final resolution of all appeals in this case. In addition to the requirements set out in D.C.COLO.LCivR 54.3, an affidavit from a neutral attorney expert should accompany any request for fees, by Judge John L. Kane on 6/10/2024. Text Only Entry(angar,) (Entered: 06/10/2024)
06/21/2024	<u>120</u>	NOTICE OF APPEAL as to <u>117</u> Judgment,, Teminated Case, by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton (Filing fee \$ 605, Receipt Number ACODC-9743133) (Rassbach, Eric) (Entered: 06/21/2024)

06/24/2024	121	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 120 Notice of Appeal, filed by Lisa Sheley, St. Mary Catholic Parish in Littleton, Archdiocese of Denver, The, St. Bernadette Catholic Parish in Lakewood, Daniel Sheley to the U.S. Court of Appeals. (Retained Counsel, Fee paid,) (Attachments: # 1 Preliminary Record and Docket Sheet)(angar,) (Entered: 06/24/2024)
06/24/2024	124	USCA Case Number 24-1267 for 120 Notice of Appeal, filed by Lisa Sheley, St. Mary Catholic Parish in Littleton, Archdiocese of Denver, The, St. Bernadette Catholic Parish in Lakewood, Daniel Sheley. (angar,) (Entered: 07/05/2024)
06/28/2024	122	TRANSCRIPT ORDER FORM re 120 Notice of Appeal, by Plaintiffs Archdiocese of Denver, The, Daniel Sheley, Lisa Sheley, St. Bernadette Catholic Parish in Lakewood, St. Mary Catholic Parish in Littleton (Reaves, Nicholas) (Entered: 06/28/2024)
07/05/2024	123	LETTER TO USCA and all counsel certifying the record is complete as to 120 Notice of Appeal, filed by Lisa Sheley, St. Mary Catholic Parish in Littleton, Archdiocese of Denver, The, St. Bernadette Catholic Parish in Lakewood, Daniel Sheley. A transcript order form was filed stating that the necessary transcript is already on file. (Appeal No. 24-1267) Text Only Entry (angar,) (Entered: 07/05/2024)

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Billable Pages:	17	Cost:	1.70

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-2079

**FIRST AMENDED
COMPLAINT**

**DEMAND FOR
JURY TRIAL**

NATURE OF THE ACTION

1. St. Mary Catholic Parish in Littleton ("St. Mary's"), St. Bernadette Catholic Parish in Lakewood ("St. Bernadette's"), and the Archdiocese of Denver faithfully serve the educational mission of the Catholic Church by operating preschool programs to assist parents in the religious and educational upbringing of their children.

2. Parents who send their children to these preschools come from diverse backgrounds and varied economic circumstances, but all share the desire to have their children educated in a vibrant Catholic community.

3. These parents include Plaintiffs Daniel and Lisa Sheley, who currently have a four-year-old at St. Mary's preschool.

4. When Colorado announced it was creating a program to fund "universal" preschool education for prekindergarteners, St. Mary's preschool planned to participate.

5. To that end, St. Mary's preschool director reached out to the State seeking information about the program, contacted the preschool's local coordinating organization, and set up an online profile for the preschool.

6. Other Archdiocesan preschools, including St. Bernadette's, took similar steps.

7. Upon learning more about Colorado's UPK program, however, Plaintiffs discovered that the newly created Department of Early Childhood ("Department") had imposed requirements on participation in the UPK program that would categorically exclude all Archdiocese of Denver Catholic preschools because of the Catholic Church's sincere and long-held religious beliefs.

8. Specifically, the Department is purporting to require all preschool providers to accept any applicant without regard to a student or family's religion, sexual orientation, or gender identity, and to prohibit schools from "discriminat[ing] against any person" on the same bases.

9. These requirements directly conflict with St. Mary's, St. Bernadette's, and the Archdiocese's religious beliefs and their religious obligations as entities that carry out the Catholic Church's mission of Catholic education in northern Colorado.

10. In accordance with their Catholic beliefs, St. Mary's, St. Bernadette's, and the Archdiocese give priority to Catholic families seeking to ensure their children receive a Catholic education, thus prioritizing in admission not only Catholic families from their own parish congregation, but also Catholic families active in other local parishes and Catholic families who recently moved to the Denver area.

11. Following this religious belief would violate the Department's ban on religious "discrimination," though Plaintiffs do not believe adhering to these beliefs constitutes discrimination.

12. St. Mary's and St. Bernadette's—in accordance with the Archdiocese's guidance—also must ensure that those who teach in and administer their preschool programs uphold Catholic moral teachings in both word and deed.

13. In order to accomplish this goal, St. Mary's and St. Bernadette's each require their preschool staff to sign Archdiocese-approved employment contracts on an annual basis affirming their willingness to abide by and uphold Catholic teachings on (among other issues): life, marriage, and human sexuality.

14. Abiding by Catholic teaching on these issues would violate the Department's ban on sexual-orientation and gender-identity "discrimination," though Plaintiffs do not believe adhering to these beliefs constitutes discrimination.

15. As Catholic parishes seeking to foster vibrant Catholic communities, St. Mary's and St. Bernadette's also require parents who send children to their preschool to understand and accept "the community's worldview and convictions" regarding Catholic moral issues like life, marriage, and human sexuality.

16. This is in accordance with the Archdiocese's teaching that Catholic schools must take into consideration whether a family's actions and beliefs could create "intractable conflicts" for Catholic schools' ability to form children in, live out, and consistently witness to what they believe is true based on the Catholic faith.

17. Indeed, the Archdiocese instructs all Catholic schools, including St. Mary's and St. Bernadette's, to consider whether a family or child seeking placement in their schools has identified as LGBTQ, is in a same-sex relationship, or has adopted a gender identity different from his or her biological sex.

18. Yet taking sexual orientation and gender identity into account in this way would violate the Department's ban on sexual-orientation and gender-identity "discrimination."

19. For all the above reasons, neither St. Mary's, St. Bernadette's, nor any other preschool within the Archdiocese of Denver is able to sign the Department's mandatory UPK Program Service Agreement.

20. The Archdiocese's preschools were part of a coalition of religious preschool providers that asked the State to recognize religious exemptions and alerted the Department to the problems its implementation of the UPK program had created for religious schools.

21. The Department, however, made clear it would not grant Plaintiffs a religious accommodation that would allow them to participate in the UPK program.

22. For Plaintiffs Daniel and Lisa Sheley, this means that by choosing to send their children to St. Mary's preschool, they are losing out on 15 hours per week of state-funded preschool services that they could receive at a secular private preschool.

23. The Archdiocese's 36 preschools provide high quality, Catholic educational environments for over 1,500 preschoolers each year.

24. Many families who send their children to Archdiocesan schools are of limited means. Twenty percent of the families who send their children to Archdiocesan schools qualify for Colorado's free and reduced-price school meals program.

25. By creating a program that provides "universal" funding for preschool programs, Colorado has cornered the market for preschool services.

26. Any providers who do not participate in the UPK program will be severely disadvantaged since they will be forced to charge significantly higher prices than the participating programs—both secular and religious—which aren't religiously barred from participating in the UPK program.

27. This is especially true when it comes to serving the twenty percent of families who send their kids to Archdiocesan schools and who receive free or reduced-price lunches.

28. At St. Mary's, for example, several families with children who would be enrolling as four-year-olds for preschool either pulled out of the preschool or did not enroll because of the UPK program's offer of free preschool services at other non-Catholic providers.

29. At St. Bernadette's, where 85% of children are on free or reduced lunch plans based on family income, the school's inability to participate in the UPK program has made affording preschool a challenge for current parents and, on information and belief, has deterred prospective parents from applying.

30. Colorado did not have to create a universal preschool funding program, but in doing so it cannot implement that program in a way that excludes certain religious groups and providers based on their sincerely held religious beliefs.

THE PARTIES

31. Plaintiff St. Mary Catholic Parish in Littleton ("St. Mary's") is a Colorado corporation sole. St. Mary Catholic Preschool is a ministry of St. Mary's.

32. Plaintiff St. Bernadette Catholic Parish in Lakewood ("St. Bernadette's") is a Colorado corporation sole. Wellspring Catholic Academy of St. Bernadette is a ministry of St. Bernadette's.

33. Plaintiffs Daniel and Lisa Sheley are parishioners at St. Mary Catholic Parish in Littleton and send their four-year-old to St. Mary's preschool. Plaintiffs also have a two-year-old and (almost) one-year-old who will attend St. Mary's preschool.

34. Plaintiff The Archdiocese of Denver is a Colorado corporation sole. The Archbishop of Denver is the person vested with title pursuant to Colo. Rev. Stat. § 7-52-

101. The Archbishop of Denver is responsible under Catholic canon law for the oversight and ultimate control over all Catholic parishes within the Archdiocese, including those parishes' preschool ministries.

35. Defendant Dr. Lisa Roy is the Executive Director of the Colorado Department of Early Childhood. Defendant Roy is authorized to implement and promulgate rules to execute Title 26.5 of Colorado's Revised Statutes, including the UPK program. Colo. Rev. Stat. § 26.5-1-105. She is sued in her official capacity only.

36. Defendant Dawn Odean is the Department's Universal Preschool Program Director and responsible for implementing and coordinating the UPK program. She is sued in her official capacity only.

37. Defendants Roy and Odean administer Colorado's UPK program.

JURISDICTION AND VENUE

38. This action raises federal questions under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

39. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

40. The Court has authority to issue the declaratory and injunctive relief sought under 28 U.S.C. §§ 2201 and 2202.

41. This Court can award costs and attorneys' fees under 42 U.S.C. § 1988(b).

42. Venue lies in this district under 28 U.S.C. § 1391(b)(1) because all Defendants reside in the District of Colorado.

43. Venue also lies in this district under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims in this lawsuit occurred in the District of Colorado.

FACTUAL ALLEGATIONS

St. Mary Catholic Parish

44. Plaintiff St. Mary Catholic Parish in Littleton is a Colorado corporation sole in the Roman Catholic Archdiocese of Denver and subject to the authority of the Archbishop of Denver. St. Mary's was founded in 1951 in Littleton, Colorado and is dedicated to the Blessed Virgin Mary. St. Mary's has operated a preschool program as a ministry of the Parish since 2006.

45. St. Mary's operates one of the largest Catholic schools in the Archdiocese of Denver, serving approximately 470 students.

46. Twenty five percent of the families who attend St. Mary's preschool receive discounts or scholarships.

47. St. Mary's preschool is also an inclusive preschool, meaning that it is able to provide preschool services to a limited number of students with disabilities, including students with Down syndrome or autism.

48. The UPK program—by not allowing St. Mary's to individually interview families before enrollment—prevents St. Mary's from assessing the needs of individual families who seek to send their children with disabilities to St. Mary's preschool and determine on a case-by-case basis whether the school has the resources available to meet those needs.

49. This uncertainty has made it harder for St. Mary's to provide services to children with disabilities.

50. St. Mary's preschool is an integral component of St. Mary's religious education ministry. Eighty percent of children who attend St. Mary's preschool continue on to kindergarten at St. Mary's.

51. For many families, choosing a preschool is not about choosing where one child will attend school: five families at St. Mary's have two students in preschool currently and forty-one families have other children also enrolled at St. Mary's school.

52. Twenty percent of families who have children in St. Mary's preschool have four or more children. Without universal preschool funding, many of these families will be unable to send their younger children to St. Mary's preschool.

53. For the 2022-23 school year, St. Mary's preschool enrolled 64 four-year-old children; this year, they have only 52.

54. Numerous families have inquired about St. Mary's participation in the UPK program and told St. Mary's that they are not enrolling their child at the preschool because the school is not participating in the UPK program.

55. Upon information and belief, there are numerous other families who have made the same decision but have not informed St. Mary's.

56. By losing out on universal preschool funding, St. Mary's is unable to compete with schools that participate in the program because they lack the financial resources to attract and retain teachers for their program.

57. St. Mary's preschool curriculum follows the standards and objectives set by both the Archdiocese of Denver and Colorado Department of Education, and uses the "Catechesis of the Good Shepherd curriculum to guide our teaching of the Catholic faith," which is "steeped in the Holy Scripture together with tradition."¹

58. "Focused on Students and Centered in Christ," St. Mary's "strives to produce engaged Catholics, lifelong learners, responsible community members and effective

¹ *Academic Excellence Preschool*, St. Mary Catholic School, <https://perma.cc/3PDJ-EXU5>.

communicators.”² Its mission is to “educate the heart, mind, body, and soul of the student and to develop the potential in each, giving glory to God.”³

59. At St. Mary’s, students develop “a *sacramental vision* to perceive God in all” and a “*moral imagination* to see themselves as the saints, heroes and geniuses they are called to be.”⁴

60. St. Mary’s preschool gives priority to applicants in the following order: (1) siblings of current students, (2) parishioners of St. Mary’s, (3) members of other Catholic parishes within the Archdiocese of Denver, (4) Catholics transferring into the Denver metro area whose children attend or previously attended Catholic schools within the last calendar year, and (5) Catholics unaffiliated with a parish or non-Catholics.

61. St. Mary’s requires all administrators, teachers, and staff to agree to a Statement of Community Beliefs when signing annual contracts for at-will employment. *See* Ex. A. The Statement explains that “it is important for all members of our community to . . . be committed to our community’s worldview and beliefs.” *Id.* at 1.

62. The Statement further explains that all “Catholic School employees must be men and women who are ‘outstanding in correct doctrine and integrity of life,’ and who desire to grow in their love for Jesus Christ and his Church, joyfully giving witness to the truth of the Gospel.” Ex. A at 6.

63. Even non-Catholic employees “must understand [that] the moral and ethical standards are for all employees and must respect our Catholic worldview, giving a joyful model of good character and maturity, and carrying out their duties in support

² *Welcome*, St. Mary Catholic School, <https://perma.cc/B4MR-SJXU>.

³ *Why St. Mary?*, St. Mary Catholic School, <https://perma.cc/S8HZ-WGLZ>.

⁴ *Welcome*, St Mary Catholic School.

of the school's Catholic mission. They 'have the obligation to recognize and respect the Catholic character of the school from the moment of their employment.'" *Id.*

64. For teachers in particular, the Statement further explains that they must create and protect, among other things, "[a]n environment that addresses issues of race, gender, poverty, and inequality in a manner that is consistent with Church teaching and avoids the influence of secular, critical philosophies and theories that contradict Church teaching." *Id.* at 4.

65. All teachers must also be committed to the Church's worldview regarding "Catholic teachings on sexual identity, marriage, family, and parenting," as well as "the sanctity of life from the moment of conception to natural death, and the givenness of our sexuality, in all its aspects as male and female created in God's image and likeness[.]" *Id.* at 3.

66. Those teachers must therefore "must refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the Parish, the School, and the Church in the Archdiocese of Denver, or be considered in contradiction with Catholic doctrine or morals." *Id.* at 4.

67. St. Mary's and St. Bernadette's are subject to the authority of the Archdiocese of Denver. Their policies and activities must therefore follow the Archdiocese's teachings on all matters of faith.

68. The Archdiocese of Denver has promulgated "Guidance for Issues Concerning the Human Person and Sexual Identity" ("Guidance"). Ex. B. In this document, the Archdiocese has explained that "Catholic schools in particular need to implement policies that are consonant with Christian anthropology's view of the person. Schools should avoid validating or affirming the premises of gender ideology, even indirectly, by silence or inaction." *Id.* at 4.

69. This means Catholic schools are not to “recognize or facilitate a ‘gender transition,’ or grant any accommodation that recognizes or suggests a change in sexual identity.” *Id.* at 2. Children “should never be granted access to the restroom or changing facilities of the opposite sex.” *Id.* It is “impermissible” for students to wear the opposite sex’s uniform or insist on the use of a preferred pronoun. *Id.*

70. The Archdiocese’s guidance also states that while “children born to cohabiting couples must always be treated with respect,” “Catholic schools cannot recognize cohabitation as equivalent to marriage.” *Id.*

71. The Archdiocese has also explained that enrolling children whose parents or legal guardians are in a same-sex relationship “is likely to lead to intractable conflicts” because a “*Catholic school cannot treat a same-sex couple as a family equivalent to the natural family without compromising its mission and Catholic identity[.]*” *Id.* at 15.

72. Similarly, because Catholic schools cannot affirm LGBTQ identities and relationships, the Archdiocese advises Catholic schools to have all teachers sign employment agreements annually “acknowledging the expectation that they will uphold Catholic moral teachings in word and deed.” *See id.* at 16.

73. Both St. Mary’s and St. Bernadette’s require their employees to sign these agreements annually.

74. One way St. Mary’s preschool ensures families share its vision is by having in-person meetings with all prospective families before enrolling them in its preschool program. This is necessary to ensure that the school and the family are a good match, and that families understand St. Mary’s Catholic beliefs and expectations.

St. Bernadette Catholic Parish

75. Plaintiff St. Bernadette Catholic Parish in Lakewood is a Colorado corporation sole in the Roman Catholic Archdiocese of Denver and subject to the authority of the Archbishop of Denver.

76. St. Bernadette's was founded in 1947 in Lakewood, Colorado and is dedicated to St. Bernadette of Soubirous. St. Bernadette's first opened a parish school in 1953.

77. Today's St. Bernadette's parish school is called Wellspring Catholic Academy ("Wellspring").

78. Wellspring offers a Catholic, Colorado Shines 4-Start rated preschool program beginning at age 3.

79. Wellspring's mission is to offer "our students, families, and community a Catholic education that Invites all to Dig Deep, to uncover our precious gifts within a loving encounter with God, the 'source and author of life' (Acts 3:15)."

80. Wellspring teachers and staff "strive to form young people who go forth from us to share Christ with the world because they know Him and are becoming like Him." Ex. G at 7.

81. Wellspring's Archdiocesan-approved curriculum integrates faith into all aspects of the educational environment, providing students with the foundation in faith that helps them grow into faithful Catholics.

82. In 2023, families that attended Wellspring received over \$250,000 in scholarships.

83. Eighty-five percent of children attending Wellspring's preschool receive free or reduced-price lunches, three families are under the poverty line, and half of the students are ESL (English as a Second Language) learners.

84. Were Wellspring's preschool to have a waiting list, it would prioritize applicants in the following order: (1) siblings of current students, (2) parishioners of St. Bernadette, (3) members of other Catholic parishes within the Archdiocese of Denver, (4) Catholics transferring into the Denver metro area whose children attend or previously attended Catholic schools within the last calendar year, and (5) Catholics unaffiliated with a parish or non-Catholics.

85. Wellspring "accepts students who meet age and ability requirements, and who are shown through their family's application to be a good fit for [the] school – academically, socially, behaviorally, and spiritually. If accepted, in order to be fully admitted to Wellspring, the parent/guardian and students must agree to the school's philosophy and agree to abide by the educational policies and regulations of the school and Archdiocese." Ex. G at 11.

86. As a Catholic Parish and school within the Archdiocese of Denver, St. Bernadette's and Wellspring are subject to the religious guidance of the Archdiocese.

87. Wellspring requires all administrators, teachers, and staff to agree to the Archdiocese's Statement of Community Beliefs when signing annual contracts for at-will employment. *See* Ex. A.

88. Wellspring also requires all parents to confirm their agreement with the Archdiocese's Code of Conduct, which the school incorporates into its handbook. Ex. G at 57.

Daniel and Lisa Sheley

89. Daniel and Lisa Sheley have six children, ages 14, 11, 8, 4, 2, and almost 1 year old.

90. The Sheleys have sent all of their school-age children to St. Mary's Catholic school because they believe the school provides excellent intellectual, moral, and spiritual formation for our children. They also believe that they are commanded by their Catholic faith to educate their children in the Catholic faith.

91. The Sheleys' four-year-old is currently in preschool. If St. Mary's preschool participated in Colorado's Universal Preschool Program, Daniel and Lisa would receive 15 hours per week of free preschool education for their four-year-old, saving (as calculated by the State) \$5,926.69 over the course of the 2022-23 school year. Because St. Mary's is ineligible for the Program, they Sheleys are not receiving that benefit and have to pay the full cost out of pocket.

92. The Sheleys plan to send their two-year-old and (almost) one-year-old to St. Mary's preschool. If St. Mary's preschool participated in Colorado's Universal Preschool Program, they would receive 15 hours per week of free preschool education for each of these children when they are enrolled in prekindergarten. Because St. Mary's is ineligible for the Program, they will not receive that benefit and instead will have to pay the full cost out of pocket.

93. Saving roughly \$6,000 per child for their three youngest children would go a long way to help Daniel and Lisa support their family.

The Archdiocese of Denver

94. The first Catholic church in Denver was founded in 1860 by Bishop Joseph Machebeuf and would later become St. Mary's Cathedral.

95. Today, the Archdiocese of Denver is the spiritual home to roughly 610,000 Catholics across 149 parishes, stations, and mission parishes in northern Colorado.

96. The Archdiocese is led by Archbishop Samuel Aquila.

97. All Catholic parishes and Catholic schools located in the Archdiocese's territory are under the care and direction of the Archdiocese.

98. All Catholic schools which provide a religious education must follow Archdiocesan guidance and policies, especially on all matters of faith and morals.

99. The Archdiocese oversees, guides, and supports 36 preschools serving roughly 1,500 preschoolers.

100. The Archdiocese, in part through its Office of Catholic Schools, speaks for and advances the interests of all of the Archdiocese of Denver's Catholic schools and preschools.

101. One of the primary purposes of the Archdiocese's Office of Catholic Schools is to provide guidance and support to Catholic schools throughout the Archdiocese.

102. When Colorado rolled out its UPK program, the Archdiocese reviewed and assessed whether Archdiocesan preschools could participate in the program consistent with their religious beliefs and obligations. Ultimately, the Archdiocese determined that the UPK program's "quality standards" provision failed to provide the necessary religious exemptions for Catholic schools to ensure they could both participate in the UPK program and act in accord with their sincere religious beliefs.

103. Accordingly, the Archdiocese instructed all of its Catholic parishes and Catholic preschools not to sign the UPK program Agreement as written. Ex. H.

104. All Catholic preschools that provide a religious education within the Archdiocese of Denver are therefore precluded from participating in the UPK program on account of their shared religious beliefs, and in particular their shared inability to sign the Agreement due to the lack of a religious exemption from its non-discrimination provisions.

Colorado's New Universal Preschool Program

105. Enacted in 2022, the Colorado Universal Preschool Program Act (the “Act”), Colo. Rev. Stat. §§ 26.5-4-201 *et seq.*, establishes a system of state funding for preschool services.

106. The Act’s stated purpose is to “provide adequate funding for both a high-quality universal preschool program and additional preschool programming for children in low-income families.” *Id.* § 26.5-4-202(3)(b).

107. In passing the Act, the legislature explained that “Colorado voters in rural, urban, and suburban communities . . . demonstrated their strong commitment to expand[] access to quality preschool for children regardless of their economic circumstances,” *id.* § 26.5-4-202(1)(a)(V), and that universal preschool “increases the ultimate social and economic benefits of high-quality preschool programming for the state as a whole,” *id.* § 26.5-4-202(1)(a)(VI).

108. The Act requires the Department to operate Colorado’s UPK program. *Id.* § 26.5-4-204(1).

109. The UPK program’s primary purpose is “[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.” *Id.* § 26.5-4-204(1)(a).

110. Accordingly, the Department “shall annually establish the per-child rates for universal preschool services,” and shall distribute funds to preschool providers “based on the actual numbers and types of eligible children enrolled” in each participating preschool. *Id.* § 26.5-4-208(1)(a), (3)(a). These funds can be used “only to pay the costs of providing preschool services directly to eligible children enrolled by the preschool provider.” *Id.* § 26.5-4-208(5).

111. Funding under the UPK program is therefore allocated “based on parent choice.”⁵

112. Children eligible to participate in the UPK program can receive 15 hours per week of publicly funded preschool services for the 2023-24 school year. *See* 8 Colo. Code Regs. § 1404-1:4.104(C).

113. The Act also directs the Department to use “local coordinating organizations” to recruit “as broad a range [of UPK program providers] as possible.” Colo. Rev. Stat. § 26.5-4-204(2).

114. Preschools seeking to participate in the UPK program must be licensed to provide preschool services in Colorado, must meet quality standards established by the Department, and must sign a Program Service Agreement (“Agreement”).

115. A true and accurate copy of the UPK Colorado Program Service Agreement and its Terms & Conditions are attached as Exhibit C.

116. When a provider preschool submits a signed Agreement, its name then appears online in the Department’s “Family Search and Application” portal, allowing families to apply to use UPK program funds at that preschool.

117. For the 2023-24 school year, St. Mary’s preschool would receive \$5,926.69 per child attending half-days (15 hours per week) and \$10,544.48 per child attending full days (30 hours per week). Ex. D at 21.

118. For the 2023-24 school year, St. Bernadette’s preschool would receive \$5,890.53 per child attending half-days (15 hours per week) and \$10,513.26 per child attending full days (30 hours per week). Ex. D at 22.

⁵ H.B. 22-1295, 74th Gen. Assemb., Reg Sess., Bill Summary (Colo. 2023), <https://perma.cc/X6NV-WVS4>.

119. Any child in the year before they are eligible for kindergarten is eligible for 15 hours of free preschool education; children who meet additional eligibility criteria—including due to parental income, foster care/kin care placement, dual language needs, or who have an Individual Education Program can receive additional hours of free preschool education.

120. The first UPK program payment to preschool providers for the 2023-24 school year was on August 1, 2023, for students enrolled by July 9, 2023. The Department will continue to make monthly payments to participating providers based on the number of eligible students enrolled in the provider's preschool on the 15th of the prior month.⁶

The UPK program's exclusionary provisions

121. In implementing the UPK program, the Department has imposed two provisions that exclude St. Mary's, St. Bernadette's, and all Archdiocesan preschools from participating in the UPK program.

122. This, in turn, prevents families like the Sheleys from receiving the State's generally available benefit of 15 hours per week of free preschool education for their children.

123. The Act also requires the Department to promulgate UPK program guidelines that “include . . . [a] requirement that each preschool provider provide eligible 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, as such characteristics and circumstances apply to the child or the child's family[.]” Colo. Rev. Stat. § 26.5-4-205(2)(b).

⁶ *Universal Preschool Provider Information*, Colorado Department of Early Childhood, <https://perma.cc/X3X6-KDB6>.

124. The Department has not yet promulgated this requirement (the “Enrollment Mandate”) by rule, but it has included it in its Agreement as a requirement preschool providers must adhere to immediately, and in advance of the promulgation of a rule. *See* Ex. C at 2.

125. The Department retains discretion to waive the Enrollment Mandate, which is part of the Act’s quality standards: “If necessary to ensure the availability of a mixed delivery system within a community,” the Department may “allow a preschool provider that does not meet the quality standards to participate” in UPK while that provider works toward satisfying the standards. *Id.* § 26.5-4-205(1)(b)(II).

126. In addition to the Enrollment Mandate, the Department has added a second nondiscrimination requirement (the “Catch-all Provision”) to the terms and conditions of the Agreement participating preschool providers must sign.

127. The Catch-all Provision prohibits preschool providers from engaging in “discriminat[ion] against any person on the basis of gender, race, ethnicity, religion, national origin, age, sexual orientation, gender identity, citizenship status, education, disability, socio-economic status, or any other identity.” Ex. C at 23.

128. Regardless of these two exclusionary provisions, the Department in its discretion allows UPK program preschools to selectively admit or exclude applicants in at least seven different circumstances.

129. First, faith-based providers “may require families to be a part of [their] congregation.” Ex. D at 37.

130. Second, “a co-op” may “require family participation as part of [their] programming.” Ex. D at 37.

131. Third, preschools that are “immersive or dual-language provider[s]” may require applicants “to be screened.” Ex. D at 37.

132. Fourth, school-district providers may require families to reside in the same “school district or boundary.” Ex. D at 37.

133. Fifth, “a Head Start grantee and families” may need “to meet additional factors to enroll” with certain providers. Ex. D at 37.

134. Sixth, providers may prioritize their employees’ children in placement decisions. Ex. D at 37.

135. Seventh, the Department takes into account siblings already enrolled with a provider when making matches.⁷

136. Regarding the first exception, the Department has explained that faith-based preschool providers may “reserve all or a portion of their seats for their *members*, and decline a match from a family that is not *part of the congregation*.” Ex. F (emphasis added).

137. The Enrollment Mandate and Catch-all Provision, however, continue to bar preschool providers from declining a match because of a family’s *religion*.

Colorado’s UPK program excludes St. Mary’s, St. Bernadette’s, and all Arch-diocesan preschools on the basis of their religious beliefs.

138. According to Catholic teaching, “[t]he duty and right of educating belongs in a special way to the Church, to which has been divinely entrusted the mission of assisting persons so that they are able to reach the fullness of the Christian life.” Code of Canon Law c.794 § 2.

⁷ *Universal Preschool Provider Information*, Colorado Department of Early Childhood, <https://perma.cc/X3X6-KDB6> (“As families apply, we will consider if they currently have a sibling also enrolled with a certain provider. We will take this into account in our matching to keep families and siblings together where possible.”).

139. Accordingly, the Church imposes a general obligation on Catholic “[p]arents . . . to entrust their children to those schools which provide a Catholic education.” *Id.* c.798. They can refrain from doing so only “[i]f they are unable.” *Id.*

140. To permit Catholic parents to discharge this obligation, it follows that Catholic schools prioritize Catholic families in allocating their limited spots. Indeed, as with the obligation for parents, there is a corresponding “duty” for “[p]astors”—they must “arrang[e] everything so that all the faithful can have a Catholic education.” *Id.* c.794 § 2.

141. That is, as communities of faith and religious ministries designed to help pass on the faith to the next generation, Plaintiffs’ sincere religious beliefs require them to prioritize in preschool admissions not just parishioners, but affiliated Catholic applicants and Catholic families who participate fully in the life of the Church.⁸

142. This sincere religious belief that Catholic schools must prioritize providing an opportunity for Catholic families to send their children to Catholic schools means Plaintiffs cannot sign the UPK Provider Agreement as written because it forbids giving preference on the basis of religious belief.

143. Likewise, as a faith community and religious ministry of the Catholic Church, Plaintiffs require their teachers, administrators, and staff to agree to uphold and abide by the moral law of the Catholic Church in word and deed in order to ensure that those who pass on the “faith to the next generation” do so faithfully. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 (2020); *see also* Code of Canon Law c.803 § 2 (“teachers are to be outstanding in correct doctrine and integrity of life”).

⁸ *How to Apply*, St. Mary Catholic School, <https://perma.cc/GV5S-SE42>.

144. This sincere religious belief means that Plaintiffs cannot employ teachers, staff, and administrators who refuse to uphold the Catholic Church's beliefs regarding marriage and the family, including its belief that marriage is limited to one man and one woman for life.

145. This sincere religious belief also means Plaintiffs cannot sign the UPK Provider Agreement as written because of its prohibition on discrimination based on sexual orientation and gender identity in the Catch-all Provision.

146. The Enrollment Mandate and Catch-all Provision also prohibit St. Mary's and St. Bernadette's preschools from individually screening prospective families before enrolling them in their preschool programs, instead requiring the schools to accept whoever chooses to enroll.

147. Further, Archdiocesan preschools, including St. Mary's and St. Bernadette's preschools, cannot enroll children who assert a gender identity at odds with their biological sex.

148. Further, in certain circumstances, Archdiocesan preschools, including St. Mary's and St. Bernadette's preschools, may be obligated not to enroll a student whose parents identify as gay or lesbian or who present themselves as part of a same-sex couple, in accordance with the Archdiocese's teaching that enrolling such students "is likely to lead to intractable conflicts." Ex. B at 15.

149. This sincere religious belief means neither St. Mary's, St. Bernadette's, nor any Archdiocesan religious preschool can sign the UPK Provider Agreement as written, due to its prohibition on discrimination on the basis of sexual orientation and gender identity.

150. But for the Enrollment Mandate and the Catch-all Provision, Plaintiffs are fully qualified to participate in the UPK program.

151. Plaintiffs therefore are categorically excluded from participating in the UPK program based solely on their religious beliefs and exercise.

152. By excluding Plaintiffs from participation in the UPK program, Defendants have imposed harm by denying Plaintiffs' schools equal access to funding and restricting their ability to serve Colorado families.

153. Absent prompt judicial relief, more harm will be done to the schools and the families that hope to enroll their children there.

154. Each month that Plaintiffs' preschools are excluded from participation, they will lose out on access to generally available government funding for their preschool programs.

155. For Plaintiffs Daniel and Lisa Sheley, each month that St. Mary's does not participate in the UPK Program, they are required to pay the full cost of preschool services at St. Mary's.

156. The Department has also already refused to grant Plaintiffs an exemption from its exclusionary requirements.

157. On February 17, 2023, a statewide coalition of religious preschool providers including the Archdiocese sent a letter to the State, requesting that the Department grant faith-based preschool providers exemptions from the Enrollment Mandate. Ex. E (The Catch-all Provision had not yet been announced by the Department.)

158. The coalition explained that "many private providers have chosen not to participate in UPK at this time" for fear of "compromising their sincerely held . . . beliefs." Ex. E at 1.

159. Defendant Dr. Lisa Roy replied to the coalition's letter on February 28, 2023.

160. On behalf of the Department, she declined to grant any exemptions. Letter to Colorado Private School Coalition Re: Recent Communication (Feb. 28, 2023), Ex. F.

161. Roy claimed that the Act does not authorize the Department to grant exemptions from its quality standards, declining to address or acknowledge the coalition letter's reference to First Amendment principles potentially requiring such exemptions regardless of state law.

162. St. Mary's preschool director has informed her local coordinating organization—the Arapahoe County Early Childhood Council—that St. Mary's preschool would like to participate in the UPK program but cannot sign the Agreement. The Council told St. Mary's preschool director that the State requires her to sign the Agreement to participate.

163. If the Department's Enrollment Mandate and Catch-all Provision are enjoined, St. Mary's preschool will seek to participate in the UPK program as soon as it is able.

164. Because of the UPK program's requirements that exclude Archdiocesan preschools, Wellspring has not yet sought to participate in the UPK program. If the Department's Enrollment Mandate and Catch-all Provision are enjoined, however, Wellspring's preschool will seek to participate in the UPK program as soon as it is able.

165. Because of the UPK program's requirements that exclude Archdiocesan preschools, other Archdiocesan religious preschools have not yet sought to participate in the UPK program. If the Department's Enrollment Mandate and Catch-all Provision are enjoined, however, Archdiocesan religious preschools will seek to participate in the UPK program as soon as they are able.

CLAIMS FOR RELIEF

Count I

42 U.S.C. § 1983

Violation of U.S. Const. Amend. I:

Free Exercise Clause—Categorical Exclusion from Otherwise Available Government Benefits

166. All preceding paragraphs are incorporated by reference.

167. The Free Exercise Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I.

168. The Free Exercise Clause applies to states and their subdivisions and municipalities through the Fourteenth Amendment to the U.S. Constitution.

169. Under the Free Exercise Clause, imposing “special disabilities on the basis of religious views or religious status” triggers strict scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460-461 (2017).

170. Thus, a system that precludes religious entities and families from obtaining generally available state benefits solely because of their religious character or beliefs is unconstitutional unless the government can satisfy strict scrutiny. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020); *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022).

171. Plaintiffs St. Mary’s, St. Bernadette’s, and the Archdiocese engage in religious exercise by providing education from a distinctively Catholic religious perspective, for the spiritual formation of their students and in service to their families.

172. To fulfill this mission, Plaintiffs St. Mary’s, St. Bernadette’s, and the Archdiocese must be free to hire teachers according to their religious beliefs and practices and admit families and students on the basis of their adherence to the Catholic Church’s religious beliefs—including by assessing a family’s willingness to support

and abide by the Catholic Church's beliefs regarding marriage, life, the family, human sexuality, and gender.

173. Plaintiffs St. Mary's, St. Bernadette's, and the Archdiocese's religious beliefs and religious mandate as Catholic ministries means their preschools must also be able to direct the education of children according to Catholic religious beliefs and practices, which includes the ability to organize their schools in line with their beliefs on human sexuality and gender.

174. Plaintiffs Daniel and Lisa Sheley seek, in accordance with their Catholic beliefs, and in accordance with their obligation as Catholic parents, to provide their children with a Catholic education in preschool.

175. Colorado offers a benefit to licensed preschool providers: "a dedicated source of funding for statewide, voluntary, universal preschool programming." Colo. Rev. Stat. § 26.5-4-202(1)(a)(V).

176. To participate, however, Plaintiffs must agree to the Enrollment Mandate and the Catch-all Provision. Individually and collectively, these provisions amount to a "religious gerrymander[]" and have the effect of completely excluding St. Mary's, St. Bernadette's, the Sheleys, and all the Archdiocese's religious preschools from the UPK program because of their sincere religious beliefs. *Carson*, 142 S. Ct. at 2000.

177. The Enrollment Mandate and Catch-all Provision would make it unlawful for Plaintiffs St. Mary's, St. Bernadette's, and the Archdiocese to prioritize providing educational opportunities to families and children who share the Catholic faith, even if those families are not part of specific preschools' respective congregations.

178. The Enrollment Mandate and Catch-all Provision would also make it unlawful for Plaintiffs St. Mary's, St. Bernadette's, and the Archdiocese to require all families who send their children to their preschools to abide by the Catholic Church's teachings on marriage, human sexuality, and gender.

179. The Catch-all Provision further prohibits Plaintiffs St. Mary's, St. Bernadette's, and the Archdiocese's religious preschools from hiring teachers who support and uphold those preschool's religious mission and from structuring their preschool according to their religious beliefs.

180. The Catch-all Provision and the Enrollment Mandate both require Plaintiffs to choose between their religious exercise and receiving an otherwise generally available benefit. Plaintiffs are thus "disqualified from this generally available benefit 'solely because of their religious character'" and beliefs. *Carson*, 142 S. Ct. at 1997.

181. "By condition[ing] the availability of benefits in that manner," Colorado's UPK program "effectively penalizes the free exercise of religion." *Id.* (internal quotations omitted).

182. The Department's categorical exclusion of Plaintiffs from the UPK program furthers no compelling governmental interest.

183. Excluding Plaintiffs from the UPK program is not the least restrictive means of furthering Colorado's interests.

184. Plaintiffs have suffered and will suffer harm absent relief.

Count II
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Exercise Clause—Ministerial Exception

185. All preceding paragraphs are incorporated by reference.

186. "The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as

those of faith and doctrine.” *Our Lady*, 140 S. Ct. at 2055 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

187. An institution’s right to religious autonomy “ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194-95 (2012).

188. “Applying this principle,” the Supreme Court has repeatedly held that “the First Amendment bar[s] a court from entertaining an employment discrimination claim” regarding a teacher or other ministerial employee responsible for transmitting the faith to the next generation. *Our Lady*, 140 S. Ct. at 2055 (citing *Hosanna-Tabor*, 565 U.S. 171).

189. Preschool teachers and administrators at Plaintiffs St. Mary’s, St. Bernadette’s, and the Archdiocese’s preschools play a crucial role in educating the children in their care in the faith and in passing on the faith to the next generation. As such, all preschool teachers and administrators qualify as ministers under the ministerial exception.

190. The Catch-all Provision interferes with Plaintiffs St. Mary’s, St. Bernadette’s, and the Archdiocese’s selection of preschool teachers and administrators by prohibiting them from selecting employees based on the employee’s religious beliefs or willingness to abide by the Catholic Church’s beliefs regarding marriage, human sexuality, and gender.

191. Defendants’ actions have therefore interfered with Plaintiffs St. Mary’s, St. Bernadette’s, and the Archdiocese’s religious hiring policies for their ministerial employees.

192. Consequently, the Catch-all Provision, as applied to school employees who have the “responsibility of educating and forming students in the faith, . . . threatens the school’s independence in a way that the First Amendment does not allow.” *Our Lady*, 140 S. Ct. at 2069.

193. Plaintiffs have suffered and will suffer harm absent relief.

Count III
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Exercise Clause—Church Autonomy

194. All preceding paragraphs are incorporated by reference.

195. The First Amendment protects the right of a religious institution to make “personnel decision[s] based on religious doctrine” even when those decisions do not involve a ministerial employee. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 660 (10th Cir. 2002).

196. Plaintiffs St. Mary’s, St. Bernadette’s, and the Archdiocese require all pre-school employees to abide by standards of religious conduct.

197. Enforcing the Catch-all Provision to bar or modify such standards of religious conduct will interfere with Plaintiffs St. Mary’s, St. Bernadette’s, and the Archdiocese’s right to frame policies and doctrine, govern their own internal affairs, and maintain a school environment faithful to their religious beliefs. This violates the First Amendment. *See Our Lady*, 140 S. Ct. at 2060 (2020).

198. Plaintiffs have suffered and will suffer harm absent relief.

Count IV
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Exercise Clause—Not Generally Applicable:
Discretionary Exemptions

199. All preceding paragraphs are incorporated by reference.

200. Plaintiffs St. Mary's, St. Bernadette's, and the Archdiocese's sincerely held religious beliefs inform how they engage in all aspects of their religious ministries—including the operation of their preschools.

201. Plaintiffs exercise their sincerely held religious beliefs through the operation of their preschools, by educating children in the Catholic faith, and by hiring teachers and staff who support and uphold their beliefs.

202. Application of the Enrollment Mandate and Catch-all Provisions substantially burden Plaintiffs' religious exercise.

203. Laws or regulations "burdening religious practice must be of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

204. State action is no longer of general applicability "if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1871 (2021).

205. The Department has the authority to grant exemptions from the Enrollment Mandate and the Catch-all Provision.

206. The Department has authority to "allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance with the quality standards." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II).

207. By enforcing the Enrollment Mandate and Catch-all Provisions against religious schools while retaining discretion to grant exemptions for other reasons, the Department's actions are not neutral and generally applicable.

208. The Department’s categorical exclusion of Plaintiffs’ preschools furthers no compelling governmental interest.

209. Excluding Plaintiffs’ preschools from the UPK program is not the least restrictive means of furthering Colorado’s interests.

210. Plaintiffs have and will continue to suffer harm absent relief.

Count V
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Exercise Clause—Not Neutral or Generally Applicable:
Categorical Exemptions

211. All preceding paragraphs are incorporated by reference.

212. Laws or regulations “burdening religious practice must be of general applicability.” *Lukumi*, 508 U.S. at 542 (1993).

213. Government regulation burdening religious exercise fails to be neutral or generally applicable when its “categorizations” treat comparable activities differently. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

214. “[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

215. The Enrollment Mandate aims to ensure equal access to preschool providers for all Coloradans, regardless of “religious affiliation, sexual orientation, gender identity . . . income level, or disability.” Colo. Rev. Stat. § 26.5-4-205(2)(b).

216. This interest in equal access is undermined by the Department’s creation of seven categories of exemptions from its nondiscrimination requirements.

217. These exemptions together compromise the state’s interest in ensuring equal access to preschool services by allowing *some* providers to privilege *some* children—if those providers accomplish interests favored by the Department.

218. At least two exemptions directly contravene the Enrollment Mandate by allowing providers to discriminate based on protected categories.

219. The exemption for Head Start grantees allows those providers to prefer children based on their family's income level.

220. The exemption for faith-based providers allows some faith-based providers to prefer their own congregants, thus permitting those providers to prefer applicants on the basis of religion.

221. But the Department offers no exemption to faith-based providers without attached congregations, or to faith-based providers who seek to maintain the religious character of their schools in other ways.

222. Therefore, the Department treats comparable activities differently.

223. Since the Department is willing to compromise its interest in equal access for many reasons, the Enrollment Mandate is not neutral or generally applicable, and its application to Plaintiffs requires strict scrutiny.

224. The Department's categorical exclusion of Plaintiffs furthers no compelling governmental interest.

225. Excluding Plaintiffs from the UPK program is not the least restrictive means of furthering Colorado's interests.

226. Plaintiffs have suffered and will continue to suffer harm absent relief.

Count VI
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Speech—Compelled Speech and Expressive Association

227. All preceding paragraphs are incorporated by reference.

228. Using government power to force a group that is formed for expressive purposes to include a message not its own "violates the fundamental rule of protection

under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

229. The Free Speech Clause prohibits the government from compelling people to speak messages against their will.

230. The Free Speech Clause also prohibits the government from forcing a group formed for expressive purposes to accept members who oppose those purposes. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 650, 659 (2000); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023).

231. Plaintiffs St. Mary’s, St. Bernadette’s, and the Archdiocese’s preschools were formed for the expressive purpose of teaching the Catholic faith to the next generation. They are expressive associations within the meaning of *Hurley* and *Dale*.

232. The Archbishop’s Guidance makes clear that Catholic schools cannot engage in conduct that will “implicitly affirm[]” beliefs contrary to those of the Catholic Church. For example, if a Catholic school allows a student who asserts an identity at odds with his or her biological sex to wear a uniform of the opposite sex, “the school would be implicitly affirming the student’s erroneous identity, and effectively encouraging the student to continue down a path that is harmful and unhealthy.” Ex. B at 11-12.

233. In order to avoid endorsing conduct contrary to Catholic teaching, the Archdiocese also instructs Catholic schools to “communicate clearly what the Church teaches about marriage and same-sex relationships.” Ex. B at 15. This is not possible if a Catholic school is required to affirm beliefs about marriage and the family that contradict those of the Church.

234. Together and separately, the Enrollment Mandate and Catch-all Provisions would require Plaintiffs St. Mary's, St. Bernadette's, and the Archdiocese to admit families and hire faculty who are opposed to their religious vision.

235. Admitting families and hiring faculty who oppose the Church's view on Catholic moral teachings sends a misleading and erroneous message to parishioners, all Catholics, and the general public that the Church approves of the conduct of those it employs and admits into its programs.

236. Coercing Plaintiffs into altering their religious expression serves no compelling governmental interest.

237. Colorado's Enrollment Mandate and Catch-all Provision are not narrowly tailored to accomplish the government's alleged interests.

238. Plaintiffs have suffered and will continue to suffer harm absent relief.

Count VII
42 U.S.C. § 1983
Violation of U.S. Constitution Amend. I:
Denominational Favoritism

239. All preceding paragraphs are incorporated by reference.

240. The First Amendment forbids the government from engaging in "denominational preferences," which favor the religious beliefs and practices of one religious denomination over another. *Larson v. Valente*, 456 U.S. 228, 245 (1982).

241. The Catholic Church believes that all Catholics are "members of the people of God" who are in a "bond of close communion" and thus "called to share . . . goods in common." *Lumen Gentium*, ¶ 13 (1964).

242. Accordingly, Plaintiffs' preschools prioritize placement in their schools based not only on affiliation with a particular parish or congregation, but also based on membership in the Catholic Church.

243. By permitting religious preschool providers to reserve some or all of their spots for families who are members of the congregation sponsoring the preschool but not to allow preschools to reserve or prioritize spots for members of their shared faith who are not members of their sponsoring congregation, the Department prefers certain religious denominations over others based on their theological beliefs about the composition of their church and their beliefs about the role of a religious school in providing education to those who share their beliefs.

244. Defendants do not have a compelling interest in preferring some religious denominations over others.

245. Defendants' exclusion of certain religious denominations based on their religious structure and beliefs is not the least restrictive means to accomplish any government interest.

246. Plaintiffs have suffered and will continue to suffer harm absent relief.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that the Court:

a. Declare that the religious affiliation, sexual-orientation, and gender-identity nondiscrimination requirements as set out in the Universal Preschool (UPK) Colorado Program Service Agreement violate the First Amendment to the United States Constitution as applied to Plaintiffs' religious exercise;

b. Declare that the religious affiliation, sexual orientation, and gender identity nondiscrimination requirements of Colo. Rev. Stat. § 26.5-4-205(2)(b) violate the First Amendment to the United States Constitution as applied to Plaintiffs' religious exercise;

c. Issue preliminary and permanent injunctive relief prohibiting Defendants from denying Plaintiffs participation in Colorado's UPK program based on Plaintiffs' religious beliefs, character, and exercise, including Plaintiffs' religious exercise of:

- (i) prioritizing Catholic families in admission;
- (ii) requiring preschool teachers, staff, and administrators to abide by and uphold Catholic teachings on life, marriage, gender, and human sexuality;
- (iii) considering for purposes of admission or retention whether a family or child seeking placement in their schools has identified as LGBTQ, is in a same-sex relationship, or has adopted a gender identity different from his or her biological sex; and
- (iv) declining to grant students and staff access to the restroom or changing facilities of the opposite sex, to permit them to wear the opposite sex's uniform, or to insist on the use of a preferred pronoun.

d. Award nominal damages in the amount of \$1.00 against Defendants.

e. Award Plaintiffs reasonable attorney's fees and costs.

f. Award all such other relief as the Court may deem proper.

JURY DEMAND

Plaintiffs demand a trial by jury of all issues so triable.

Dated: September 13, 2023

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:23-cv-02079-JLK

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

Plaintiffs,

v.

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

Defendants.

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs seek court-sanctioned permission to accept taxpayer funds for their preschools while also discriminating against LGBTQ families and children. The law does not require the alarming relief that Plaintiffs request. It goes without saying that states have it within their power to protect LGBTQ persons from the devastating effects of government-backed discrimination.

Plaintiffs might be seeking to move First Amendment law in a different direction by bringing this test case. That is their right, and it is no secret that the U.S. Supreme Court has recently shifted the landscape underlying many First Amendment doctrines. But this case is a particularly poor vehicle for that purpose. Plaintiffs have identified no actual family or child to whom they have denied enrollment on account of their LGBTQ status. And the Colorado Department of Early Childhood (the "Department") and multiple other agencies have received no complaint that Plaintiffs have discriminated against LGBTQ persons. The absence of such facts renders this Court unable to review these important constitutional questions on a record

sufficiently developed to sharpen the presentation of the issues. It also confirms that Plaintiffs lack standing and their claims are not ripe for adjudication. The Court should therefore dismiss this case for lack of subject matter jurisdiction.

Certificate of Conferral under D.C.Colo.LCivR 7.1: the undersigned conferred with Plaintiffs' counsel regarding the relief requested by this motion. Plaintiffs oppose this motion.

BACKGROUND

I. Colorado's history and investment in preschool.

Since 1988, Colorado has steadily increased its investment in high-quality preschool programming. In 1988, Colorado established the Colorado Preschool Program, which focused on serving Colorado's most needy families. Ex. 1, Odean Declaration ¶ 3. Nevertheless, in 2019-2020, the Colorado Preschool Program was able to serve only approximately 25 percent of Colorado's four-year-old children. *Id.* In the 2020 general election, Colorado voters overwhelmingly approved proposition EE, establishing a dedicated source of funding for statewide, voluntary, universal preschool (the "UPK program"). Colo. Rev. Stat. § 26.5-4-202(1)(a)(V). The Colorado General Assembly declared the intent of the UPK program is to continue to address income barriers to preschool access and further the benefits of high-quality preschool throughout the state. Colo. Rev. Stat. § 26.5-4-202(1)(b). To implement the UPK program, House Bill 21-1304 created the Department of Early Childhood. Colo. Rev. Stat. § 26-6.2-302(6) (2021). All the prior responsibilities of the Department of Human Services for administering early childhood programs and services, including the UPK program, were transferred to the new Department on July 1, 2022. Colo. Rev. Stat. § 26.5-1-106(1)(a)(I)(A).

The new UPK program is universal and available to all children and families in the year prior to kindergarten. The Department is charged with providing early childhood opportunities for all children in Colorado and prioritizing the equitable delivery of resources. Colo. Rev. Stat. § 26.5-1-102(1)(a), (f).

Colorado law requires the Department to develop and establish in rule the Quality Assurance Standards that each preschool provider must meet to receive program funding. Colo. Rev. Stat. § 26.5-4-205(1)(a). These standards must reflect national and community-informed best practices, and the Department must work with families, educators, and program administrators to review and revise them as necessary. *Id.*

By statute, the Quality Assurance Standards must also include a requirement that each participating preschool provide eligible children with an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family. Colo. Rev. Stat. § 26.5-4-205(2)(b). To implement this provision, participating preschool providers must enter into a Program Service Agreement (the "Agreement") with the Department in which they contractually agree to provide eligible children an equal opportunity to enroll, provide preschool services, and not discriminate on the basis of the protected classes identified in section 26.5-4-205(2)(b). Ex. 1, Odean Declaration ¶ 12; Doc. 30-3 at 3 ("Quality Assurance" header).

The Department has not yet promulgated its Quality Assurance Standards rules for preschool providers. Once the Quality Standards are adopted, they will not become effective until the 2024-2025 school year. Ex. 1, Odean Declaration ¶ 14. The prior rules adopted by the

Department of Human Services continue in effect and apply until the Department promulgates the Quality Assurance Standards in rule. Colo. Rev. Stat. § 26.5-1-106(1)(c). All rules promulgated by the Department must increase equity in access to programs and services. Colo. Rev. Stat. § 26.5-1-105(1)(a)(III).

Separate from the Quality Assurance Standards, the Department's Agreement also contains a general antidiscrimination provision in paragraph 18(B), which Plaintiffs call the "Catch-all" provision. Doc. 30-3 at 23; Doc. 30 at 19, ¶¶ 126-27. Plaintiffs allege paragraph 18(B) prohibits them from declining to hire teachers, staff, and administrators who refuse to uphold the Catholic Church's views regarding marriage and the family. Doc. 30 at 22, ¶ 144. The Department, for its part, interprets and applies this provision to permit religious organizations to hire co-religionists in accordance with federal law, and to make employment decisions about their ministerial employees in accordance with federal law. Ex. 1, Odean Declaration ¶ 16.

II. The Department's commitment to inclusion of faith-based providers.

The Department identified and recruited preschool providers throughout the state before beginning to enroll children for the 2023-2024 school year. Ex. 1, Odean Declaration ¶¶ 5-6. In doing so, it established a "mixed delivery" system that enables parents to select preschool providers for their children from as broad a range as possible within their communities. Colo. Rev. Stat. § 26.5-4-204(2). Under this mixed delivery system, the UPK program's eligible preschool providers include licensed child care centers operated by public, private, and parochial schools. Colo. Rev. Stat. §§ 26.5-4-203(14); 26.5-5-303(3).

To ensure that the UPK program was inclusive of faith-based providers, the Department convened a faith-based work group consisting of religious providers that met on an

approximately bi-weekly basis from December 20, 2022 through June 13, 2023. Ex. 1, Odean Declaration ¶ 7. A representative of St. Mary Catholic School, one of the plaintiffs here, participated regularly in the work group and frequently conveyed what she asserted were the views of the Denver Archdiocese. *Id.* One product of this bi-weekly dialogue with faith-based providers is the ability of faith-based providers to give a preference to members of their own congregation by reserving all or a portion of their preschool seats for their congregation members. *Id.* ¶ 8. Through its ongoing rulemaking process, the Department is currently evaluating how to define “congregation.” *Id.*

One of the Plaintiffs here, the Denver Archdiocese, requested that the state grant it an exemption from section 26.5-4-205(2)(b)’s antidiscrimination provision, stating that complying with the antidiscrimination requirement may compromise the Archdiocese’s sincerely held beliefs. Doc. 31-1 at 23, ¶¶ 157-58. Defendant Roy responded that the Department does not have authority to create an exemption from the statute’s antidiscrimination provision. Doc. 30-6 at 2; *see* Colo. Rev. Stat. §§ 24-4-103(8)(a); 26.5-4-205(2)(b). Dr. Roy also explained, however, that faith-based providers participating in the UPK program may give preference to members of their congregation by reserving all or a portion of their preschool seats for their members. *See* Doc. 30-6 at 3.

III. Family choice governs the child’s preschool placement.

Once providers were in place, the Department began the process of matching families to those providers. This process starts with the family choosing up to five providers and ranking them from one to five in preference. The Department will match children with only one of the family’s choices. If none of the family’s choices are available, the family can select additional

providers for their child. A child is placed with a provider only when their family agrees to accept the match. As of September 2023, over 38,000 children are participating in the UPK program and have been matched with 1,905 preschool providers; they started receiving preschool services in the fall of 2023. Ex. 1, Odean Declaration ¶ 9. Of the children matched to providers, 94% of families received one of their top 2 choices and 82% of families received their top choice. *Id.* Forty faith-based providers are participating in the UPK program, and 904 children have been matched to those faith-based providers. *Id.* ¶ 10.

IV. The Plaintiff schools have not been subjects of complaints for discrimination as child care licensees or preschool providers.

Apart from the requirements applicable to UPK program providers, child care providers (including preschools) are subject to separate child care licensing requirements that long predate the UPK program. *See* 12 C.C.R. 2509-8.¹ Applicable government agencies often receive complaints regarding licensed child care providers from concerned parents, guardians, community members, and family members. The complaints run the gamut, from allegations of child abuse or neglect to child care staff not having proper certifications or qualifications. Ex. 1, Odean Declaration ¶ 20.

Both of the Plaintiff schools here, Wellspring Catholic Academy of St. Bernadette Catholic School and St. Mary Catholic Preschool, hold child care facility licenses. St. Bernadette has been licensed since 2007; St. Mary has been licensed since 2006. Neither has been the subject of a complaint from a LGBTQ family or other person for LGBTQ-based discrimination

¹ This rule is scheduled to be renumbered in the near future when regulatory oversight moves from the Department of Human Services to the Department of Early Childhood.

as a child care licensee. *Id.* ¶¶ 22-24. In fact, 35 schools that are affiliated with the Denver Archdiocese hold child care licenses; none has been the subject of a complaint for LGBTQ-based discrimination as a licensee. *Id.* ¶ 21.

Furthermore, St. Mary Catholic Preschool and nine other Denver Archdiocese preschools participate in the Colorado Child Care Assistance Program (“CCCAP”). Ex. 2, Burne Declaration ¶ 13. CCCAP helps families that are homeless, working, searching for work, or in school, find low-income child care assistance. *Id.* ¶ 3. CCCAP is administered at the county level with state oversight by the Department. *Id.* ¶ 4. Like the UPK program, participating providers in CCCAP must sign an agreement that prohibits discrimination based on a person’s sex, sexual orientation, and other protected characteristics. St. Mary signed this agreement as recently as August 23, 2023. *Id.* ¶ 16. The counties in which the participating Denver Archdiocese preschools are located have not received any complaints regarding alleged acts of LGBTQ-based discrimination by any of the ten participating Denver Archdiocese preschools. *Id.* ¶ 18.

Last, St. Bernadette and nine other Denver Archdiocese preschools are preschool providers through the Denver Preschool Program. Ex. 5, Holguin Declaration ¶ 7. For the last 17 years, the Denver Preschool Program has offered tuition credits to Denver families with preschool-aged children. *Id.* ¶ 3. Like the UPK program and CCCAP, participating providers in the Denver Preschool Program must sign an agreement that prohibits discrimination based on a person’s sexual orientation and gender identity, among other characteristics. *Id.* ¶ 5. St. Bernadette signed this agreement as recently as June 2022. *Id.* ¶ 9 & Ex. 7. The Denver Preschool Program has also never received a complaint that any of its participating Catholic

preschools discriminated against a LGBTQ family or student due to their protected LGBTQ status. *Id.* ¶ 10.

LEGAL STANDARD

A challenge to subject matter jurisdiction can be raised at any stage, and the party invoking jurisdiction bears the burden of proof. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citation omitted). If a party makes a factual attack to subject matter jurisdiction, as here, the court need not presume the truthfulness of the allegations. *See Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001). Rather, the court has wide discretion to consider affidavits and other documents. *Id.*

ARGUMENT

I. Plaintiffs lack Article III standing to challenge Colorado’s UPK program.

No live case or controversy exists here because Plaintiffs lack standing. To have standing under Article III, a plaintiff must show (1) an injury in fact that is “concrete and particularized,” not “conjectural or hypothetical,” (2) that the injury is fairly traceable to the challenged action of the defendant, and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations omitted).

Plaintiffs lack standing here because their claimed injury, if any, is self-inflicted and not traceable to Defendants. Moreover, Plaintiffs identify no actual family or student they have excluded from their schools, rendering their claimed injury conjectural and hypothetical. Last, Plaintiffs face no credible threat that Defendants will prevent them from making faith-based

employment decisions as they desire. Defendants interpret and apply the Agreement in conformity with federal employment law.

A. Plaintiffs’ alleged harm is self-inflicted and thus insufficient to create standing.

Plaintiffs cannot establish standing because their alleged injury is self-inflicted and not fairly traceable to Defendants. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013). A plaintiff cannot “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.” *Id.* Nor can a plaintiff premise their standing based on “costs they incurred in response to a speculative threat,” even if the alleged threat rises to the level of a “nonparanoid fear.” *Id.* Such injuries are caused by the plaintiff’s voluntary choices and not fairly traceable to the defendant. *See id.*; accord *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (“No [party] can be heard to complain about damage inflicted by its own hand.”).

Here, the Archdiocese of Denver instructed its preschools, including the two Plaintiff schools, to refrain from participating in the UPK program. Doc. 30-8. Specifically, the Archdiocese emailed their preschools on January 14, 2023, stating that “our Catholic preschools are eligible” to “receive the funding to provide the preschool program service to families” and it “appears to be a great benefit for families[.]” *Id.* at 1. But despite acknowledging their eligibility and the benefit to families, the Archdiocese “directed” its parishes and preschool programs to “not enter into any agreements with the state for UPK.” *Id.* at 2. The two Plaintiff schools heeded the Archdiocese’s directions and chose to refrain from participating in Colorado’s UPK program. Ex. 1, Odean Declaration ¶ 18.

This is self-inflicted harm. Defendants welcome preschool providers of all types to participate in the UPK program—religious, secular, or otherwise. *Id.* ¶ 6. Indeed, Colorado currently has 40 religious schools participating in the UPK program. *Id.* ¶ 10. Plaintiffs here had the same opportunity as any other provider to sign up to participate in the program. Plaintiffs’ voluntary choice to forego participation “break[s] the causal chain” between Defendants and Plaintiffs’ claimed injury. *State v. U.S. Env’t Prot. Agency*, 989 F.3d 874, 888 (10th Cir. 2021) (citing *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (Ginsburg, J.)).

Plaintiffs also base their standing on two parents who wish to receive UPK program funding to send their children to preschool at St. Mary. Doc. 31-1 at 14 ¶¶ 90-93. Without the funding offered by the UPK program, Plaintiffs argue, the parents “instead will have to pay the full cost out of pocket.” *Id.* ¶ 92. But just as the Plaintiff schools’ voluntary choice to forgo UPK participation breaks the causal chain for their own injury, so too does it break the causal chain for the parents’ alleged injury. The causation element of standing requires that the alleged injury is “fairly . . . trace[able] to the challenged action *of the defendant*” and not the result of some independent action by a third party. *Lujan*, 504 U.S. at 560 (emphasis added) (quotations omitted). Plaintiffs fail to make that showing here.

B. Plaintiffs’ speculation about potential future events that have not occurred, and may never occur, does not generate standing.

Even if Plaintiffs’ harm is not self-inflicted, Plaintiffs still fail to establish the required injury in fact. To have Article III standing, the plaintiff’s injury in fact cannot be conjectural or hypothetical but rather must be “concrete and particularized” and “actual or imminent.” *Lujan*, 504 U.S. at 560; *accord Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). A plaintiff does not

satisfy Article III’s requirement that their injury be “certainly impending” when their theory “relies on a highly attenuated chain of possibilities.” *Clapper*, 568 U.S. at 410.

Plaintiffs allege that a LGBTQ family’s beliefs and actions, or a four-year old’s adoption of a gender identity different from their biological sex, could create “‘intractable conflicts’ for Catholic schools’ ability to form children in, live out, and consistently witness to what they believe is true based on the Catholic faith.” Doc. 31-1 at 3, ¶ 16. But Plaintiffs have not alleged any instance in which they actually denied a family or child enrollment into their preschool due to a child’s gender identity or a LGBTQ family’s beliefs or actions. For Plaintiffs to have standing, a very lengthy and speculative chain of circumstances would have to occur: (1) an LGBTQ family enrolls their eligible child in the UPK program; (2) the family considers one of the Plaintiff schools as a potential match in the program; (3) the family learns about Plaintiffs’ policies discriminating against LGBTQ families; (4) the family requests an exemption from Plaintiffs’ policies; (5) the Plaintiff school refuses to provide equal access to preschool to that child; (6) a complaint is filed with the Department regarding the Plaintiff school’s actions; (7) the Department investigates the complaint; (8) the Department finds a violation; (9) the Plaintiff school refuses to remedy the violation(s); and (10) the Department files a breach of contract claim against the Plaintiff school. None of these events has occurred, and may never occur.

The speculative possibility that Plaintiffs may “‘some day’” face the prospect of a LGBTQ family requesting enrollment in one of the Plaintiff schools, without more, is insufficient to create Article III standing. *Colo. Outfitters Ass’n v. Hickenlooper*, 823 F.3d 537, 553 (10th Cir. 2016) (quoting *Lujan*, 504 U.S. at 564) (finding no standing where challengers alleged they might “some day” “experience difficulties” exercising their constitutional rights).

Strictly adhering to Article III’s standing prerequisites and awaiting a controversy that “actually exists[s],” *Spokeo*, 578 U.S. at 340, also assures the “concrete adverseness” that “sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]” *Baker v. Carr*, 369 U.S. 186, 204 (1962). Here, Plaintiffs’ amended complaint alleges no facts involving an actual family who requested but was denied enrollment into Plaintiffs’ schools due to their LGBTQ status or other protected characteristics. With no actual facts to go on, the Department—and the Court—are unable to determine the specific circumstances of the family’s situation, the reasons for the provider’s denial, what specific services were not provided, and whether the provider violated Colorado’s Quality Assurance Standards.

Nor have Plaintiffs alleged a sufficiently imminent threat of enforcement as required to establish standing for a pre-enforcement challenge under the First Amendment. *See Susan B. Anthony List v. Driehaus* (“*SBA List*”), 573 U.S. 149, 159 (2014). To have standing for a pre-enforcement challenge, the plaintiff must demonstrate an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute, and that there exists “a credible threat of prosecution thereunder.” *Colo. Outfitters Ass’n*, 823 F.3d at 545 (quoting *SBA List*, 573 U.S. at 159). Courts evaluate three factors when determining whether an alleged threat is credible: (1) whether the plaintiff showed “past enforcement against the same conduct”; (2) whether authority to initiate charges is “not limited to a prosecutor or an agency” and, instead, “any person” could file a complaint against the plaintiffs; and (3) whether the state disavowed future enforcement. *SBA List*, 573 U.S. at 164-65.

Applied here, these factors show that Plaintiffs’ alleged fear is not credible.² The Department has not disciplined any religious UPK program participant in the past, only the Department can bring a breach-of-contract action to enforce the Agreement, and as explained below, the Department disavows enforcement of the Agreement’s paragraph 18(B) against Plaintiffs’ employment decisions involving their co-religionists or ministerial employees that are consistent with federal law.³ Ex. 1, Odean Declaration ¶ 16. These facts show that Plaintiffs’ claimed fear is “imaginary or speculative,” *Babbit v. United Farm Workers Nat’l Union*, 442 U.S. 289, 299 (1979) (quotations omitted), and not “objectively justified.” *Bronson v. Swensen*, 500 F.3d 1099, 1107 (10th Cir. 2007) (quotations omitted).

The absence of any credible threat of future enforcement is also established by facts that Plaintiffs fail to mention in their amended complaint. Both Plaintiff schools have long been

² Plaintiffs’ intent to discriminate against LGBTQ families and students while accepting state funds is also not a constitutionally protected interest—a point Defendants will fully develop if this case proceeds to the merits.

³ While the Department does not disavow its authority to enforce the Quality Assurance Standards should the need arise, such a disavowal is “not necessary to defeat standing.” *Ward v. Utah*, 321 F.3d 1263, 1268 (10th Cir. 2003); *accord Mink v. Suthers*, 482 F.3d 1244, 1255 (10th Cir. 2007) (“It is not necessary for defendants [] to refute and eliminate all possible risk that the statute might be enforced to demonstrate a lack of a case or controversy.”). Disavowals by government regulators become important “only in cases in which, without a disavowal, the plaintiff seeking to enjoin enforcement would have a reasonable basis for concern that he might be prosecuted.” *Winsness v. Yocum*, 433 F.3d 727, 733 (10th Cir. 2006) (quoting *Lawson v. Hill*, 368 F.3d 955, 959 (7th Cir. 2004)); *see also Kegler v. U.S. Dep’t of Justice*, 436 F. Supp. 2d 1204, 1212-18 (D. Wyo. 2006) (surveying federal case law and concluding that a prosecutor’s disavowal is not necessary to show lack of standing, “lest the courthouse doors swing open for all disgruntled citizens lacking such assurances.”). A mere expectation that a statute on the books will be enforced is not enough. *See Mink*, 482 F.3d at 1253. At bottom, in the absence of allegations indicating that Plaintiffs are a “special priority” for government regulators in enforcing the Quality Assurance Standards, *Kegler*, 436 F. Supp. 2d at 1218 (quotations omitted), Plaintiffs face no credible threat of enforcement.

licensed as child care facilities in Colorado. St. Bernadette has been licensed since 2007; St. Mary has been licensed since 2006. Ex. 1, Odean Declaration ¶¶ 22-23. Thirty-three other schools affiliated with the Denver Archdiocese also hold child care licenses. *Id.* ¶ 21. As licensees, they are subject to regulatory oversight. *See* 12 C.C.R. 2509-8. The state often receives complaints regarding licensed child care facilities on a range of topics. Ex. 1, Odean Declaration ¶ 20. The earliest complaint against a Denver Archdiocese school dates to 1992 and involves alleged harsh treatment of a child. But as relevant here, the complaint histories of the 35 licensees affiliated with the Denver Archdiocese reveal no complaints from LGBTQ families or others for discrimination related to a child's or family's protected LGBTQ status. *Id.* ¶ 21. This includes St. Bernadette and St. Mary. The absence of such complaints over such a lengthy period as licensed child care providers (16 years for St. Bernadette and 17 years for St. Mary) confirms that Plaintiffs face no credible threat.

Similarly, St. Mary and nine other Denver Archdiocese preschools participate in CCCAP. Ex. 2, Burne Declaration ¶ 13. To participate, these schools contractually agree to not discriminate based on a person's sex, sexual orientation, and other protected characteristics. *Id.* ¶¶ 9-11. St. Mary signed this agreement as recently as August 23, 2023—one week *after* filing this lawsuit. *Id.* ¶ 16. Like the UPK program, the counties that administer CCCAP have received no complaint alleging that St. Mary or any other Denver Archdiocese school has discriminated against a LGBTQ family or child. *Id.* ¶ 18.

The same is true for yet a *third* government program. St. Bernadette and nine other Denver Archdiocese preschools participate in the Denver Preschool Program. Ex. 5, Holguin Declaration ¶ 7. To participate in the Denver program, these schools contractually agree to an

antidiscrimination provision that is even stronger than that required by the UPK program.⁴ *Id.*

¶¶ 4-5. St. Bernadette signed this agreement as recently as June 2022. *Id.* ¶ 9 & Ex. 7. And like the UPK program and CCCAP, the Denver Preschool Program has received no complaint over its 17-year history suggesting that any of these ten participating Catholic preschools has engaged in LGBTQ-based discrimination. *Id.* ¶ 10.

The absence of any complaints against Catholic preschools, including the two Plaintiff schools, across multiple government programs is telling. It shows that Plaintiffs face no credible threat of enforcement. It remains possible, even likely, that the outcome Plaintiffs so fear may never come to pass. Plaintiffs thus lack standing to bring their claims.

C. The Department applies paragraph 18(B) of the Agreement consistently with federal law, thus protecting Plaintiffs’ right to prefer their co-religionists and to make employment decisions involving their ministerial employees in accordance with federal law.

Plaintiffs’ amended complaint also fails to establish an actual injury resulting from the Agreement’s paragraph 18(B) that, among other things, prohibits employment discrimination. Doc. 31-1 at 19, ¶ 127. Plaintiffs allege that they cannot employ individuals “who refuse to uphold the Catholic Church’s beliefs regarding marriage and the family” and this “means that Plaintiffs cannot sign the UPK Provider Agreement . . . because of its prohibition on discrimination based on sexual orientation and gender identity” in paragraph 18(B). Doc. 31-1 at 22, ¶¶ 144-45.

⁴ It is unclear why St. Mary and St. Bernadette found the antidiscrimination provisions for other government programs acceptable but refused to sign the UPK program’s substantially similar provision.

Plaintiffs lack standing to challenge paragraph 18(B) for two reasons. *First*, the Department interprets and applies paragraph 18(B) to permit religious organizations to hire co-religionists in accordance with federal law and to make employment decisions involving its ministerial employees as protected by federal law. Ex. 1, Odean Declaration ¶ 16. The Department disavows any intention of interfering with Plaintiffs’ faith-based hiring decisions that are protected by federal law. The Department has not caused concrete and particularized injury to Plaintiffs, nor is any such injury imminent. The Department has no history of enforcement against identical conduct, only the Department can bring a breach-of-contract action to enforce the Agreement, and the Department has disavowed enforcement against a religious provider’s hiring of co-religionists in accordance with federal law and against a religious provider’s employment decisions involving its ministerial employees as protected by federal law.⁵ *Id.* ¶¶ 16-17.

Second, Plaintiffs’ employment-related claims as to paragraph 18(B) are conjectural rather than “concrete and particularized” and “actual or imminent.” *Lujan*, 504 U.S. at 560. Again, a lengthy and speculative chain of events would have to occur before Plaintiffs would have standing: (1) an individual applies for a UPK program position with Plaintiffs or is already an employee in Plaintiffs’ preschools; (2) Plaintiffs believe the individual is not living life as a co-religionist because they “refuse to uphold the Catholic Church’s beliefs regarding marriage

⁵ The Court and the Department will of course need facts to determine whether a provider’s employment decisions regarding its co-religionist employees and ministerial employees are protected by federal law—yet another reason this case is not yet justiciable. For example, determining whether an employee qualifies as a ministerial employee, and thus whether the ministerial exception applies, requires facts absent here. *See generally Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. __ (2020).

and the family,” Doc. 31-1 at 22, ¶ 144; (3) Plaintiffs decline to hire or fire the individual; (4) the individual files a complaint with the Department; (5) the Department investigates the complaint; (6) the Department finds a contractual violation; (7) Plaintiffs refuse to remedy the violation; and (8) the Department files a breach of contract claim against Plaintiffs.⁶ None of these events have occurred and they may never occur.

Plaintiffs therefore lack standing for their claims premised on the Agreement’s paragraph 18(B).

II. Plaintiffs’ claims are not ripe for adjudication.

Even if Plaintiffs have standing, the Court should still dismiss the amended complaint because Plaintiffs’ claims are not yet ripe. The ripeness doctrine is “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). A “claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998). The ripeness test requires courts to consider: (1) the fitness of the issue for judicial resolution; and (2) the hardship to the parties of withholding judicial consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *United States v. Doe*, 58 F.4th 1148, 1154 (10th Cir. 2023). Because Plaintiffs’

⁶ These hypotheticals do not encompass every possible chain of events or circumstances that may ever lead to an injury.

claims rest entirely on speculation about future events that have not occurred and may never occur, their claims are not ripe for adjudication.⁷

A. Plaintiffs’ unripe claims rely on incidents that may never occur, rendering them unfit for judicial resolution.

In determining whether an issue is fit for judicial resolution, courts consider whether the issue is “purely legal” and whether “the agency action [is] final.” *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir. 1990). Both show Plaintiffs’ claims are unripe.

First, Plaintiffs’ claims are unfit for judicial decision at this time because they are not purely legal but rather depend heavily on facts that have not occurred. Whether St. Bernadette or St. Mary are ever confronted with the prospect of having to enroll a transgender child or LGBTQ family “may not occur as anticipated, or indeed may not occur at all.” *Texas*, 523 U.S. at 300. Indeed, the complete absence of complaints against the Plaintiff schools—or *any* Denver Archdiocese-affiliated school for that matter—for LGBTQ-based discrimination over a 15-year-plus period shows that the events Plaintiffs fear might never occur. Moreover, a school’s reasons for declining to enroll a student may be multi-pronged, with some grounded in permissible reasons (e.g., no slots available) and some in impermissible reasons (e.g., LGBTQ-based discrimination). Only a fact-based inquiry that fully develops the record will allow the Department, and the Court, to know for sure. *See Pub. Affairs Assocs. v. Rickover*, 369 U.S. 111,

⁷ Article III ripeness defects are evaluated under Rule 12(b)(1), while prudential ripeness is evaluated under Rule 12(b)(6). *See North Mill Street, LLC v. City of Aspen*, 6 F.4th 1216, 1230 (10th Cir. 2021). Defendants assert Plaintiffs’ claims are unripe under both. “Even when an appeal satisfies Article III’s ‘case or controversy’ requirement, [the court] may still decline to review it under the prudential ripeness doctrine.” *United States v. Cabral*, 926 F.3d 687, 693 (10th Cir. 2019).

112-13 (1962) (declining to adjudicate a dispute of “serious public concern” absent “an adequate and full-bodied record”).

Plaintiffs’ employment-related claims are similarly dependent on facts that have not yet occurred and may never occur. The Department has not taken or threatened enforcement action based on Plaintiffs’ employment policies governing the hiring of co-religionists and ministerial employees. And again, it may never do so, given the chain of speculative events that would first have to occur. Indeed, the Department has disavowed enforcement of paragraph 18(B) of the Agreement for employment decisions made pursuant to federal law. For these reasons, this dispute is unfit for judicial decision.

Second, the Department’s agency action is not final in two important ways. For one, the Department has never initiated an investigation into either St. Bernadette or St. Mary because neither is participating in the UPK program and, in any event, no LGBTQ family has lodged a complaint. Unless and until such an investigation occurs, the Department’s agency action is not yet final, rendering the issue unripe for judicial review. For another, the Department is currently at the early stages of its rulemaking process to establish the Quality Assurance Standards required by the Colorado General Assembly. *See* Colo. Rev. Stat. § 26.5-4-205(1)(a); Ex. 1, Odean Declaration ¶ 13. As part of the rulemaking process, the Department is evaluating how broadly or narrowly to define “congregation” for purposes of the UPK program. Ex. 1, Odean Declaration ¶ 15. This definition is key because faith-based providers can reserve all or a portion of their preschool seats for members of their congregation. Doc. 30-6 at 3; Doc. 31-1 at 19, ¶ 129. Depending on the results of the rulemaking and the definition of congregation, certain of Plaintiffs’ claims may be rendered moot or, at minimum, require that Plaintiffs amend their

complaint to adjust their claims. As such, Plaintiffs' unripe claims are not fit for judicial resolution at this early stage.

B. Plaintiffs will experience no hardship if the Court withholds judicial review pending an actual controversy.

On the second ripeness factor, withholding judicial review until Plaintiffs' claims ripen into an actual dispute will not result in hardship. Hardship occurs when the plaintiff incurs an "immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance[.]" *Abbott Laboratories*, 387 U.S. at 153. Here, Plaintiffs are experiencing no change in the conduct of their own affairs, let alone an "immediate and significant" change that results in penalties for noncompliance. *Id.* Plaintiffs voluntarily chose to forego state funds offered through the UPK program and declined to seek court intervention before making that choice. Plaintiffs are subject to no penalties for continuing their current operations. Plaintiffs' situation thus remains the same as it was before the UPK program was promulgated. *See Utah Republican Party v. Cox*, 892 F.3d 1066, 1093 (10th Cir. 2018) ("By declining to address the remedy of a violation which may never occur, we simply maintain the status quo.").

Accordingly, Plaintiffs' claims are not ripe for adjudication.

CONCLUSION

This Court should dismiss the amended complaint for lack of subject matter jurisdiction because Plaintiffs lack standing and, even if they have standing, their claims are not ripe for adjudication.

Dated: October 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, I electronically filed the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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Exhibit List to Defendant's Motion to Dismiss Plaintiffs' Amended Complaint

Ex. 1: Declaration of Dawn Odean dated October 6, 2023.

Ex. 2: Declaration of Jesse Burne dated October 5, 2023.

Ex. 3: Attachment 1 to Declaration of Jesse Burne, Colorado Child Care Assistance Program (“CCCAP”) Fiscal Agreement valid January 1, 2023 through December 31, 2025.

Ex. 4: Attachment 2 to Declaration of Jesse Burne, signed CCCAP Fiscal Agreement by St. Mary Catholic Preschool in Littleton, Colorado, signed August 23, 2023.

Ex. 5: Declaration of Elsa Holguin dated October 3, 2023.

Ex. 6: Attachment 1 to Declaration of Elsa Holguin, Denver Preschool Program (“DPP”) 2022-2023 Provider Agreement.

Ex. 7: Attachment 2 to Declaration of Elsa Holguin, signed DPP Provider Agreement for 2022-2023 by St. Bernadette Catholic Preschool in Lakewood aka “Wellspring Catholic Academy of St. Bernadette,” signed June 1, 2022.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:23-cv-02079-JLK

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

Plaintiffs,

v.

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

Defendants.

DECLARATION OF DAWN ODEAN

I, Dawn Odean, pursuant to 28 U.S.C. § 1746, do depose and state as follows:

1. I am over 18 years of age. I am a citizen of the United States and resident of the
State of Colorado. I am competent to make this declaration under oath, and make this
declaration based on my personal knowledge.

2. I am the Director of the Universal Preschool Program (the "UPK program") for
the Colorado Department of Early Childhood. I assumed my position as Director of the
Program on August 15, 2022.

Background of the UPK program

3. Since 1988, Colorado has steadily increased its investment in high-quality
preschool programming. In 1988, Colorado established the Colorado Preschool Program,
which focused on serving Colorado's most in-need families. Nevertheless, in 2019-2020, the
Colorado Preschool Program was able to serve only approximately 25 percent of Colorado's
four-year-old children.



4. In the 2020 general election, Colorado voters overwhelmingly approved proposition EE, establishing a dedicated source of funding for statewide, voluntary, universal preschool.

5. All the prior responsibilities of the Department of Human Services for administering early childhood programs and services, including the preschool UPK program, were transferred to the Colorado Department of Early Childhood (the “Department”) on July 1, 2022. Families of children in the year before they are eligible for kindergarten, and qualifying three-year-olds, can apply for the UPK program. Every child is eligible for up to a half-day (15 hours) of state-funded, voluntary preschool each week the year before they are eligible for kindergarten. The Department was charged with identifying and recruiting preschool providers throughout the state to participate in the UPK program. The Department’s mission for the UPK program is to provide early childhood opportunities for all children in Colorado and prioritize the equitable delivery of resources. The UPK program is statutorily required to provide a “mixed delivery system” of preschools which includes public, private, and parochial schools. The UPK program allows families to choose the right setting for their child, whether it is in a licensed community-based, school-based, or home-based preschool environment.

6. The Department has actively reached out to public, private, and parochial preschools and engaged them in discussions regarding the UPK program. Colorado welcomes preschool providers of all types to participate in the UPK program—religious, secular, or otherwise.

7. The Department convened a faith-based work group which met on a bi-weekly basis from December 20, 2022, through June 13, 2023. The purpose of the group was to ensure the Department was inclusive of faith-based providers. A representative of St. Mary Catholic School in Littleton, one of the Plaintiffs here, participated regularly in the work group and frequently conveyed what she asserted were the views of the Denver Archdiocese.

8. One product of this bi-weekly dialogue with faith-based providers is the ability of faith-based providers to give a preference to members of their own congregations. Faith-based providers participating in the UPK program may give preference to members of their congregation by reserving all or a portion of their preschool seats for their congregation members, and may decline a match from a family that is not part of their congregation. Through its ongoing rulemaking process, described in more detail below, the Department is currently evaluating how broadly or narrowly to define “congregation” for this purpose.

9. After the Department had providers enrolled in the UPK program, it started the process of matching families to those providers. Before a family is matched with a provider, the family chooses up to five providers and ranks them from one to five. The Department will only match children with one of the family’s choices. If none of the family’s choices are available, the family will have the opportunity to select additional providers for their child. Ultimately, families must accept a match before their children can be enrolled with a provider. Of the children matched to providers, 94% of families received one of their top 2 choices and 82% of families received their top choice. As of September 2023, over 38,000 children and roughly 1,900 preschool providers are participating in the UPK program mixed delivery system.

10. Currently, there are 40 faith-based providers participating in the UPK program and 904 children have been matched to faith-based providers.

Quality Standards Required by Law

11. Colorado law requires the Department to develop and establish in rule the Quality Assurance Standards that each preschool provider must meet to receive program funding. Colo. Rev. Stat. § 26.5-4-205(1)(a). These standards must reflect national and community-informed best practices, and the Department must work with families, educators, and program administrators to review and revise them as necessary.

12. By statute, the Quality Assurance Standards must also include a requirement that each participating preschool provide eligible children with an equal opportunity to enroll and

receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family. Colo. Rev. Stat. § 26.5-4-205(2)(b). To implement this antidiscrimination provision, participating preschool providers must enter into a Program Service Agreements (the “Agreement”) with the Department in which they agree not to discriminate on the basis of the protected classes identified in section 26.5-4-205(2)(b).

13. The UPK program is at the early stages of its rulemaking as it relates to Quality Assurance Standards. On September 11, 2023, the Department held a public stakeholder webinar to discuss the Quality Standards. The Department accepted stakeholders’ written comments, suggested questions for inclusion in the Department’s FAQs, and suggested changes to the Quality Standards up through September 22, 2023. The Department will review and consider all submitted feedback before drafting proposed rules for the Quality Standards.

14. Anyone, including all child care providers, are welcome to participate in that process as a stakeholder. The proposed rules will be reviewed by the Department’s Rules Advisory Council¹ early next year. Once the Quality Assurance Standards are adopted in rule, they will not become effective until the 2024-2025 school year. The prior rules adopted by the Department of Human Services continue in effect and apply until the Department promulgates Quality Assurance Standards in rule. Colo. Rev. Stat. § 26.5-1-106(1)(c). All rules promulgated by the Department must increase equity in access to programs and services. Colo. Rev. Stat. § 26.5-1-105(1)(a)(III).

15. As indicated, through its ongoing rulemaking process, the Department is currently evaluating how broadly or narrowly to define “congregation.” As discussed, faith-based providers participating in the UPK program may give preference to members of their

¹ See Colo. Rev. Stat. § 26.5-1-105(2)(a) and (j)(2023).

congregation by reserving all or a portion of their preschool seat for their congregation members.

16. The Department interprets and applies Contractual Provision 18(B) in the Agreement—which Plaintiffs call the “Catch-all” provision—to permit religious organizations to hire co-religionists in accordance with federal law and to protect religious organizations’ employment decisions about their ministerial employees in accordance with federal law. The Department disavows enforcement of Contractual Provision 18(B) against religious providers who hire co-religionists in accordance with federal law, and against religious providers’ employment decisions involving their ministerial employees as protected by federal law.

17. The Department has not sanctioned or disciplined any faith-based preschool provider in the UPK program, nor has it filed any action to enforce any terms in the Agreement against a provider. The Department is the only entity with authority over the UPK program and the only entity with the ability to enforce compliance with the Agreement.

18. The two Plaintiff schools here—St. Mary Catholic Preschool and Wellspring Catholic Academy of St. Bernadette Catholic School—are not currently participating in the UPK program and have not signed the Agreement.

19. I am aware from my work with the Department, including its convening of the faith-based work group, that other faith-based providers strongly disagree with Plaintiffs’ decisions not to participate in the UPK program based upon their desire to reserve the ability to discriminate against LGBTQ families and children.

Colorado’s regulation of childcare facilities

20. In addition to the Department’s oversight of UPK program providers, licensed child care providers, including preschools, are subject to licensing requirements that long predate the UPK program. *See* 12 C.C.R. 2509-8. The state often receives complaints regarding licensed child care facilities from concerned parents, guardians, community and family members. The complaints run the gamut, from allegations of child abuse or neglect to

child care staff not having proper certifications or qualifications. The Department has access to the records of any and all complaints made against any licensed childcare facility for as long as the facility has had a child care license.

21. Thirty-five schools affiliated with the Denver Archdiocese, including the two Plaintiff schools in this case, hold child care licenses. Some have a history of complaints, with the oldest complaint dating to 1992 involving alleged harsh treatment of a child. None of the 35 schools, however, has any history of a complaint from an LGBTQ family or other person alleging LGBTQ-based discrimination.

22. Wellspring Catholic Academy of St. Bernadette Catholic School has been licensed as child care facility since 2007. The state has no records of complaints of any kind against it during that time.

23. St. Mary Catholic Preschool has been a licensed child care facility since 2006 and has two complaints against it during that time: (i) for dispensing the wrong medication to a child in 2017, and (ii) for failing to report an injury in 2009.

24. Neither of the Plaintiff schools has any history of a complaint from an LGBTQ family or other person for LGBTQ-based discrimination.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of October 2023.

/s/ Dawn Odean

Dawn Odean

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-2079-JLK

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION
TO DISMISS PLAINTIFFS'
AMENDED COMPLAINT
(ECF NO. 38)**

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INTRODUCTION

Chutzpah has been defined as “that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.” Leo Rosten, *The Joys of Yiddish* 93 (1968). Defendants’ motion to dismiss is an extended exercise in *chutzpah* and victim blaming. Defendants are the ones who have harmed Plaintiffs and violated the Constitution. They cannot now complain that Plaintiffs have asserted their rights and haled Defendants into federal court to answer for their misdeeds.

To hear Defendants tell the tale, they are the victims of a “test case” brought by parochial schools and parents who are looking to change First Amendment law. According to Defendants, Plaintiffs alone are responsible for their inability to participate in the State’s new universal preschool program—even as Defendants in the same breath claim they are “alarm[ed]” by Plaintiffs’ request that they be permitted to do so.

But it is Plaintiffs who are being victimized by Defendants, not the other way around. It was the State who decided to pursue its goal of increasing preschool access by the counterintuitive means of excluding all Catholic preschools from a “universal” preschool funding program. It was the State who denied an accommodation when the Archdiocese of Denver sought one. And it is the State who could make this lawsuit go away, simply by waiving the specific conditions of the agreements that are causing the First Amendment conflict and by allowing religious families and schools to follow their faith. The injuries resulting from Defendants’ actions couldn’t be more concrete and immediate: the parochial school Plaintiffs are losing students every month they are barred from UPK Colorado, and Catholic families across Colorado (including the parent Plaintiffs) are losing money, simply because they observe their faith by sending their kids to Catholic school.

Defendants’ Article III arguments derive from a fundamental confusion over what kind of civil rights lawsuit this is. Defendants assert that this is a pre-enforcement challenge. But this case is about whether Defendants can insist *today* that Plaintiffs agree to unconstitutional conditions in a

contract in order to participate in UPK Colorado. If Plaintiffs don't sign, they will not get the benefits. So far, Plaintiffs have been shut out of the program for the entire first semester of the school year. That fact eliminates all of Defendants' standing and ripeness arguments. To put it in terms of classic civil rights litigation, Defendants aren't just thinking about excluding Plaintiffs from equal access to educational benefits that ought to belong to every child in Colorado—they are standing in the schoolhouse door.

Defendants explain their refusal to accommodate by saying they are “protect[ing]” families from Plaintiffs' religious exercise. But while Plaintiffs, too, oppose “unjust discrimination,” Catechism of the Catholic Church ¶ 2358, they have a right to seek to convey their beliefs to the next generation, including through forming communities composed of those receptive to their beliefs. Allowing them to do so while also participating in UPK Colorado doesn't exclude a single preschool or family whose beliefs are more amenable to the State. Meanwhile, it respects the “promise of the free exercise of religion” that “lies at the heart of our pluralistic society.” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753-54 (2020).

The Court should deny Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (ECF No. 38).

FACTUAL BACKGROUND

A. Catholic education in the Archdiocese of Denver

Plaintiffs St. Mary's and St. Bernadette's operate Catholic preschools to assist parents in providing a high-quality, Catholic education to their children. St. Mary's “aim is to form our preschoolers into ‘saints, heroes, and geniuses.’” ECF No. 32-14 ¶ 14. St. Bernadette's offers “a Catholic education that invites all to Dig Deep, to uncover our precious gifts within a loving encounter with God, the ‘source and author of life’ (*Acts* 3:15).” ECF No. 32-16 ¶ 5. Both preschools also strive to make quality Catholic education affordable, helping to serve the many families of limited

means who desire a Catholic education for their children. At St. Bernadette's, for example, 86 percent of preschool students receive free or reduced-price lunches. *Id.* ¶ 9.

Plaintiffs Daniel and Lisa Sheley are parishioners at St. Mary's who have a four-year-old currently enrolled in St. Mary's preschool. ECF No. 32-18 ¶ 6. The Archdiocese of Denver's Office of Catholic Schools oversees 36 parish and Archdiocesan preschools, including St. Mary's and St. Bernadette's. ECF No. 32-1 ¶¶ 7-8. These schools are subject to the Archdiocese's direction on matters of faith and morals. *Id.*

Educating and forming students in the Catholic faith is the central mission of these schools. ECF No. 32-1 ¶ 23. "Because Jesus asked the Church to form disciple-students, the school is the natural place for discipleship, in learning the Christian faith and forming habits of the Christian life." ECF No. 32-9 at 8. The Catholic school is therefore a "place of evangelization and catechesis, existing to equip students to go forth proclaiming the marvelous works of God." *Id.* at 9. Catholic preschools in particular provide "preparation for further formal instruction," ECF No. 32-1 ¶¶ 20-21, planting the seeds of discipleship by creating a faith-filled and Christ-centered community. ECF No. 32-14 ¶¶ 8-15.

Archdiocesan preschools can only fulfill this purpose if those who lead them are properly formed in the Catholic faith. Accordingly, the Archdiocese requires that those who teach and pass on the Catholic faith to the next generation—including preschool teachers—strive to uphold its tenets in both word and deed, and to meet the requirements of provisional catechetical certification. ECF No. 32-1 ¶¶ 24-26.

Parents and families also play a crucial role in creating a community of faith and discipleship. As the Archdiocese tells parents, "[b]y enrolling your child in our school, you are joining our Catholic educational mission[.]" ECF No. 32-3 at 7. Accordingly, "all Catholic school families must understand and display a positive and supportive attitude toward the Catholic Church, her

teachings, her work, and the mission of the Catholic school.” *Id.* at 8. Without this common understanding, Catholic schools could not fulfill their role of supporting parents as the primary educators of their children and forming faith-fostering communities of disciples. ECF No. 32-9 at 8-9. This understanding of what is required to form a faith-filled community informs the Archdiocese’s religious belief that its schools should prioritize admitting Catholic families active in Archdiocesan parishes and carefully consider whether admitting students or families who—in word or deed—oppose Catholic teachings will create “intractable conflicts.” ECF No. 32-6 at 15; *see also* ECF No. 32-1 ¶ 27.

The Archdiocese insists on an openness to the Catholic faith because when what is being taught in school conflicts with the education and example in the home, this can undermine the mission of Catholic schools and can negatively impact the education provided to other students and families who enroll in the school. *Id.* This has meant that at times Plaintiffs have had to make the difficult decision not to enroll a family in their schools because doing so would “cause conflict and confusion within the school and within their family.” ECF No. 32-16 ¶ 26. Ultimately, though, most families who seek out Catholic schools do so *because* they want their child to receive an education that both challenges them intellectually and nourishes them spiritually. And, as Defendants readily admit, despite the fact that the Archdiocese has insisted on adherence to these religious beliefs and taught the truths of the Catholic faiths across its 36 preschools for decades, it has carried out its unique mission without generating complaints from those who don’t share these beliefs. ECF No. 38 at 15.

The Archdiocese takes seriously this obligation to help form faithful school communities. The Archdiocese’s consistent position has been that those who teach in its schools and participate in its faith communities must be open to and supportive of the Catholic Church’s teachings. The Archdiocese provided further guidance on how this manifests itself with regard to issues concerning the “human person and sexual identity” in 2018, issuing a 19-page document explaining the

Catholic Church's beliefs and providing guidance for Catholic schools facing these issues. ECF No. 32-6. The Archdiocese's Office of Catholic Schools helps to implement these beliefs by, among other things, requiring Archdiocesan schools to use its "Statements of Community Belief" when entering into employment contracts, ECF No. 32-1 ¶ 8; providing draft contracts for school staff (including preschool teachers), *id.* ¶ 12; providing courses of study and curriculum guides for mandatory use in Archdiocesan schools, *id.* ¶ 17; and providing ongoing tools and guidance to Archdiocesan schools as they carry out their religious mission, *id.* ¶¶ 13-14.

B. The Department of Early Childhood's Universal Preschool Program

In 2022, Colorado established a system of state funding for "universal" preschool to be administered by the newly created Department of Early Childhood. Colo. Rev. Stat. §§ 26.5-4-201, *et seq.* The new program aims to make some "preschool services" free for all Colorado children, "regardless of their economic circumstances." *Id.* §§ 26.5-4-202(1)(a)(V), 26.5-4-204(1)(a).

For the 2023-24 school year, the Department will reimburse participating preschool providers for 15 hours of preschool per child. This funding may be used "only to pay the costs of providing preschool services directly to eligible children enrolled by the preschool provider." *Id.* § 26.5-4-208(5). Preschools seeking to participate in UPK Colorado must sign a Program Service Agreement. ECF No. 32-15. The Agreement includes two "nondiscrimination" provisions—one covering student enrollment and the other a provider's general operations. First, the Enrollment Mandate requires "each preschool provider [to] provide eligible children an equal opportunity to enroll and receive preschool services regardless of [the] ... religious affiliation, sexual orientation, [or] gender identity" of "the child or the child's family." ECF No. 32-15 at 2; ECF No. 38 at 3; *see also* Colo. Rev. Stat. § 26.5-4-205(2)(b). Second, the Catch-all Provision forbids "discriminat[ion] against any person on the basis of ... religion, ... sexual orientation, [or] gender identity." ECF No. 32-15 at 27; ECF No. 38 at 4.

Despite these requirements, UPK Colorado allows participating preschools numerous opportunities to reject a family that seeks to enroll. For example, UPK Colorado’s official Provider Guide lists seven “exception criteria” that providers can use to screen applications. ECF No. 1-4 at 38. These criteria allow, among other things, faith-based providers to serve only families who are part of their “congregation,” co-op programs to “require family participation,” dual language providers to “screen” program participants, “Head Start grantee” programs to require families to “meet additional factors to enroll.” *Id.*; see also ECF No. 32-13 at 3 (“faith-based providers can ... decline a match from a family that is not part of the congregation”); ECF No. 38 at 5 (confirming “that faith-based providers ... may give preference to members of their congregation by reserving all or a portion of their preschool seats for their members.”). Currently, only 2 percent of UPK providers are faith-based. See ECF No. 38-1 at 3.

UPK Colorado dramatically changed how preschool providers enroll families. Previously, preschools would enroll families in their program after a family applied and was accepted into the school. Now, families enroll directly in UPK Colorado and are then “matched” by an algorithm with a preschool provider.¹ See also ECF No. 38-1 ¶ 9. As the Director of UPK Colorado testified last month, this new program “represents more than a policy shift, it is an ongoing cultural shift for Colorado families and preschool providers alike.”² UPK Colorado, for the first time, has limited the ability of preschools to screen applicants before enrollment. Once a family is “matched” with a preschool provider, “the school then reviews that placement and either accepts the match or uses a department exception process if there is some legitimate reason they are unable to accept the placement.”³ And, as explained above, the Department-sanctioned exceptions *do not* include

¹ *Testimony of Dawn Odean Before the Colorado Legislature Joint Budget Committee*, 74th Gen. Assemb., First Reg. Sess. at 10:59 a.m. (Co. 2023), <https://bit.ly/3FmLahg>.

² *Id.*

³ *Id.*

(and Defendants explicitly rejected) a religious accommodation that would protect Plaintiffs' religious exercise.

C. The Department's exclusion of Catholic preschool providers

When UPK Colorado was created in April 2022, St. Mary's and St. Bernadette's hoped to participate and started taking affirmative steps to do so. ECF No. 32-14 ¶¶ 33-37; ECF No. 32-16 ¶ 27. As details about the program emerged, however, the schools and the Archdiocese learned that they would be excluded because of their religious exercise. ECF No. 32-1 ¶¶ 30-33. The Enrollment Mandate and Catch-all Provision—both included in the mandatory Program Service Agreement for 2023-24—prevent Archdiocesan preschools from reserving spots for Catholic families from other Archdiocesan parishes. ECF No. 32-15. They also forbid Archdiocesan schools from taking into consideration whether a child or family is open to and supportive of the Catholic Church's teachings—including its teachings on human sexuality—or whether personal circumstances or actions would create intractable conflicts with what is being taught in the schools. *See, e.g.*, ECF No. 32-16 ¶¶ 22-24; ECF No. 32-14 ¶¶ 25-31. Finally, the Catch-all Provision forbids Archdiocesan preschools from requiring that those who teach the faith agree to live out those teachings in both word and deed, and from implementing policies consistent with these beliefs in their operation. *E.g.*, ECF No. 32-6 at 10-12.

When a coalition of religious preschools, including the Archdiocese, approached Defendants in February 2023 to request a religious accommodation so that they could participate in UPK Colorado, they were swiftly told no religious accommodation would be provided. ECF No. 32-1 ¶ 34; ECF No. 32-13; ECF No. 38 at 5 (acknowledging that “Defendant Roy responded that the Department does not have authority to create an exemption from the statute's antidiscrimination provision.”). As a result, the Archdiocese was obligated by its religious beliefs to direct its schools not to participate in UPK Colorado, explaining that “in our review of the UPK statutes ... we have found significant concerns with” the UPK Colorado nondiscrimination requirements, which

“clearly run counter to Church teachings and guidance we have provided to Catholic schools in the Archdiocese of Denver with respect to issues of sexual and gender identity.” ECF No. 32-11 at 1-2. Accordingly, “due to the significant risk involved and until such a time as religious exemptions can be guaranteed by UPK, parishes and their preschool programs are directed to not enter into any agreements with the state for UPK.” *Id.* at 2.

Defendants’ denial of a religious accommodation has harmed both the families who send their children to Catholic preschools and the schools themselves. For hundreds of families just like the Sheleys, the State’s denial of an accommodation costs them roughly \$600 per month. ECF No. 32-18 ¶¶ 6-7. And Archdiocesan preschools like St. Mary’s and St. Bernadette’s have experienced a significant decrease in enrollment and other harms as a result of their exclusion. *See* ECF No. 32-14 ¶¶ 38-48; ECF No. 32-16 ¶¶ 28-33. At St. Mary’s, four-year-old enrollment decreased from 64 to 52 in one year, an almost 20 percent decline. ECF No. 32-14 ¶ 38. The inability to participate in UPK Colorado has also made it more difficult for St. Mary to retain staff and ensure continuity of care. *Id.* ¶¶ 42-46. At St. Bernadette’s, four-year-old enrollment dropped from 11 to 6, an almost 50 percent decline. ECF No. 32-16 ¶ 15. But for Defendants’ discriminatory exclusion of Catholic preschools, St. Mary’s and St. Bernadette’s preschools would immediately seek to participate in UPK Colorado. *Id.* ¶ 35; ECF No. 32-14 ¶ 50.

LEGAL STANDARD

“When evaluating a plaintiff’s standing at [the motion to dismiss] stage, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. We also must construe the statements made in the affidavits in the light most favorable to the petitioner.” *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (citations and quotation marks omitted) (en banc). Further, “[f]or purposes of standing, we must assume the Plaintiffs’ claim has legal validity.” *Id.* at 1093.

ARGUMENT

I. Plaintiffs have easily shown Article III standing.

A Plaintiff may “establish Article III standing by showing (1) an ‘injury in fact’ that is ‘concrete and particularized’ and ‘actual or imminent,’ (2) that the injury is ‘fairly ... trace[able] to the challenged action of the defendant,’ and (3) that the injury is likely to be ‘redressed by a favorable decision’ of the court.” *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022). “[T]he First Amendment context creates unique interests that lead us to apply the standing requirements somewhat more leniently.” *Id.*; *see also Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (“Because of the significance of First Amendment rights, the Supreme Court ‘has enunciated other concerns that justify a lessening of prudential limitations on standing.’”).

A. Defendants both misunderstand and ignore Plaintiffs’ injury.

Plaintiffs are suffering an ongoing injury: by operation of the Enrollment Mandate and Catch-All Provision, Plaintiffs are forced to choose between following their religious beliefs and participating in UPK Colorado. This is an unconstitutional choice. And it is—as the Supreme Court, the Tenth Circuit, and this Court have all recognized—a concrete injury-in-fact under Article III. Defendants, rather than engage with this argument, try to recharacterize Plaintiffs’ case as a pre-enforcement challenge. But, as explained below, this is not a pre-enforcement case. Moreover, even under Defendants’ (incorrect) standing theory, Defendants’ arguments fail. Plaintiffs have standing.

1. Defendants have excluded Plaintiffs from UPK Colorado because of their religious character and exercise.

Plaintiffs’ injury is simple: They are “exclude[d] ... from an otherwise generally available public benefit because of their religious exercise.” *Carson v. Makin*, 142 S. Ct. 1987, 1998 (2022). As a condition of participating in UPK Colorado, preschool providers must *sign a document* requiring them to agree to provide “an equal opportunity to enroll ... regardless of” a child or family’s “religious affiliation, sexual orientation [or] gender identity,” and not “discriminat[e] against

any person” on these bases. Compl. ¶¶ 123-27; ECF No. 30-3 at 3, 28-29. But the Archdiocese’s preschools operate in accordance with their Catholic religious beliefs—so they are forbidden by their faith from agreeing to these requirements. Compl. ¶¶ 138-49; ECF No. 30-1; ECF No. 30-8; ECF No. 30-12. And although the Archdiocese reached out to Defendants, explained the conflict, and asked for an exemption, ECF No. 32-12, Defendants denied that request, ECF No. 32-13.

Because of Defendants’ conditions, then, Plaintiffs are barred from participating in UPK Colorado—even as thousands of other Colorado preschools who *don’t* share their beliefs *do* participate. ECF No. 38-01 ¶ 9. “When,” as here, “the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group,” “[t]he ‘injury in fact’ ... is the denial of equal treatment resulting from the imposition of the barrier.” *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

That is a cognizable injury-in-fact. *Id.* Indeed, it is exactly the injury at issue in each of the trilogy of recent Supreme Court decisions addressing religion-based exclusions from government benefit programs. *Carson*, 142 S. Ct. 1987; *Espinoza v. Mont. Dep’t of Rev.*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017). In each of these cases, the relevant injury was “not the denial of a grant”; it was the denial of a religious school’s “right to participate in a government benefit program without having to disavow its religious character.” *Trinity Lutheran*, 582 U.S. at 463; *see also Carson v. Makin*, 979 F.3d 21, 30-31 (1st Cir. 2020) (“the plaintiffs’ injury in fact inheres in their having lost the ‘opportunity’ to find religious ... education for their children that would qualify for public funding”), *reversed on merits grounds*, 142 S. Ct. 1987. That is precisely the injury Plaintiffs are suffering here: the only way they can participate in UPK Colorado is if they disavow their religious exercise of, *inter alia*, preferring Catholic families in enrollment and considering an applicant’s openness to the Church’s teachings on marriage and sexuality when making enrollment and employment decisions. *Cf.*

Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 493 (10th Cir. 1998) (“the injury is the imposition of the barrier itself”).

And the circumstances particular to this case make the injury only more concrete. Plaintiffs’ preschool directors have testified that they are currently losing enrollment and staff “due to th[e] increased funding” for UPK-participating schools. ECF No. 32-14 ¶¶ 38-42; ECF No. 32-16 ¶¶ 29-33. And Plaintiffs the Sheleys are currently losing around \$600 per month because their child’s preschool cannot participate. ECF No. 32-18 ¶ 6. “This is a classic pocketbook injury sufficient to give [Plaintiffs] standing.” *Tyler v. Hennepin County*, 598 U.S. 631, 636 (2023).

In fact, standing here is even clearer than in *Carson*. The plaintiffs there, like the Sheleys, sought to send their children to religious schools that were disqualified because of their religious exercise from participating in a government benefit program. 142 S. Ct. at 1994-95. Yet in *Carson*, unlike here, there was “uncertainty about [the schools’] willingness to participate” even if the challenged condition were struck down. *Compare Carson*, 979 F.3d at 30, with ECF No. 32-14, 32-16 (explaining that but for the Enrollment Mandate and Catch-All Provisions, St. Mary and St. Bernadette would seek to participate in UPK Colorado). Nonetheless, the First Circuit in *Carson* found standing, *Carson*, 979 F.3d at 29-32, and at the Supreme Court not a single Justice questioned it. Given *Carson*, this is an *a fortiori* case.

Nor are these cases alone. Rather, “[t]he Supreme Court has addressed many disputes about the validity of conditions attached to” funding “without a single Justice suggesting that the Court was issuing advisory opinions.” *Bd. of Educ. of Ottawa Twp. High Sch. Dist. 140 v. Spellings*, 517 F.3d 922, 924 (7th Cir. 2008). In *Fulton v. City of Philadelphia*, for example, the Supreme Court held that Philadelphia’s “refusal . . . to contract with” a Catholic foster-care agency “unless it agrees to certify same-sex couples as foster parents” violated the First Amendment. 141 S. Ct. 1868, 1882 (2021). That is indistinguishable from the injury Plaintiffs are suing over here—the State’s “refusal”

to allow Catholic preschools to participate in UPK “unless [they] agree[] to” provide equal access to non-Catholics and families who reject Church teaching on marriage and sexuality. *Id.*

And lower courts around the country have entertained challenges to allegedly unlawful conditions on funding arising in a posture indistinguishable from this case. *See, e.g., Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 737-38 (W.D. Tex. 2019) (plaintiffs had standing where “they lost the opportunity to contract with” government agencies “because they refused to sign anti-boycott certifications”); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1032 (D. Ariz. 2018) (“[T]he Firm was injured when it was asked to promise to refrain from engaging in a broad swath of boycotting activities, at least some of which is protected under the First Amendment, in exchange for receiving a government contract.”).⁴ Indeed, in *Colorado v. United States Department of Justice*, Colorado itself sued over allegedly unlawful “immigration-related conditions and certifications” attached to federal funding; this Court addressed its claim on the merits and ruled for the State. 455 F. Supp. 3d 1034, 1043-44 (D. Colo. 2020) (Kane, J.).

The State’s counter to this argument turns entirely on the claim that Plaintiffs’ injury is “self-inflicted.” ECF No. 38 at 8-10. According to the State, it was Plaintiffs’ “voluntary choice[]” not to participate—a claim it attempts to substantiate by pointing to the Archdiocese’s communication to its schools “instruct[ing] its preschools” not to sign the UPK Colorado provider agreements. *Id.*

But if this injury is “self-inflicted,” then so were the injuries in (for example) *Carson*, *Fulton*, and *City of Jacksonville*—not to mention the State’s own injury in *Colorado v. DOJ*. Unsurprisingly, then, the State’s argument is irreconcilable with both the facts and the law.

⁴ Both these decisions were vacated on appeal after the government—rather than challenging standing or defending itself on the merits—exempted the plaintiffs from the challenged condition. *Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020); *Jordahl v. Brnovich*, 789 F. App’x 589 (9th Cir. 2020).

Factually, the argument is based on a selective, misleading quotation of the Archdiocese's communication to its schools. The Archdiocese did not arbitrarily direct its preschools not to participate despite their being "eligible." ECF No. 38 at 9. Rather, it told them that because "elements of" UPK Colorado's "non-discrimination requirements ... clearly run counter to Church teaching," they could not participate without coming into "non-compliance for upholding Church teaching in our employment and admission practices," risking "penalties," and "cooperat[ing] with an ideology and agenda contrary to our beliefs on the human person." ECF No. 32-11 at 2. In other words, the nonparticipation here isn't due to an Archdiocesan fit of whimsy; it's the result of the State "condition[ing] receipt of an important benefit upon conduct proscribed by [the Archdiocese's] faith," *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981)—exactly what this lawsuit is all about. *See also Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

Legally, a plaintiff does not have to agree to an allegedly unconstitutional condition to challenge it. Rather, as the Tenth Circuit has explained, "it is an injury in itself to avoid lawful conduct"—like participation in UPK—"to avoid the application of an allegedly unlawful Rule"—like the challenged conditions here. *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 902-03 (10th Cir. 2016). Of course, the plaintiff must show that he is "'able and ready' to apply" for the benefit absent the challenged condition. *Carney v. Adams*, 141 S. Ct. 493, 499-500 (2020). But that Plaintiffs have met that requirement is both undisputed and indisputable in this case. *See* ECF No. 32-14 ¶ 50 ("If St. Mary's preschool were not prevented from participating in the UPK program because of our sincere religious beliefs, we would seek to participate in the program immediately."); ECF No. 32-16 ¶ 35 (same for St. Bernadette's). Indeed, both St. Mary's and St. Bernadette's have attained four-star ratings (the second highest) from the State's Colorado Shines ratings system, are

licensed by the State, and have already participated in other government programs (like those cited by the State itself, the Denver Preschool Program and the Colorado Child Care Assistance Program) that do not impose the same unlawful conditions, *see infra* Part I.A.2.

Tellingly, none of the State’s “self-inflicted harm” cases, ECF No. 38 at 9-10, have anything to do with an unconstitutional-conditions challenge like this one. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410-18 (2013) (claimed fear of future surveillance); *Colorado v. U.S. Env’t Protection Agency*, 989 F.3d 874, 888 (10th Cir. 2021) (self-inflicted harm where state tied state law to federal law *before* challenged change to federal law, then attempted to rely on link to demonstrate standing); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (states’ claimed injuries arose from “decisions by their respective state legislatures,” which “[n]othing prevent[ed]” them from changing). Indeed, the Tenth Circuit has already distinguished the State’s lead case, *Clapper*, as “concern[ing] ‘the actions of the political branches in the fields of intelligence gathering and foreign affairs,’ where the Court engages in an especially rigorous standing inquiry”—unlike a case (like this one) “concerning ... fundamental” constitutional rights. *Fish v. Schwab*, 957 F.3d 1105, 1120 (10th Cir. 2020) (cleaned up); *see also* 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.5 (3d ed. 2023) (“So long as the defendants have engaged in conduct that may have contributed to causing the injury, it would be better to recognize standing[.]”).

More to the point, the Tenth Circuit has “rejected the notion that the source of an injury is a litigant’s decision not to comply with an allegedly unlawful state regime, rather than the regime itself.” *Fish*, 957 F.3d at 1120 (cleaned up). Indeed, “[w]ere this notion to apply,” “a court could never enjoin enforcement of an unlawful statute if the plaintiffs could have complied with the statute but elected not to; this hypothetical scenario borders on the absurd.” *Id.* Yet that “absurd” result is exactly the one the State asks this Court to reach here. The “allegedly unlawful regime”

consists of the nondiscrimination provisions on which the State has conditioned participation in UPK Colorado; Plaintiffs do not have to “comply with” that regime before they can sue over it. *Id.*

In short, the upshot of the State’s position is that the Archdiocese’s preschools should—in bad faith—agree to conditions on UPK Colorado funding that they have no intention of complying with, and then hope the State never comes after them in an enforcement action. Yet the First Amendment does not require citizens to “express th[eir] beliefs only at the price of evident hypocrisy.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 219-20 (2013). And it is difficult to see how encouraging parties to seek benefits on false pretenses serves the values of Article III—or even of the rule of law. *See Turner v. Fouché*, 396 U.S. 346, 361 n.23 (1970) (“the appellant Heath’s allegation that he is not a freeholder,” and thus ineligible for the benefit at issue, “is uncontested, and Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law”). Plaintiffs have alleged an injury-in-fact.

2. This is not a pre-enforcement challenge.

Rather than address the actual injury Plaintiffs alleged, Defendants offer a red herring, claiming that Plaintiffs brought a pre-enforcement challenge and must therefore show a credible threat that they will be punished for violating the relevant nondiscrimination provisions. But this is not a pre-enforcement case. In a pre-enforcement challenge, a plaintiff sues *before* she suffers an injury, alleging a future government action will cause her harm. Here, by contrast, Plaintiffs alleged they are *already* injured by their exclusion from UPK Colorado, because they cannot agree to the provisions (as the State requires them to do) in the first place. In other words, the law has already put Plaintiffs to the unconstitutional choice of either upholding their religious beliefs or receiving a government benefit. *Cf. Walker*, 450 F.3d at 1090 (contrasting the pre-enforcement challenge in *Laird v. Tatum* with the two-third requirement already injuring the plaintiffs in *Walker*). That is an

Article III injury, *supra* Part.I.A.1, and it is the only one the Court needs to address to resolve the standing issue here.⁵

Because Defendants focus on the wrong theory of standing, they also focus on the wrong facts—most of which aren’t even relevant to the claims brought in this case. But even taking Defendants’ factual arguments at face value, they fail. Defendants claim there is no credible threat of enforcement because Plaintiffs “have not alleged ... they actually denied a family or child enrollment into their preschool” in violation of the Agreement. ECF No. 38 at 11. While Plaintiffs don’t believe this is even *relevant* to standing for the reasons articulated in Part I.A.1, the record shows Plaintiffs have had to do exactly that. *E.g.*, ECF No. 32-16 ¶ 26 (noting that St. Bernadette has had to deny families enrollment on account of disagreements regarding the Archdiocese’s religious beliefs).

Defendants also suggest there is no credible threat of enforcement because Plaintiffs have participated in other government programs with non-discrimination provisions. ECF No. 38 at 14-15. But Defendants ignore characteristics of these other programs that make them entirely compatible with Catholic teaching where Colorado UPK is not. Defendants claim that “[t]o participate in [the Denver Preschool Program], these schools contractually agree to an antidiscrimination provision that is even stronger than that required by the UPK program.” *Id.* The DPP agreement, however, specifically protects the constitutional rights of faith-based preschool providers. ECF No. 38-7 at 16 (“Nothing in this Agreement shall be construed to ... affect the independence of Providers, including any rights protected by the Colorado and U.S. Constitutions and applicable law.”). Similarly, the non-discrimination provision for CCCAP covers only “referrals,” but Arapahoe County (with whom St. Mary’s entered into the CCCAP fiscal agreement) does not make referrals; instead,

⁵ Plaintiffs’ pre-enforcement challenge arguments are largely recycled from their arguments in *Darren Patterson Christian Academy v. Roy*, where the plaintiff did sign the UPK Colorado Program Service Agreement and brought a pre-enforcement challenge against the enforcement of the Agreement against them.

it directs families to “online child care searches” and other third parties to help them locate providers.⁶ Moreover, St. Mary’s accepts a child’s CCCAP funds only *after* evaluating and admitting that child into their program—another critical difference from UPK Colorado. *See* ECF No. 38-1 ¶ 9 (describing the UPK Colorado “matching” process).

Defendants next purport to “disavow” portions of the Catch-All Provision. But the Department claims to disavow the Catch-All Provision *only* as to “hiring of co-religionists”⁷ and “a religious provider’s employment decisions involving its ministerial employees as protected by federal law.” ECF No. 38 at 16. This does not come close to resolving Plaintiffs’ challenge to the Catch-All Provision, as that provision covers *all aspects* of a provider’s operations—not merely hiring teachers and select staff. ECF No. 30 ¶¶ 142-148. At a minimum, the Catch-All Provision would still cover the same enrollment decisions as the Enrollment Mandate (which Defendants *refuse* to disclaim), and it would cover the day-to-day operations of Plaintiffs’ preschools. *See* ECF No. 32-6 at 10-12 (outlining operational policies for Archdiocesan schools). “Disavowing” the ability to violate federal law is like Defendants “disavowing” ownership of the Brooklyn Bridge.

Equally problematic is Defendants’ footnote five, which takes back Defendants’ purported disavowal. ECF No. 38 at 16 n.5. Defendants explain that, despite the so-called disavowal, the Department will “of course,” still need “facts to determine whether a provider’s employment decisions regarding its co-religionist employees and ministerial employees are protected by federal law.” *Id.* In other words, Defendants would *still investigate* Plaintiffs if they made hiring or firing decisions in line with their sincere religious beliefs to determine whether the Department believes Plaintiffs’ actions are protected by federal law. That hardly disavows anything—Defendants already must comply with federal law.

⁶ Arapahoe County, *Child Care Assistance*, <https://perma.cc/3QVM-KLKQ>.

⁷ The Supreme Court has expressly rejected a “co-religionist” requirement in ministerial exception cases. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2068-69 (2020).

Even Defendants’ pre-enforcement standing theory fails on its own (flawed) terms. Defendants contend Plaintiffs lack standing because they have not “alleged a sufficiently imminent threat of enforcement.” ECF No. 38 at 12. But Defendants ignore precedent confirming that challenges to recently enacted statutes presumptively satisfy the “credible threat of enforcement” requirement because courts assume the government will enforce its newly enacted laws. *E.g.*, *Rocky Mountain Gun Owners v. Polis*, No. 23-cv-1077, 2023 WL 5017253, at *7 (D. Colo. Aug. 7, 2023) (“Here, the statute is new, there is no evidence of an assurance that the statute will not be enforced, and there is no indication that the statute is moribund based on a change in controlling law. For the purpose of a preliminary injunction, the Individual Plaintiffs have made a clear showing of a credible threat of prosecution.” (internal citation omitted)); *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988) (“The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise.”); *New Hampshire Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 14-15 (1st Cir. 1996) (analyzing four Supreme Court decisions addressing this issue).

Here, Plaintiffs challenge a recently enacted provision of Colorado law and a recently created government program. And besides failing to meaningfully disavow the Catch-all Provision, Defendants have explicitly *refused* to disavow enforcement of the Enrollment Mandate. ECF No. 38 at 13 n.3. Plaintiffs’ religious beliefs and conduct are also well known to the State, including to the Governor, who expressed his disapproval of Plaintiffs’ position in this case. ECF No. 32 at 16-17. There is thus no question Plaintiffs face a credible threat of enforcement should they violate their religious beliefs and, in bad faith, sign the Agreement. *E.g.*, *Brown v. Buhman*, 822 F.3d 1151, 1165 (10th Cir. 2016) (“A credible threat is one that is ... not ‘imaginary or wholly speculative.’” (citation omitted)).

Adopting the State’s contrary theory would also insulate exclusionary government programs from legal challenge across Colorado. Here, Defendants claim Plaintiffs lack standing because

they have not signed the Agreement. But in the parallel *Darren Patterson* case, Defendants claim that by signing the Agreement, the plaintiff there cannot challenge UPK Colorado's requirements. *See* Motion to Dismiss, *Darren Patterson Christian Acad. v. Roy*, No. 1:23-cv-1557 (D. Colo. Aug. 7, 2023), ECF No. 28. The State instead seems to think a plaintiff must wait for the government to bring an enforcement action before it can even think about suing. That is not the law. *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 907 (10th Cir. 2012) (“[P]laintiff ... ‘should not be required to await and undergo [enforcement] as the sole means of seeking relief.’”) (citation omitted).

B. Defendants’ actions have injured Plaintiffs and an injunction from this Court would remedy that injury.

With a proper understanding of the injury-in-fact, the other two elements of standing are straightforward. The State’s actions cause the injury, since, but for the challenged conditions, Plaintiffs would seek to participate in UPK Colorado. ECF No. 32-14 ¶ 50; ECF No. 32-16 ¶ 35; *see also Carson*, 979 F.3d at 30-31; *City of Jacksonville*, 508 U.S. at 666 n.5. That is, Plaintiffs’ current “lost opportunity” to participate “is fairly traceable to the” UPK Colorado conditions currently preventing them from doing so. *Carson*, 979 F.3d at 31.

Likewise, this Court can easily redress that injury—with an injunction allowing Plaintiffs to participate without regard to the challenged conditions. *See* ECF No. 30 at 35-36; ECF No. 32 at 8; *see also City of Jacksonville*, 508 U.S. at 666 n.5. As in *Carson*, “invalidation of [the challenged conditions] would restore the plaintiffs’ now non-existent *opportunity* to” participate in UPK. 979 F.3d at 31; *see also, e.g., Buchwald*, 159 F.3d at 493 (plaintiff denied admission for discriminatory reason “has standing to seek a prospective injunction ordering her admission to the school”).

The State offers no argument on redressability. And its only argument on causation is to reiterate its “self-inflicted injury” argument, which fails for the reasons stated above. *Supra* Part I.A.1. Plaintiffs have standing.

II. Plaintiffs' claims are ripe.

Defendants attempt to hedge their bets, also invoking ripeness. ECF No. 38 at 17-20. Their ripeness arguments, however, suffer from the same fundamental flaw as their standing arguments: a misconception of Plaintiffs' injury. As explained above, this case is not about a hypothetical future action by the Department to "enforce" the provisions of the Agreement and the related Quality Standards. Instead, Plaintiffs have been and are currently being injured by their exclusion from UPK Colorado because they cannot sign the Program Service Agreement. *Supra* Part I.A.1. Their claims are therefore ripe for adjudication.

Ripeness "derives from both constitutional and prudential concerns" and its purpose "is to prevent the premature adjudication of abstract claims." *Texas Brine Co. & Occidental Chem. Corp.*, 879 F.3d 1224, 1229 (10th Cir. 2018). Here, however, constitutional ripeness rises or falls with standing: "if a threatened injury is sufficiently imminent to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied." *Awad v. Ziriox*, 670 F.3d 1111, 1124 (10th Cir. 2012) (cleaned up); *Supreme Ct. of N.M.*, 839 F.3d at 903. Because Plaintiffs are currently being injured, their claims are constitutionally ripe.

As for prudential ripeness, courts engage in this inquiry by balancing "the fitness of the issues raised for judicial review," with "the hardship to the parties from withholding review." *Awad*, 670 F.3d at 1124 (ellipses omitted).⁸ "[I]n determining the fitness of the issue for review, this Court considers whether determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed." *Texas Brine*, 879 F.3d at 1229 (cleaned up). To assess hardship from withholding judicial review, courts ask "whether the challenged action creates a 'direct and immediate' dilemma for the parties." *New Mexicans for Bill Richardson v. Gonzales*,

⁸ As Defendants noted, prudential ripeness is decided under Rule 12(b)(6). ECF No. 38 at 18 n.7; see *North Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1230 (10th Cir. 2021). As such, it is judged by "accept[ing] as true the well-pleaded factual allegations in the complaint" and assuming the validity of Plaintiffs' claims. *Hill v. Warsewa*, 947 F.3d 1305, 1308 (10th Cir. 2020).

64 F.3d 1495, 1499 (10th Cir. 1995) (citation omitted); *Awad*, 670 F.3d at 1125. Here, both factors cut in favor of this Court discharging its “virtually unflagging” “‘obligation’ to hear and decide” this justiciable case. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 527 U.S. 118, 126 (2014) (citation omitted).

Fitness. This case is fit for judicial review. The issues involved are far from abstract or hypothetical. UPK Colorado is currently operating, and nearly 2,000 providers are currently receiving funding from the program. ECF No. 38-1 ¶ 9. For Plaintiffs to do likewise, Defendants admit that Plaintiffs must sign the Program Service Agreement and operate according to its conditions—indeed, they denied Plaintiffs’ request for a religious accommodation and even claimed they *could not* grant an accommodation under state law. *See* ECF No. 38 at 3; ECF No. 30-3 at 3, 5, 28-29. But Plaintiffs cannot sign a binding legal agreement committing them to operate in this manner because doing so would violate their religious beliefs. Compl. ¶¶ 138-49. The dispute between the parties is thus properly teed up for resolution.

Legal questions also predominate in this dispute. Whether Plaintiffs’ ongoing exclusion from UPK Colorado is constitutionally permitted is a question of law. *See Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1198 (D. Colo. 2012) (potential candidate’s challenge required no further factual development because it turned on the legal issue of the validity of the condition being challenged), *aff’d*, 495 F. App’x 947 (10th Cir.). The central facts—the conditions imposed on participation, and the conflict between those conditions and Plaintiffs’ religious exercise—are undisputed. And any ancillary factual questions raised by Defendants can be (and are being) resolved through expeditious discovery. *Cf. Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004) (“the ripeness inquiry asks whether the challenged harm has been sufficiently realized *at the time of trial*” (emphasis added)).

In response, Defendants say this controversy is not fit for review because “[w]hether St. Bernadette or St. Mary are ever confronted with the prospect of having to enroll a transgender child

or LGBTQ family ‘may not occur.’” ECF No. 38 at 18. But again, Plaintiffs are not challenging future enforcement against *violations* of the provider agreement; they are challenging the agreement’s *imposition of unconstitutional conditions* itself. In other words, the event on which Plaintiffs’ claim rests—the State’s conditioning Plaintiffs’ UPK Colorado participation on their agreement to provide equal access to families who reject Church teaching—has already “occur[red].” The question in this case is whether that condition is lawful.

Regardless, although it is unnecessary, even Defendants’ scenario, too, has occurred—Plaintiffs have consistently abided by their religious beliefs in making enrollment and employment decisions, including by having to turn away families who disagree with the very teachings at issue here. *See* ECF No. 32-16 ¶ 26. That Defendants believe this religious exercise has never generated a complaint only underscores the needlessness of their unlawful insistence that Plaintiffs waive it as a condition of participating. *See* ECF No. 38-01 ¶ 24.

Next, Defendants note they are “at the early stages of” a “rulemaking process” related to the Quality Assurance Standards, which they say also undercuts fitness. ECF No. 38 at 19. But Defendants do not even hint that a future rule could give Plaintiffs all the relief they are seeking here. Far from it, they characterize that relief as “alarming,” *id.* at 1, emphasize that the Enrollment Mandate is required “[b]y statute,” *id.* at 3, and cannot help but pepper their allegedly jurisdictional motion to dismiss with asides disputing Plaintiffs’ claims on the merits, *id.* at 1, 13 n.2.

More importantly, nothing about the hypothetical future rule alters the fact that Plaintiffs are *now* excluded. Plaintiffs want to participate in UPK Colorado today—and to do so they “are obliged to register and to submit ... forms in accordance with presently existing [requirements].” *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965). Thus, “the mere contingency that [Defendants] might revise the [requirements] at some future time does not render premature [Plaintiffs’] challenge to the existing requirements.” *Id.*; *see also, e.g., Powder River Basin*

Res. Council v. Babbitt, 54 F.3d 1477, 1484 (10th Cir. 1995) (“Even though defendant began proceedings to change the statute, those proceedings did not lessen the force of the statute, and there was no guarantee that defendant would actually alter the provision.”); *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) (“If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely.”).

Hardship. The second ripeness factor, hardship to the parties from withholding review, also weighs heavily in favor of proceeding. Defendants suggest the Court could withhold review pending an effort by Defendants to enforce the challenged conditions in the context of a particular enrollment or employment decision. ECF No. 38 at 18-19. But this situation could only arise if Plaintiffs agree to the conditions in the first place—which they cannot do. Thus, to accept Defendants’ suggestion would not be to withhold, but to deny, review—shutting Plaintiffs out of UPK Colorado in perpetuity.

Moreover, Plaintiffs are suffering ongoing—and increasing—harms right now. Every month, families like the Sheleys lose out on roughly \$600 because of the religious exercise of sending their four-year-old to a Catholic preschool. ECF No. 32-18 ¶¶ 6-7. And Archdiocesan preschools, including St. Mary’s and St. Bernadette’s, struggle to maintain staff continuity and fend off decreasing enrollment. ECF No. 32-14 ¶¶ 38-48; ECF No. 32-16 ¶¶ 28-33. There is no doubt that Plaintiffs’ exclusion from UPK Colorado “creates a direct and immediate dilemma,” *Awad*, 670 F.3d at 1125 (citation omitted): Plaintiffs can either uphold their religious beliefs or sign the UPK Colorado Program Service Agreement, agreeing to abide by requirements inconsistent with those beliefs. ECF No. 32-14 ¶¶ 38-42; ECF No. 32-16 ¶¶ 29-33. This is not a hypothetical or future harm. As Defendants concede, children have been (and are being) matched with preschools and the State is disbursing funds—all conditioned on accepting the terms of the Program Service Agreement. ECF No. 38-1 ¶ 9; *see also* Motion to Dismiss at 6-7, 17, *Darren Patterson Christian Acad.*, No. 1:23-cv-1557, ECF No. 28. This case is ripe for this Court’s review.

* * *

Plaintiffs’ goal is not “to move First Amendment law in a different direction.” ECF No. 38 at 1. Their goal is to participate in a generally available public benefit without signing away their First Amendment rights. If Defendants are willing to permit that result absent an adverse ruling from this Court, Plaintiffs remain open to settlement or to a consent judgment. But Defendants have proven unwilling—so Plaintiffs are suffering *current* harm from a program that is *now* up and running. This is a justiciable controversy, and the Court should adjudicate it.

CONCLUSION

The Court should deny Defendants’ motion to dismiss.

Dated: October 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on all parties via CM/ECF and as required by the relevant federal and local rules.

Dated: October 20, 2023

/s/ Eric C. Rassbach

Eric C. Rassbach

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:23-cv-02079-JLK

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

Plaintiffs,

v.

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

Defendants.

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

Colorado's Universal Preschool Program ("UPK Program") welcomes all preschool
providers' participation. Faith-based providers, like Plaintiffs, are encouraged to join the UPK
Program and, indeed, faith-based preschool providers around Colorado, including preschools
affiliated with the Archdiocese of Denver, joined the UPK program and currently serve Colorado
children.

Nevertheless, the Plaintiff Preschools made the decision not to join the UPK Program.
They allege that the UPK Program's statutory and contractual nondiscrimination requirements
exclude them from the Program even though faith-based providers—along with other private and
public providers—are welcome to participate. Moreover, Plaintiffs signed other contracts with
similar non-discrimination requirements, thus participating in and receiving the benefits of other
government programs, and Plaintiffs provide no legal or factual basis to explain why the UPK

Program’s requirements exclude them from participating while other programs do not. In the end, what the record shows is that Plaintiffs made a choice not to participate in the UPK Program. That is their choice. But Plaintiffs cannot now use that choice to manufacture injury, and thus standing, to seek relief from this Court.

Moreover, this case is simply not ripe. The UPK Program is a new program, and the Colorado Department of Early Childhood (“Department”) is a new state agency. Rulemaking is underway to implement the quality standards for the UPK Program and the results of that rulemaking may address Plaintiffs’ alleged concerns. In addition, the Department is in the process of updating and amending its UPK provider agreement in anticipation of the 2024-2025 school year. These updates and amendments may similarly address Plaintiffs’ alleged injuries. Finally, the number of as-yet-unrealized events that would need to take place before an enforcement action is ever taken against any of the Plaintiffs proves that there is an insufficient factual record to decide Plaintiffs’ constitutional claims.

Because Plaintiffs lack standing and this case is unripe, the Court should grant the Defendants’ Motion to Dismiss.

BACKGROUND

The matching process and the use of programmatic preferences.

The background section of Plaintiffs’ Response demonstrates that Plaintiffs misunderstand how the UPK Program’s matching process—including the congregation, sibling, and continuity of care preferences—works. It is key that the Court understand the matching process and these preferences because they eliminate most, if not all, of Plaintiffs’ alleged injuries.

To begin, Plaintiffs incorrectly say that families are matched with preschool providers purely by an algorithm. Doc. 42 at 12. This is not a complete picture of Ms. Odean's testimony before the Joint Budget Committee nor of the matching process. Family choice is paramount to the UPK Program matching process. As explained in Defendants' Motion to Dismiss, families can choose up to five providers and rank them from one to five. Doc. 38-1 ¶ 9. The Department will then only match those families with one of the families' choices. *Id.* If none of a family's choices are available, the family will have the opportunity to select additional providers for their child. *Id.* But, 94% of families received one of their top 2 choices and 82% of families received their top choice." *Id.* These facts are particularly important here. Plaintiffs concede that most families specifically seek out Catholic preschools because of their educational, faith-based curriculum and related policies. Doc. 42 at 10. Given that the overwhelming majority of families receive their top choice of school, those families that specifically wish to send their children to a Catholic preschool will be matched to that school.

Plaintiffs next state that faith-based providers must accept a family match as part of the matching process and that they have no ability to screen matches. That too is incorrect. This is where the congregation preference comes into play. Through that preference, a faith-based provider, like the Plaintiff Preschools, may "give preference to members of their congregation by reserving all or a portion of their preschool seats for their congregation members[.]" *Id.* ¶ 8. Under those circumstances, if a family that is not part of the faith-based provider's congregation is matched to their preschool, the provider may decline the match. *Id.* So, for example, if a Catholic school holds its preschool spots for members of its Catholic congregation, that school may then "decline" a match from a family that is not part of the school's congregation. Plaintiff

Preschools have not explained why they cannot recommend that Catholic families that want to attend one of the Plaintiff Preschools or an Archdiocese Preschool join their congregation.

The UPK Program also grants all providers the ability to consider and give preference to siblings during the matching process, a preference that is also of significance to Plaintiff Preschools. For example, St. Mary alleges that 41 of the 52 families that have children enrolled in its preschool have other children enrolled at St. Mary. Doc. 31-1 at 8 ¶ 51-53, 20 ¶ 135. Wellspring also seeks to provide spots for siblings of current students. Doc. 32-1 at 2 ¶ 10. Finally, the Department will also consider whether a child currently attends one of their provider choice preschools during the match process.¹

In these ways, the Program accommodates the Plaintiffs' interest in "forming communities composed of those receptive to their beliefs," Doc. 42 at 8, and Plaintiffs' "religious belief that its schools should prioritize admitting Catholic families active in Archdiocesan parishes[.]" Doc. 42 at 10. Indeed, the UPK Program's congregation and sibling preferences are consistent with the preferences that the Plaintiff Preschools already use to prioritize applicants for enrollment: 1. Siblings, 2. Parishioners, 3. Archdiocese Parishioners, 4. Catholics transferring into the Denver metro area, and 5. Unaffiliated Catholics and non-Catholics. Doc. 31-1 at 9 ¶ 60 and 13 ¶ 84. To the extent Plaintiffs feel that the scope of the congregation preference remains unclear, the Department is currently in the rulemaking process to evaluate how to define the term "congregation" as used in the preference, a process that may

¹ See <https://cdec.colorado.gov/universal-preschool-family-information>. St. Mary alleges that five families that would have selected its preschool for the UPK Program already have two students enrolled in their preschool. Doc. 32-14 at ¶ 7; Plaintiff parents allege that they plan to send their 2-year-old and almost 1-year-old children to St. Mary preschool as well as their 4-year-old child.

address any remaining concerns. *See* Doc. 38. Stakeholders, including Plaintiffs, are welcome and encouraged to provide comment on that rulemaking.

STANDARD OF REVIEW

Plaintiffs state that the Court must accept all material allegations of Plaintiffs' Amended Complaint as true when determining the Defendants' Motion to Dismiss. This is incorrect. That standard applies to a subject matter jurisdiction challenge based on the pleadings alone. *See Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006). But when a party makes a factual challenge to subject matter jurisdiction, as Defendants do here, the Court need not presume the truthfulness of the allegations. *See Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001). Rather, the Court has wide discretion to consider affidavits and other documents outside the pleadings to determine subject matter jurisdiction. *Id.*

ARGUMENT

I. Plaintiffs mischaracterize the nature of Defendants' Motion to Dismiss.

Throughout their Response, Plaintiffs claim that Defendants cite the incorrect standing standards. They allege that they are not bringing a pre-enforcement challenge and that as a result, Defendants' Motion to Dismiss fails.

But Defendants challenge Plaintiffs' standing through several legal theories. The first is that Plaintiffs' alleged harm is self-inflicted and thus insufficient to create standing. *See* Doc. 38 at 9. The second is that Plaintiffs' alleged harm is conjectural and hypothetical, rather than "concrete and particularized" and "actual or imminent". *See id.* at 10. Finally, Defendants attack Plaintiffs' standing to bring a pre-enforcement claim for a lack of a credible threat of enforcement. *See id.* at 12. Under each legal theory, Defendants show that Plaintiffs fail to

establish standing.

Plaintiffs now assert that they are not bringing a pre-enforcement suit. This is puzzling, as Plaintiffs seek judicial relief ordering the Defendants not to enforce statutory and contractual provisions against them in some future action if Plaintiffs were to sign the UPK provider agreement and join the program. In any event, Plaintiffs have now apparently abandoned any claim for pre-enforcement standing, and thus the Court accordingly can instead simply address traditional standing questions.²

II. Plaintiffs do not present an “actual or imminent” injury in fact apart from their own manufactured injury.

Plaintiffs attempt to prove standing by arguing that their schools and the parent Plaintiffs are categorically excluded from the UPK program. They argue that Defendants erected statutory and contractual barriers that bar faith-based schools’ participation in the program. But that is simply not true.³

² To the extent the Court wishes to analyze Plaintiffs’ standing through the pre-enforcement framework, Plaintiffs still do not have standing. For the reasons set forth in Defendants’ Motion to Dismiss, Plaintiffs do not satisfy the three-pronged pre-enforcement standing test. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) First, Plaintiffs’ have shown no past enforcement against any faith-based UPK provider based on their faith-based policies. Indeed, Defendants have not sanctioned or disciplined any faith-based provider, nor has it filed any action to enforce any terms in the UPK provider agreement against any faith-based provider. Doc. 38-1 ¶ 17. Second, Defendants have explained that they are the only party that can enforce the UPK provider agreement *Id.* Finally, the record indicates that the State of Colorado has not taken any action against any of the Plaintiff preschools under their childcare licenses based on their faith-based policies. Doc. 38 at 14. In addition, Defendants have disavowed interfering in Plaintiffs’ employment decisions that are in accordance with federal law. Doc. 38-1 at 16. Together, Plaintiffs face no credible threat to support pre-enforcement standing.

³ Plaintiffs compare this case to that in *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993). But that case is distinguishable. There, the city’s bidding structure put plaintiffs at a disadvantage in competing for projects by giving a

Faith-based schools are welcome and encouraged to join the UPK program, and at least 40 faith-based providers are already participating in the UPK Program, including six preschools affiliated with Denver Archdiocese. Additionally, for years, the Plaintiff Preschools have agreed to non-discrimination provisions in other government contracts that are similar to those in the UPK Program. Moreover, the matching process, together with the congregation, sibling and continuity of care preferences, mean that Plaintiffs can participate in the UPK Program while still “forming communities composed of those receptive to their beliefs” and “prioritiz[ing] admitting Catholic families active in Archdiocesan parishes”, further demonstrating the absence of any actual or imminent injury. Finally, Defendants’ disavowal of enforcement action against Plaintiffs Preschools’ employment decisions in accordance with federal law alleviates alleged concerns about Defendants’ interference with those decisions. For all of these reasons, Plaintiffs have not established standing.⁴

A. Catholic preschools are not categorically excluded from the UPK program; instead, faith-based providers are welcome to join and have joined.

Plaintiffs begin by arguing that Catholic preschools are categorically excluded from the

preference to certain other contractors bidding for those projects. *Id.* at 657. But for the reasons set forth herein, Plaintiffs are not at a disadvantage as compared to other providers. They, like other licensed childcare providers, are welcome to join the UPK program. And faith-based providers, unlike other providers, have the benefit of the congregation preference during the matching process.

⁴ Plaintiffs, in their Notice of Supplemental Authority, Doc. 44, cite to Judge Domenico’s recent order in *Darren Patterson Christian Academy v. Roy* 23-cv-01557 in support of their standing. But this Court already “determined that the facts and claims of the two cases are not sufficiently related to warrant special assignment or transfer.” Doc. 28.

UPK program.⁵ That is not true.

The Colorado General Assembly established a “mixed delivery” system that enables parents to choose preschool providers for their children from as broad a range as possible within their communities. Colo. Rev. Stat. § 26.5-4-204(2). Under this system, licensed childcare centers operated by parochial schools are specifically noted as eligible providers in the UPK program. Colo. Rev. Stat. § 26.5-5-303(3). Per statute, all licensed, faith-based childcare providers are eligible and encouraged to participate in the UPK program.

To encourage faith-based providers to join the UPK Program and to ensure that the Department was inclusive of faith-based providers, the Department convened a faith-based working group for religious providers to discuss the providers’ participation in the program. Doc. 38-1 ¶ 7. Members of the Archdiocese of Denver were active participants of this working group. *Id.* A by-product of the working group was the development of the congregation preference.

⁵ Plaintiffs’ efforts to rely on this Court’s decision in *Colorado v. United States Department of Justice*, 455 F. Supp. 3d 1034 (D. Colo. 2020) is misplaced. There, Colorado was participating in a federal funding program and challenged the government’s refusal to disburse the funds after the state objected to terms and conditions it alleged to violate the Tenth Amendment and separation of powers principles. *Id.* at 1040. Here, Plaintiffs are not participating in the UPK program, so there is no refusal to disburse UPK payments. In fact, on the contrary, Plaintiffs are welcome to join the UPK program and receive UPK payments.

Moreover, this case is not like *Carson v. Makin*. 142 S. Ct. 1987, 1998 (2022). Plaintiffs cite to the First Circuit’s standing analysis in *Carson* as support. But there, the First Circuit held that the injury was parents’ *complete* inability to enroll their children in a faith-based school because of Maine’s categorical exclusion of faith-based providers from the state’s tuition assistance program. *See Carson as next friend of O.C. v. Makin*, 979 F.3d 21, 30 (1st Cir. 2020), *rev’d and remanded*, 142 S. Ct. 1987 (2022). That is not what is at issue here. There is no statutory or categorical exclusion of faith-based providers, as discussed throughout this brief. Parents across Colorado currently send their children to faith-based providers through the UPK Program. *Carson* does not support standing.

Again, this preference enables faith-based providers, like Plaintiffs, to reserve their preschool seats for their congregation members.

Plaintiffs provide no explanation as to why reserving all preschool seats for their congregation does not alleviate their concerns and cure their alleged injuries. This is especially true given that through the congregation preference, a provider “may decline a match from a family that is not part of their congregation.” Doc. 38-1, ¶ 8.⁶

Despite Defendants’ and the Colorado General Assembly’s inclusion and accommodation of faith-based providers in the UPK Program, Plaintiffs now argue that the Defendants have singled out Catholic faith-based providers and created barriers to their entry into the UPK Program. But the record disproves this notion. Again faith-based providers, like Plaintiff Preschools, are welcome and encouraged to join the program. Many of these providers are already actively participating in the program. And the record shows that preschools affiliated with the Archdiocese of Denver⁷ are participating in the UPK program, serving Colorado children, and receiving state funds for those services. *See* Ex. 1 ¶¶ 3-5, Supplemental Declaration of Dawn Odean. Six preschools associated with the Catholic Charities wing of the Archdiocese

⁶ As discussed above, providers, including faith-based providers like Plaintiff Preschools, can also utilize the other programmatic preferences that exist in the UPK matching process. For example, Plaintiffs can prioritize siblings of students enrolled in Plaintiffs’ preschools and other educational settings. Plaintiffs can also prioritize children of Plaintiffs’ employees. Finally, Plaintiffs can prioritize those children that are already enrolled in Plaintiffs’ preschools. Together, and in connection with the congregation preference, Plaintiffs can prioritize certain families in the matching process and avoid the types of matching conflicts it alleges through its pleadings. These preferences are also consistent with the “priorities” Plaintiff Preschools already have in place for admitting applicants to their preschools. Doc. 31-1 at 9 ¶ 60 and 13 ¶ 84.

⁷ *See* <https://ccdenver.org/early-childhood-education/>

of Denver are actively participating in the UPK program. Ex. 1 ¶ 4. And no enforcement action has been taken against any faith-based UPK provider based on a provider's faith-based policies. Doc. 38-1 ¶ 17.

In short, the record shows that Plaintiffs are not categorically excluded from the UPK Program and are instead welcome to join it, along with other faith-based preschool providers, including Catholic providers. For the reasons set forth in the Defendants' Motion to Dismiss, Plaintiffs cannot now use their choice not to participate to manufacture injury to support standing.⁸

B. The mere existence of the Program's statutory and contractual non-discrimination provisions alone is not enough to create standing.

Plaintiffs state that the mere existence of the Program's statutory and contractual non-discrimination provisions alone creates standing, citing the fact that the UPK program is a new government program to suggest that enforcement action is imminent.

But courts routinely hold that a "chilling effect" associated with a potentially unconstitutional law being 'on the books' is insufficient by itself to 'justify federal intervention' in a pre-enforcement suit." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 49 (2021). This applies even if the "challenged law in question is said to chill the free exercise of religion [and] the freedom of speech." *Id.* And courts hold that the newness of a law does not relieve a plaintiff

⁸ Plaintiffs attempt to downplay the importance and impact of the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). Plaintiffs cite to *Fish v. Schwab* in its attempt to distinguish *Clapper*. 957 F.3d 1005, 1120 (10th Cir. 2020). But there, the Tenth Circuit held that *Clapper* did not apply because the voting registration requirements at issue in *Fish* had already been enforced against the plaintiffs, so there was no "hypothetical enforcement" like in *Clapper*. *Id.* Here, there is no past history of enforcement against any of the Plaintiffs under their child care licenses or based on their participation in the Denver Preschool Program or the Colorado Child Care Assistance Program for Families, making *Fish* readily distinguishable.

of its burden to establish a credible threat of enforcement. *See Nat'l Shooting Sports Found. v. Att'y Gen. of New Jersey*, 80 F.4th 215, 220 (3d Cir. 2023). (“True, the Law is new, so lack of enforcement does not tell us much either way. But the Foundation bears the burden to show standing, and this indeterminate factor does not help it carry that burden.”).

Indeed, the newness of the UPK program further explains why this case is not ripe, as discussed below. To the extent that the Plaintiffs feel that the scope of the congregation preference remains unclear, those concerns may be addressed by the Department’s current rulemaking process that is evaluating how to define the term “congregation” as used in the preference. Ex. 1 ¶¶ 11-13. In addition, the Department is amending and updating the UPK Program provider agreement in anticipation of the 2024-2025 school year. Ex. 1 ¶ 15. This too may impact issues raised by this litigation.

C. Plaintiffs’ vague allegations that St. Bernadette has recommended that some families not join their school and that Plaintiffs’ preschool enrollment has decreased do not support standing.

Plaintiffs next point to vague assertions that St. Bernadette had to deny enrollment to families based on their alleged disagreements with the Archdiocese’s religious beliefs. Plaintiffs further point to an alleged decrease in enrollment numbers for the current school year, apparently blaming the Program for that decrease. These vague assertions are not enough to support standing because Plaintiffs have not shown any causal link between the decreased enrollment numbers and the UPK Program.

First, Plaintiffs provide no explanation of their alleged disagreement with families and why those disagreements resulted in a denial of enrollment. Without those facts, there is no basis to assess any causal connection to the UPK Program standards. This is especially true when,

again, providers like St. Bernadette are allowed to hold all preschool spots for their congregation and are allowed to decline a match from families that are not part of that congregation. Doc. 38-1 ¶ 8. If, for example, St. Bernadette denied enrollment for these families because the families were not part of their congregation, then the congregation preference would apply.

Second, Plaintiffs allege that not participating in the UPK program is the cause of a decrease in enrollment at Plaintiffs' schools. Here too, no facts in the record support the alleged causal link between that decrease and the UPK Program. It is Plaintiffs' burden to establish standing, and Plaintiffs' burden includes establishing traceability—in other words, causation. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citation omitted).

Plaintiffs simply state that both St. Mary and St. Bernadette experienced a decrease in enrollment for this school year and that the decrease is “largely caused” by the schools not participating in the UPK Program. Doc. 32-14 ¶ 38. No facts in the record support this causal claim. A multitude of factors could lead to a decrease in enrollment, like parents moving out of state or children aging out of a preschool. Tellingly, no evidence in the record shows the Plaintiffs' enrollment numbers in previous years. Fluctuation in enrollment might be a regular occurrence with these schools, but there is no way to tell, because Plaintiffs fail to present those facts in the record. In short, there is nothing that shows that any decrease in enrollment is traceable to the UPK Program. This cannot support standing.⁹

⁹ Plaintiffs also assert that the Plaintiff parents are suffering monetary damages because the Plaintiff Preschools are not participating in the UPK program. Plaintiffs also point to alleged difficulties in hiring employees due to their lack of participation in the UPK Program. Even if both allegations are true, they are again attributable to Plaintiffs' decision to not join the UPK Program and cannot support standing. *See State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 888 (10th Cir. 2021) (an event that “break[s] the causal chain” cannot support standing).

D. That Plaintiffs have signed other government contracts with non-discrimination language similar to that in the UPK Program further demonstrates that their choice not to participate in the UPK Program is a manufactured injury.

Plaintiffs allege that agreeing to the UPK Program's nondiscrimination provisions would cause them injury even though the Plaintiff Preschools have participated in other government programs that required them to agree to similar nondiscrimination provisions.

Plaintiffs concede that Plaintiff Preschools signed a contract with a nondiscrimination provision to participate in the Denver Preschool Program. They nevertheless point to language in that contract that they believe assures that the nondiscrimination provision will not be enforced against them. That language provides that nothing in the contract is to be construed "to affect the independence of Providers, including any rights protected by the Colorado and U.S. Constitutions and applicable law." *See* Doc. 38-7 at 15. But as explained later in this brief, Plaintiffs take issue with Defendants' disavowal of interfering with Plaintiffs' employment decisions in accordance with federal law. It is unclear why Plaintiffs are satisfied with the Denver Preschool Program language but not with Defendants' disavowal. Both rely on the same premise: the Plaintiffs' actions are permissible if they are in accordance with federal law.

Plaintiffs next concede that their schools signed a contract with a nondiscrimination provision to participate in the Colorado Child Care Assistance Program ("CCCAP"). That provision states that Plaintiff Preschool must "[a]ccept referrals for child care without discrimination with regard to race, color, national origin, age, sex, religion, marital status, sexual orientation or physical, intellectual or mental health disability." *See* Doc. 38-3 at 2. Plaintiffs attempt to distinguish the CCCAP contract from the UPK Program provider agreement in two

ways, but those efforts are not persuasive.

First, Plaintiffs allege that the non-discrimination provision only prohibits discrimination when accepting “referrals” and that Arapahoe County, the contracting party, does not make referrals. This is a red herring. There is no meaningful distinction between the CCCAP and the UPK Program’s nondiscrimination provisions in application.

“Referrals” in CCCAP refer to a family being referred to a specific provider to receive CCCAP services. *See* Ex. 2 ¶ 4, Supplemental Declaration of Jesse Burne. Referrals occur through an online database called Colorado Shines or through a referral line where a trained referral specialist will help a family locate providers specific to the family’s needs. *Id.* ¶¶ 5-12. When a family is referred to a provider, that provider must “accept” the referral “without discrimination with regard to race, color, national origin, age, sex, religion, marital status, sexual orientation...” *Id.* ¶ 13. This is akin to the matching process in the UPK Program in that a UPK provider must also accept a family matched to it without discrimination with regard to matters such as religion, marital status, and sexual orientation. But there is one key distinction, the UPK Program gives faith-based providers even more discretion than does the CCCAP Program, as the UPK Program permits faith-based providers to decline a match through the congregation preference if the family matched is not a member of the provider’s congregation.

Second, Plaintiffs claim that the non-discrimination provision in the CCCAP agreement does not raise any constitutional concerns because Plaintiffs allege that, in CCCAP, they accept “a child’s CCCAP funds only after evaluating and admitting that child into their program.” Doc. 42 at 23. This is again a red herring. The CCCAP non-discrimination provision comes into play *before* the reimbursement stage. Ex. 2 ¶ 14. Regardless, Plaintiffs can evaluate potential matches

in the UPK Program through the congregation preference. Again, Plaintiffs can reserve all spots in their preschools for congregation members. And, when a family is matched to a Plaintiffs' school, they can evaluate whether the family is part of their congregation and decline to accept that match. Plaintiffs provide no factual or legal basis to explain why they faced no dilemma signing the DPP and CCCAP agreements but face such a dilemma here. This again shows that Plaintiffs' alleged injury is manufactured and does not support standing.

E. Defendants' disavowal of interfering with Plaintiffs' employment decisions protects Plaintiffs' autonomy to make those decisions in accordance with federal law.

Plaintiffs next allege that the Defendants' disavowal to interfere with Plaintiffs Preschools' employment decisions in accordance with federal law does not alleviate their concerns. But Defendants' disavowal provides sufficient autonomy to the Plaintiff Preschools to make those decisions without interference.

To reiterate, the Department "disavows enforcement of Contractual Provision 18(B) against religious providers who hire co-religionists in accordance with federal law[.]" Doc. 38-16 ¶ 26. The Department similarly disavows enforcement "against religious providers' employment decisions involving their ministerial employees as protected by federal law." *Id.* ¶ 27. It is undisputed that Plaintiffs have the right under federal law to make employment decisions involving ministerial employees free from government interference. Plaintiffs also have the right to prefer co-religionists in their employment decisions. Plaintiffs argue that this disavowal is not enough. But the Department cannot be more specific about its position in any future enforcement action without actual facts that would enable it to determine whether a contested employment action involved "ministerial employees" or determine the actual basis for a contested

employment action. Again, possible enforcement of Contractual Provision 18(B) would require at least eight steps involving various actions by Plaintiffs and an employee or applicant for employment.¹⁰ Plaintiffs apparently want the Defendant to agree in advance that all of Plaintiffs' future employment decisions will be in accordance with federal law—and this Defendants cannot do without actual facts. (The lack of facts also makes clear that this dispute is not ripe.)

III. Plaintiffs' claims are not ripe.

As a prefatory matter, Plaintiffs contend that if they satisfy standing the Court need not determine ripeness. But that is not true. Even if a case “satisfies Article III’s ‘case or controversy requirement,’ [courts] may still decline to review it under the prudential ripeness doctrine.” *United States v. Cabral*, 926 F.3d 687, 693 (10th Cir. 2019).

Here, Plaintiffs' claims are not ripe for two reasons. First, the Department is about to undergo rulemaking which will include addressing the scope of the congregation preference, and the Department will also revise the UPK Program provider agreement in anticipation of the 2024-2025 school year. Ex. 1 ¶¶ 8, 15-16. Resolution of these agency actions may well have an impact both on this litigation and Plaintiffs' alleged harms. Second, this matter is not fit for judicial resolution and no party will face hardship as a result of a dismissal.

¹⁰ Plaintiffs argue that this provision of the contract implicates “all aspects” of its preschools' operation, including the screening of families prior to enrollment and “giving preference on the basis of religious belief.” *See* Doc. 42 citing Doc. 30 at ¶¶ 142-148. But again, the congregation preference allows a faith-based provider to screen a matched family and deny that family's enrollment if they are not part of that provider's congregation. The remaining paragraphs of the Amended Complaint that Plaintiffs rely on for this point of contention all have to deal with employment decisions, which this disavowal covers. *See* Doc. 30 143-145.

A. Because rulemaking and contract revisions relevant to disputes in this case are ongoing, this case not ripe for review.

The Department is in the process of rulemaking to establish the Quality Standards for the UPK program, and the Department also intends to update and amend the current UPK Program provider agreement. Ex. 1 ¶¶ 8, 15-16.

As discussed above, the Department is engaged in the rulemaking process, which includes defining the scope of the congregation preference. This preference is a crucial component of this case because, again, Plaintiff Preschools may use the congregation preference during the UPK Program matching process to hold all their spots for only those families of their congregations. It may then also deny a match and subsequent enrollment if a family is not a member of Plaintiffs' congregation. A key part of the preference is how to define the regulatory term "congregation." That question will be answered as part of the rulemaking process. Plaintiffs have been, and are, invited and encouraged to engage in that rulemaking process as a stakeholder.

In addition, the Department is in the process of updating and amending the current UPK provider agreement. As part of this process, the Department may address the scope of Contractual Provision 18(B), which may alleviate Plaintiffs' alleged harm as it pertains to employment decision making. Ex. 1 ¶ 16.

B. This matter is not fit for judicial resolution and there is no hardship because Plaintiffs are not excluded from the UPK program

For the reasons set forth above, Plaintiffs are welcome and encouraged to join the UPK Program like other faith-based providers that are participating in the Program. And preferences in the matching process allow faith-based providers to avoid the types of conflicts Plaintiffs

present in their pleadings. For these reasons, this matter is not fit for judicial resolution and there is no hardship to Plaintiffs if judicial resolution is withheld.

In addition, to the extent there remains concern about some future enforcement action if Plaintiff Preschools participate in the program, Defendants explain that such an action would depend heavily on the facts that occurred. Again, it would take numerous steps before an enforcement action is taken. Only a fact-based inquiry based on a developed record will allow the Department to determine whether enforcement action is appropriate and for the Court to review such an action if any is ever undertaken.

In the end, Plaintiffs have numerous mechanisms in the matching process and assurances from the Department to avoid the types of conflicts Plaintiffs allege. For these reasons, this dispute is not ripe.

CONCLUSION

The Court should grant Defendants' Motion to Dismiss and dismiss Plaintiffs' Amended complaint for lack of standing, and if not for standing, because Plaintiffs' claims are not ripe for review.

Dated: October 27, 2023

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Attorney General

s/ Ryan K. Lorch

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2023, I electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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Attorneys for Plaintiffs

s/ Bonnie Smith

Bonnie Smith

Exhibit List to Defendants' Reply In Support of Motion To Dismiss Plaintiffs' Amended Complaint

Ex. 1: Supplemental Declaration of Dawn Odean dated October 27, 2023

Ex. 2: Supplemental Declaration of Jesse Burne dated October 26, 2023

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:23-cv-02079-JLK

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

Plaintiffs,

v.

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

Defendants.

SUPPLEMENTAL DECLARATION OF DAWN ODEAN

I, Dawn Odean, pursuant to 28 U.S.C. § 1746, do depose and state as follows:

1. I am over 18 years of age. I am a citizen of the United States and resident of the
State of Colorado. I am competent to make this declaration under oath, and make this
declaration based on my personal knowledge.

2. I am the Director of the Universal Preschool Program (the "UPK Program") for
the Colorado Department of Early Childhood. I assumed my position as Director of the UPK
Program on August 15, 2022.

Catholic Preschools Participating in the UPK Program

3. I recently learned that six preschools affiliated with the Archdiocese of Denver
signed the UPK Program agreement and are participating in the UPK Program.

4. The six preschools are:

- a. Child Development Head Start;
- b. Garfield Head Start;

EXHIBIT

1

- c. Mariposa Center;
- d. Kentucky Head Start;
- e. Margery Reed Mayo Day Nursery; and
- f. Quigg Newton.

5. Colorado children were matched to these schools as part of the UPK matching process and these schools have been reimbursed for the services provided to those children.

6. The Colorado Department of Early Childhood (“the Department”) has taken no enforcement action against any of these schools based on their policies.

7. The Department has not interfered in any employment decision at any of these schools.

Ongoing Rulemaking

8. The Department is currently in the rulemaking process to establish the Quality Standards for the UPK Program.

9. On or about October 30, 2023, the Department will release an initial packet of draft Quality Standards rules for public review and comment.

10. The Department invites and encourages stakeholders to review these rules and provide comment so that the final rules adequately address providers’, families’, and stakeholders’ concerns.

11. One of the key components of these rules is defining the scope of the congregation preference.

12. As I mentioned in previous declarations, Doc. 38-1, the congregation preference grants faith-based providers broad discretion in the UPK matching process, including the ability to decline a match from families outside of a provider’s faith-based congregation.

13. To that end, the draft rules which will be released in the next few days for public comment include the following definition of “congregation:

“Congregation” means a religious-based convocation, or multiple religious-based convocations, of individuals in a particular geographic area who share a common set of beliefs and who collectively engage in conduct with a direct nexus to that shared common set of beliefs.

14. Again, we encourage stakeholders to provide public comment on the scope of this definition.

15. In addition to rulemaking, the Department intends to amend and update the UPK provider agreement in anticipation of the 2024-2025 school year.

16. One of the areas of the current UPK agreement that the Department may address is Contractual Provision 18(B).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of October, 2023.

/Dawn Odean

Dawn Odean

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-2079-JLK

**PLAINTIFFS' SURREPLY IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS (ECF NO. 38)**

Plaintiffs file this surreply to briefly address two points raised for the first time in Defendants' reply brief. First, Defendants argue that the sibling and congregation preferences completely mitigate Plaintiffs' injury. Second, Defendants assert that six Head Start programs operated by Catholic Charities participate in UPK Colorado and claim that this shows Plaintiffs can participate too. Neither argument has merit.

Congregation and sibling preferences. Defendants argue for the first time in their reply that the congregation and sibling preferences give Plaintiffs all the relief they need. *See* ECF No. 47 at 4, 7-9. This is wrong for several independent reasons. As Plaintiffs have alleged, ECF No. 30 ¶¶ 51, 84-85, 136-37, 141-42, 243, and as discovery will show, *see* ECF No. 43-6 at 8, Plaintiffs regularly enroll students whose families are not parishioners, are not Catholic, and who do not have siblings

at the school. At St. Mary’s, for example, 18 of the currently enrolled four-year-olds are not children of St. Mary’s parishioners, and 21 don’t have siblings at the school.¹ Accordingly, Defendants’ suggestion that Plaintiffs can reserve “all preschool seats for their congregation” does not “cure” Plaintiffs’ injuries, ECF No. 49 at 9; it would instead decimate their preschool programs. These preferences also fail to address *at all* the Archdiocese’s requirements regarding the operation of either preschool. ECF No. 32-6 at 9-12; ECF No. 30 ¶¶ 68-69, 85, 145.

Nor is becoming a parishioner at St. Mary Parish or St. Bernadette Parish (a matter primarily of registering with the parish office) equivalent to agreeing with the Statement of Community beliefs required by the Archdiocese for families who seek to enroll in Archdiocesan preschools. *See* ECF No. 32-1 ¶ 8. Thus, *even if* Plaintiffs were to limit enrollment to parishioners (already an impossible counterfactual), this would not abrogate the conflict between Plaintiffs’ religious beliefs and UPK Colorado’s non-discrimination requirements. And regardless, the proposed regulations delineating the scope of the congregation preference remain subject to the Enrollment Mandate’s non-discrimination requirements, as explained below.

Put simply, Plaintiffs need the ability to make enrollment, operations, and employment decisions consistent with their faith—which includes (at times) taking into account the religious beliefs, sexual orientation, and gender identity of employees, students, and prospective students and their parents or guardians. ECF No. 30 ¶¶ 138-49; ECF No. 32-16 ¶¶ 13-14; 18-23; ECF No. 32-14 ¶¶ 21, 27, 29-31. But doing this is facially barred both by the contractual requirements of UPK Colorado and by State statute, a fact Defendants have already affirmed in their briefing (*e.g.*, ECF No. 38 at 3) and in response to Plaintiffs’ accommodation request (ECF No. 32-13)—and which

¹ Defendants claim that 41 out of 52 families have siblings at the school, ECF No. 47 at 4, but that conflates two different groups discussed in the complaint. *Compare* ECF No. 30 ¶ 51 (discussing all children currently enrolled in St. Mary’s preschool) *with id.* ¶ 53 (discussing only four-year-olds).

Governor Polis continues to reaffirm when discussing religious accommodations for UPK providers.² Even Defendants’ proposed UPK Colorado regulations, released on October 30, 2023, confirm that Plaintiffs’ policies are and will remain forbidden. Specifically, both the sibling and congregation preferences in the proposed regulations remain subject to the Enrollment Mandate. Section 4.110(B), Proposed UPK Quality Standards, Colorado Department of Early Childhood (October 30, 2023), <https://perma.cc/4GXW-GY38> (“In utilizing these programmatic preferences, eligible preschool providers must still comply with rule section 4.109(B) [the Enrollment Mandate’s non-discrimination requirement].”).

Head Start Programs. Defendants also introduce new evidence in their reply, pointing to Catholic Charities’ six Head Start and Early Head Start programs that serve needy families across Denver. ECF No. 47 at 9-10. These programs are part of Catholic Charities’ ministry to the poor, serving a significant number of families experiencing homelessness. Ex. 1 ¶ 5. Like a soup kitchen or a homeless shelter, however, the Archdiocese of Denver does not condition its care for the poor and needy on their adherence to its Catholic beliefs. *Id.* ¶ 6. Instead, these programs are open to families *regardless* of personal circumstances and seek to help those most in need by caring for children while parents seek to get back to their feet. *Id.* This charitable ministry, therefore, is not seeking to create a community of those receptive to its beliefs, *cf.* ECF No. 47 at 4, or to provide participating families with a distinctly Catholic education. These programs are also not operated by Archdiocesan parishes; to the extent they operate out of a parish’s space, the programs lease the space and remain independent of the parish—unlike Catholic preschools, which are part of the parish. Ex. 1 ¶ 5. Nor have these programs sought recognition as “faith-based” programs while

² “[O]bviously, if you run a preschool that doesn’t receive state money, you can run it the way you want. But of course, when you are publicly funded, you have to agree with the basic values: We don’t discriminate, and you can’t say parents can’t come here because they are gay or they are not married or whatever it is.” Gabrielle Franklin, *Polis: Catholic schools that want universal pre-K must not discriminate*, FOX31 (Aug. 17, 2023), <https://perma.cc/V92F-AJ4R>.

participating in UPK Colorado. Ex. 3 at 4-5 (Head Start programs not on list of faith-based preschool providers).³

These programs, therefore, are not subject to the Archdiocese's Office of Catholic Schools' guidance and are able to both sign the UPK Program Services Agreement in good faith and comply with its terms. *Id.* ¶¶ 5-7. For the Archdiocese of Denver's 36 Catholic preschools—whose mission is to create a Catholic community and support parents seeking to provide their children with a Catholic education—signing the Agreement in good faith and complying with its terms is not possible, as Plaintiffs have repeatedly explained. ECF No. 42 at 15-16; ECF No. 32-1 ¶¶ 30-36; ECF No. 30 ¶¶ 138-49; ECF No. 30-8. If anything, these Head Start programs show that the Archdiocese has thought carefully about the ways in which it *can* and *cannot* participate in government programs consistent with its Catholic beliefs and mission.

CONCLUSION

The Court should deny Defendants' motion to dismiss.

³ Defendants also introduce another supplemental declaration in their reply brief, ECF No. 47-2, but Plaintiffs have already explained why CCCAP does not violate their religious beliefs. ECF No. 42 at 22-23 (explaining that Archdiocesan preschools still have the opportunity to evaluate and admit students into their program before accepting a child's CCCAP funding).

Dated: November 3, 2023

Respectfully submitted,

/s/ Eric C. Rassbach

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on all parties via CM/ECF and as required by the relevant federal and local rules.

Dated: November 3, 2023

/s/ Eric C. Rassbach
Eric C. Rassbach

INDEX OF EXHIBITS

Ex. 1	Supplemental Declaration of Elias Moo, dated October 30, 2023
Ex. 2	Supplemental Declaration of Nicholas Reaves, dated October 31, 2023
Ex. 3	Defendants' answers to Plaintiffs' first set of interrogatories

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

ST. MARY CATHOLIC PARISH IN
LITTLETON; ST. BERNADETTE
CATHOLIC PARISH IN LAKEWOOD; DAN-
IEL SHELEY; LISA SHELEY; and
THE ARCHDIOCESE OF DENVER,

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-2079-JLK

SUPPLEMENTAL DECLARATION OF ELIAS MOO

I, Elias J. Moo, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am over the age of 21 and have personal knowledge of all contents of this declaration. I have not been convicted of a felony or crime involving dishonesty.
2. I am the current Superintendent of Catholic Schools at the Archdiocese of Denver.
3. Catholic Charities of the Archdiocese of Denver operates Head Start and Early Head Start programs that serve needy families across Denver.
4. These programs are part of Catholic Charities' ministry to the poor, serving, among others, a significant number of families experiencing homelessness in Denver.
5. These programs are not operated as Catholic schools in the Archdiocese, are not supervised by the Archdiocese's Office of Catholic Schools, do not operate according to the Office of Catholic

School's policies, and are not parish programs. Instead, to the extent these programs operate in Catholic parishes in the Archdiocese, they lease the space.

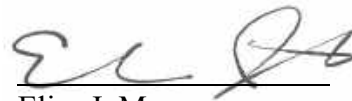
6. This charitable ministry of the Archdiocese (like the Archdiocese's soup kitchens and homeless shelters) does not condition its care for the poor and needy on adherence to Catholic beliefs or on agreement to support and uphold Catholic teachings. Instead, these Head Start and Early Head Start programs are open to all families in need, regardless of personal circumstances, and seek to help by providing childcare services while parents work to get back on their feet.

7. This charitable ministry is not seeking to create a community of believers or to provide children with a distinctively Catholic education. Accordingly, these Catholic Charities programs are able to sign the UPK Program Services Agreement in good faith since they do not, for example, prioritize Catholic families when providing this ministry to those in need.

8. For the Archdiocese of Denver's 36 Catholic preschools—whose mission *is* to create a Catholic community and support parents seeking to provide their children with a Catholic education—signing the Agreement in good faith is not possible, as I have explained in a prior declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 30, 2023.


Elias J. Moo

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-2079-JLK

JOINT STATUS REPORT

This Court directed the parties to file a joint status report answering four questions relevant to this case's progression. ECF No. 36. The parties' submissions were struck by the Court in ECF No. 59, subject to further conferral and a new joint submission by November 27, 2023. The parties met and conferred via video call on November 24, and have further exchanged drafts, resulting in this submission. As the Court will see, although some issues have been resolved or no longer need to be included here, the sides remain divided over the scope and pace of the path forward in this case. Each side's separate responses follow:

Question 1: "whether the parties believe additional discovery will be necessary beyond the December 1 cutoff date, the scope of any such discovery, and desired deadlines"

Plaintiffs' Answer: Plaintiffs do not believe additional discovery is needed in this case, for the reasons their now-pending Motion for Summary Judgment or, in the Alternative, for a Preliminary Injunction makes clear. ECF No. 61. This dispute turns on a conflict between two sets of rules—

the Archdiocese of Denver’s rules for how Catholic schools are to comport themselves consistent with Catholic doctrine, and the State’s rules for UPK providers. Whether the State is allowed to impose its rules as conditions on UPK participation in the specific areas of conflict at issue here is a question of law, and the facts necessary to resolve it are clear from the existing record. Further discovery would only delay necessary relief for Plaintiffs, increase the cost of this litigation, and waste judicial resources by requiring this Court to resolve multiple rounds of injunction briefing—exactly the results this Court at the status conference was understandably eager to avoid.

Rather than, as this Court urged the parties at the September 21 status conference, working together to complete the limited discovery necessary to resolve this largely legal dispute, Defendants propose the opposite—suggesting a “trifurcation” of this case that would be unnecessarily time-consuming, duplicative, and result in the wasting of party and judicial resources. As for Defendants’ proposed “Phase I,” this Court can easily resolve Defendants’ motion to dismiss on the papers, as courts routinely do. Defendants also claim that *future* changes to the UPK program *may* render portions of Plaintiffs’ claims moot. But unless and until those changes are made by Defendants, they aren’t relevant—and they in no way affect Plaintiffs’ standing, which is determined at the time of filing. And regardless, Defendants have already testified repeatedly that they have no authority to change the requirements of the Equal Opportunity Mandate, the statutory provision which is at the heart of Plaintiffs’ case.

Defendants also attempt to unnecessarily expand the scope of this litigation, suggesting that this court first resolve the case (“Phase II”) with regard to “the two named preschools and the two named parents” and then expand discovery (“Phase III”) to include all of the preschools in the Archdiocese. But this fundamentally misunderstands Plaintiffs’ claims. The Archdiocese, as a result of the UPK Colorado non-discrimination provisions it challenged, has been required to direct its 36 Archdiocesan preschools not to participate in UPK Colorado. ECF No. 32-11 (direction to Archdiocesan preschools). The Archdiocese therefore seeks a ruling from this Court that would

allow it to withdraw that prohibition, allowing any Archdiocesan preschool that would like to participate in UPK Colorado to be able to do so. Whether those additional schools (none of which are parties to this case) will choose to participate in UPK Colorado or not isn't part of the *Archdiocese's* injury in this case. And, as explained further below, discovery into these additional schools would both be irrelevant and unduly burdensome.

This primarily legal case is ripe for resolution. Between September 29 and November 6, the parties exchanged written discovery. Plaintiffs responded to Defendants' 11 interrogatories and 13 requests for production, producing almost 4,000 pages of documents. This included, among other things, all documents from the Plaintiffs "regarding or relating to the Archdiocese of Denver's instruction to its Catholic parishes and Catholic preschools to not sign the UPK program agreement" and all documents "regarding or relating at all to the UPK program"—broad requests, to say the least. ECF No. 43-6 at 9-10. Defendants responded to Plaintiffs' 15 interrogatories, 15 requests for production, and 5 requests for admission, producing just over 350 pages of discovery. Plaintiffs also deposed two 30(b)(6) witnesses representing the Colorado Department of Early Childhood. Defendants have scheduled five depositions to take place the week of November 27, including a 30(b)(6) witness for the Archdiocese, a 30(b)(6) witness for St. Mary's, and a 30(b)(6) witness St. Bernadette's, as well as individual depositions of Elias Moo and Lisa Sheley.

All this is why Plaintiffs have moved for summary judgment. ECF No. 61. And additional discovery would not shed light on any material fact at issue in this case. The burden is on Defendants to identify actual factual disputes in need of elucidation rather than just point to additional discovery that could be taken. *E.g.*, *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1055 (D. Colo. 2000), *aff'd*, 303 F.3d 1232 (10th Cir. 2002) ("Once a properly supported summary judgment motion is made, the non-moving party has the burden of showing that issues of undetermined material fact exist. In so doing, the opposing party ... must respond with specific facts showing the existence of a genuine factual issue to be tried." (citation omitted)). If, as they have

indicated, Defendants respond to the summary-judgment request in Plaintiffs' Motion for Summary Judgment or, in the Alternative, for a Preliminary Injunction by invoking Rule 56(d), Plaintiffs' reply brief will respond to Defendants' assertions there and explain further why Defendants cannot carry their burden. Defendants appear to have dropped their request for site visits or additional discovery from St. Bernadette (which were mentioned in the stricken report as a justification for additional time for discovery), but Defendants continue to claim that discovery from the non-party preschools and extensive expert testimony is needed. Defendants are wrong on both counts.

Documents from nonparties. Defendants claim entitlement to discovery from the 34 Archdiocesan preschools that are not parties to this case. But such discovery is not within the legal control of Plaintiffs, and Defendants don't even explain what this burdensome discovery might show.

Plaintiffs do not have legal "control" over the documents of the 34 nonparty preschools and Defendants come nowhere close to carrying their burden of proof to show otherwise. "Rule 34 is customarily interpreted as requiring that the party have the legal right to obtain the documents requested on demand." *Klesch & Co. v. Liberty Media Corp.*, 217 F.R.D. 517, 520 (D. Colo. 2003) (cleaned up); *Tomlinson v. El Paso Corp.*, 245 F.R.D. 474, 477 (D. Colo. 2007) (burden of proof on party seeking to show "control"). Each parish within the Archdiocese is a separately incorporated legal entity under Colorado law, subject to the control and direction of its pastor. Ex. 1 ¶¶ 4, 6. The Archdiocese does not control the operations, finances, or day-to-day decision-making of the nonparty preschools or collect and retain copies of all the documents created in the course of their ministry. Ex. 1 ¶ 5.

Defendants rely on an out-of-context quote from Plaintiffs' complaint that omits the key portion. That quote in full states: "The Archbishop of Denver is responsible *under Catholic canon law* for the oversight and ultimate control over all Catholic parishes within the Archdiocese, including those parishes' preschool ministries." ECF No. 30 ¶ 34 (emphasis added). Plaintiffs have been clear from that start that the Archdiocese's preschools are subject to the spiritual guidance

and authority of the Archdiocese “under Catholic canon law,” which vests the Archdiocese with ultimate oversight over all Catholic entities within the Archdiocese. ECF No. 30 ¶ 101; ECF No. 32-1 ¶ 3. That is why Plaintiff Archdiocese was able to instruct its 36 preschools not to sign the UPK provider agreement, and why it is undisputed that the preschools have followed that instruction. ECF No. 61 at 23. And that is also why Plaintiff Archdiocese is seeking in this case an injunction that would allow Plaintiff Archdiocese to rescind that instruction as to all of the preschools, freeing them to participate if they wish.

But the Archdiocese’s religious authority and responsibilities under Catholic canon law do not change the fact that the Archdiocese and its preschools are otherwise distinct and separate legal entities—or that the Archdiocese does not exercise legal or practical control over the operations of each separately incorporated preschool. *Cf., e.g., In re Roman Cath. Diocese of Rockville Ctr.*, 650 B.R. 765, 783 (Bankr. S.D.N.Y. 2023) (rejecting “assertions of control based on Catholic Canon Law” and explaining that “New York courts have rejected the argument that Catholic Canon Law imposes diocesan liability where secular law would not”); *ARK263 Doe v. Archdiocese of New York*, 2022 WL 2916781, at *2 (N.Y. Sup. Ct. July 18, 2022) (rejecting the claim that because “[a]ll schools are under the authority of the bishop” under canon law, civil courts can hold a diocese legally responsible for the actions of a Catholic school within its territory). Spiritual oversight under canon law and legal control under Rule 34 are not the same thing.

This aside, requiring Plaintiffs to respond to Defendants’ discovery requests on behalf of 34 nonparty preschools (or requiring the schools to respond independently) would be unduly burdensome, far outweighing any benefits. This Court already noted it doesn’t “see the necessity of having discovery for all of these possible schools,” especially given the “need to economize” this litigation. ECF No. 37 at 19:8-12. And Defendants have no persuasive argument to the contrary. Communications strictly between or among the nonparty preschools are not relevant to a policy decision made by the Archdiocese that was communicated to and followed by all Archdiocesan

preschools. Ex. 1 ¶ 14; ECF No. 32-1 ¶ 32; ECF No. 32-11. And that is especially so since nothing about these schools in particular is determinative of the *Archdiocese*'s injury—which, again, is the fact that it had to issue a blanket instruction prohibiting all 36 of its schools from participating.

Similarly, government funding received by nonparty preschools—especially the written grant application materials and the amount of funding received—have no bearing on the claims or defenses in this case. What is more, most of the documents regarding nonparty preschools' receipt of government funding are already within Defendants' own possession, custody, or control. *See* ECF No. 38 at 7 (Defendants' own declarations already speaking to these issues). Further, Mr. Moo has confirmed he is not aware of any government grants or funding programs that would fall within the scope of Defendants' discovery requests beyond those already listed by Plaintiffs in their discovery responses. Ex. 1 ¶ 12. And the coordination required to obtain these documents from each of the 34 nonparty preschools would be exceedingly burdensome. Indeed, given that Plaintiffs already produced over 1,100 pages of documents in response to Request for Production # 12 (regarding government funding), a conservative estimate would put this additional production at over 17,000 pages for this one discovery request. Especially in comparison to the 375 pages of documents produced in total by Defendants in response to *all* of Plaintiffs' requests, such a broad request is hardly in keeping with the requirements of the federal rules. *See* Fed. R. Civ. P. 1.

Expert witness. Pivoting from their earlier claim that they couldn't possibly obtain an expert in time for the December 19 hearing, Defendants now admit they already have an expert and seek to introduce that testimony at the December 19 hearing before this Court. But the expert testimony Defendants seek to introduce—including whether race and sexual orientation discrimination should be treated the same—are not expert opinions which will either help the trier of fact to understand the evidence or to determine a fact in issue.

This Court is more than capable of weighing the competing interests at stake—just as the Supreme Court did in *Fulton*. There, the City alleged that its interest in equal treatment of prospective

foster parents outweighed Catholic Social Services’ First Amendment right to an accommodation, and introduced expert testimony to that effect in the district court. The Supreme Court disagreed as a legal matter, explaining that “this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City’s contention that its non-discrimination policies can brook no departures.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). The Supreme Court did not even mention the expert testimony adduced by Philadelphia.

So too here. Defendants have admittedly allowed over 1,000 exemptions from their Enrollment Mandate—not to mention allowed self-selection into the congregation exemption—that undermine their interest in uniform enforcement to at least as great a degree as in *Fulton*. And Defendants have tipped their hand further by deciding not to appeal their loss in *Darren Patterson*—confirming the government’s alleged interests in this case are not compelling, which is the *only* legal issue to which such expert testimony could even theoretically speak. In fact, in denying Plaintiffs’ exemption request pre-litigation, Defendants never raised the alleged governmental interest on which their hypothetical expert will testify—and *post hoc* interests are insufficient under strict scrutiny. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008). Thus, even setting aside Defendants’ profound delay in seeking to obtain an expert, expert testimony in this case is unnecessary—as Plaintiffs’ now-pending summary-judgment motion further makes clear.

Even if this Court were initially inclined to permit expert testimony, Defendants’ failure to disclose their expert in time for Defendants to notice and depose the witness and potentially challenge the admissibility of the witnesses’ alleged expert testimony ahead of the December 19 hearing confirms the expert shouldn’t be permitted to testify.

* * *

Defendants' actions during this discovery process also confirms this Court should look with a skeptical eye at Defendants' requests. Defendants now complain about the briefing schedule Plaintiffs proposed. But Defendants had the opportunity to work with Plaintiffs back in early October to set a mutually agreeable schedule and instead chose to ignore Plaintiffs' attempts to agree on a discovery and briefing plan. *See* ECF No. 43-7 (Plaintiffs proposing discovery schedule). Defendants claimed there is no urgency to Plaintiffs' injunction request because Plaintiffs cannot participate in UPK Colorado this year. ECF No. 37 at 17. But Defendants' 30(b)(6) witness confirmed the opposite. ECF No. 61-4 at 34:17-37:5 (schools can begin participating immediately). Defendants also alleged on October 10 that it would take over 615 hours (almost 16 weeks of work for one individual) to review and produce written document discovery, but ultimately turned over their production of 177 documents less than three weeks later. And Defendants on November 16 claimed they couldn't possibly produce an expert witness for the December 19 hearing; now they apparently already have an expert ready to testify.

At minimum, even if the Court were unsure whether more discovery is needed before this case is fully resolved, Plaintiffs have filed a motion for summary judgment or, in the alternative, for a preliminary injunction. Even if the discovery thus far weren't sufficient to proceed to final judgment—and it is—the Court unquestionably has everything it needs to decide Plaintiffs' entitlement to the preliminary relief that they first sought over two months ago.

Defendants' Answer: By asking the parties to proffer near-term discovery and briefing schedules, the Court appears to be asking each side “what process is due?” and “what evidentiary findings will be sufficient?” to support a final judgment and a grant or denial of a permanent injunction, all by the end of 2023. For context, Plaintiffs seek an unprecedented state-paid license to screen and reject and even expel both students and families based on sexual orientation, gender identity,

and religion.¹ They argue above that they have established standing, ripeness, and victory on the merits, as a matter of law, based on the public record and various deposition excerpts and declarations. They argue that no further evidentiary proceedings are warranted and that a permanent injunction in favor of the entire Archdiocese of Denver should issue forthwith, extending a full “exemption” to all its affiliates to ignore the State’s non-discrimination mandate concerning sexual orientation or gender identity issues being faced by Colorado preschool families.²

Defendants strongly disagree that the case is presently justiciable given the lack of an aggrieved person or entity, or that the merits are sufficiently developed to support a Court decision as requested. This is particularly true in light of a compressed holiday schedule impacting expert retention and unexpected Department of Law staff turnover. Defendants are further concerned about the long-term prejudice their case (and all Colorado families who participate in UPK) will suffer absent full discovery on dozens of nonparty preschools and other affiliates of the Archdiocese of Denver, as well as absent full fact finding on the harm caused when sexual orientation and gender identity issues are suppressed and protections undermined. In addition, fast-moving changes in the CDEC program could moot some of Plaintiff’s arguments.

That said, Defendants have worked assiduously to find available expert support, and to live with the discovery allowed thus far by the Court. Defendants are open to a “trifurcation” approach to this lawsuit: a Phase I evidentiary proceeding on justiciability followed by oral argument on the morning of December 19, 2023. That would be followed that afternoon and through December 21

¹ See ECF No. 1-2, p. 4 of 18, Plaintiff’s “Guidelines for Issues Concerning the Human Person and Sexual Identity” (no date) (“Christian anthropology and gender ideology are incompatible...”); *id.* at p. 5 of 18 (“the Church regards gender ideology as not only harmful to the individual but also to the culture at large”).

² See ECF No. 1, p. 33 of 35 (“Plaintiffs request that the Court... [d]eclare that the religious affiliation, sexual-orientation, and gender-identity discrimination requirements as set out in the [UPK] Agreement violate the First Amendment to the United States Constitution as applied to Plaintiffs’ religious exercise.”); *accord id.* at p. 34 of 35 (seeking same for COLO. REV. STAT. Sec. 26.5-4-205(b)).

by a Phase II merits proceeding as set forth in more detail below. The final Phase III would be a full merits jury trial in mid-2024, with extended expert testimony based on a complete factual record that addresses all affected preschools and any relevant Archdiocesan affiliates and taking into account the anticipated 2024 CDEC rulemaking results and contract revisions, plus any shift in Plaintiffs' doctrinal positions concerning the treatment of LGBTQ+ families who are members of the Catholic faith. Standing and ripeness issues are jurisdictional and relevant at every phase of the litigation, including on appeal.

Phase I on justiciability. Presuming Plaintiffs stand on their papers as promised, Defendants would proceed on the presently scheduled discovery path, proffering and calling witnesses the morning of December 19 to support their pending (and fully briefed) Motion to Dismiss and buttressing their overall position that the case lacks a real aggrieved person or entity. Defendants will also present evidence supporting their position that significant swaths of the case will likely be rendered moot after upcoming rulemaking and 2024 UPK contract revision. Defendants estimate oral argument on this phase of about 45 minutes per side.

Phase II, limited merits. If the Court takes Phase I under advisement, and Plaintiffs continue to stand on their papers, Defendants are open to a limited merits proceeding December 19-21 involving just the two named preschools and the two named parents given that the Archdiocese disclaims any secular control over non-party preschools. This would include direct examination of defense witnesses to establish the contours of the UPK program, its statutory non-discrimination provisos, its "mixed-delivery" system and issues raised there involving faith-based providers, as well as the CDEC preferences system and the lack of any other exemption from the major anti-discrimination protections found in the statute and the UPK Contract. Defendants would cross-examine Plaintiff witnesses to establish their asserted doctrinal clash with statutory and contractual protections related to sexual orientation and gender identity while certain of their affiliates subscribe readily to these same or similar non-discrimination provisos in other settings. Defendants

would then present expert testimony to place sexual orientation and gender identity protections in their proper context parallel to, e.g., racial and national origin protections, and distinctly separate in kind from CDEC's preferences program, and unpacking the State's interest in preventing the pain and loss and long-term trauma suffered by families when schools (or governments) intrude into this sensitive space. Trial briefs of a suggested five pages and expert disclosures complying with Fed. R. Civ. P. 26 could be supplied by Friday, December 15, 2023. Closing arguments could follow on December 21 if there is time or can be submitted in writing soon after.

Phase III, full merits. Defendants will more fully detail their expected and requested scope of the full merits trial in their Rule 56(d) response to Plaintiffs' pending Motion for Summary Judgment, to be filed by December 7, 2023. In short, discovery must as a matter of fairness and completeness extend to all of the preschools (and any affiliates) that would benefit from Plaintiffs' requested permanent injunction, expand to fact discovery requested by the anticipated larger cadre of experts, provide sufficient time to process the expected CDEC rulemaking and contract revisions and any updates on the position of the Plaintiff Archdiocese in case of superseding canon guidance from the Vatican. This Phase III should be ready for trial by mid-2024, resolving matters in time for school year 2024-25.

Question 2: "whether Plaintiffs intend to file a supplement to their Motion for Preliminary Injunction or intend to convert that Motion to a Motion for Summary Judgment, which would result in the Motion for Preliminary Injunction being withdrawn"

Plaintiffs' Answer: Given the sufficient discovery already completed in this case, Plaintiffs believe that proceeding to summary judgment is appropriate. Accordingly, Plaintiffs have filed with the Court their Motion for Summary Judgment or, in the Alternative, for a Preliminary Injunction. ECF No. 61. Should this Court disagree that summary judgment is appropriate at this time, Plaintiffs ask in the alternative that this Court issue a preliminary injunction based on the evidence already produced in this case. Either way, Plaintiffs believe the briefing schedule set out

by Plaintiffs in response to Question No. 3 is appropriate to resolve the pending motion. Plaintiffs understand this Court's question—asking whether Plaintiffs continue to seek preliminary relief or summary judgment—to be premised on the parties' agreeing that the Court's initial discovery schedule was sufficient (which, if they agreed that it was, would allow Plaintiffs to withdraw their request for a preliminary injunction and for this Court to resolve the final merits of this case). Here, the parties disagree on that question, necessitating a motion in the alternative. To the extent that the Court would have Plaintiffs choose between making a motion for summary judgment or a motion for preliminary injunction, Plaintiffs would choose to supplement their preliminary injunction motion to ensure prompt relief, though for the reasons stated in the Motion, ECF No. 61, they believe this case can be resolved on summary judgment in their favor and they see no reason to put the two forms of relief at odds.

Defendants' Answer: Defendants believe that summary judgment is premature under Fed. R. Civ. P. 56(d) and will file an accompanying response and declaration by December 7, 2023, which will restate and expand on previously recited discovery topics and site visits. Defendants also reassert their fully briefed Motion to Dismiss, and restate their belief that pending rulemaking and contract revision could substantially change the case terrain, including by mooted out some or all of Plaintiffs' claims. And Defendants protest Plaintiffs' inclusion of a motion for preliminary injunction within their motion for summary judgment. **This Court stated that filing a Motion for Summary Judgment would result in Plaintiffs' Motion for Preliminary Injunction being withdrawn. Plaintiffs have apparently ignored the Court's directive, seeking a preliminary injunction as alternative relief to summary judgment. Defendants seek the Court's prompt guidance on exactly what they should respond to here beyond answering the Motion for Summary Judgment.**

Question 3: “a briefing schedule for Plaintiffs' Motion (either for Preliminary Injunction or for Summary Judgment) that would result in the Motion being fully briefed by December 14, 2023”

Plaintiffs' Answer: Plaintiffs propose the following briefing schedule for their Motion for Summary Judgment or, in the Alternative, a Preliminary Injunction:

November 21, 2023: opening brief filed by Plaintiffs

December 7, 2023: response brief filed by Defendants

December 14, 2023: reply brief filed by Plaintiffs

Defendants' Answer:

December 1, 2023: Complete Jurisdictional Discovery

December 7, 2023: MSJ Response Brief and Rule 56(d) Declaration

December 14, 2023: reply brief filed by Plaintiffs

December 15, 2023: Five-page trial briefs and all expert reports filed by both sides

December 19 a.m., 2023: Short evidentiary proceeding and oral Arguments on Motion to Dismiss (if needed)

December 19 p.m. through December 21, 2023: Hearing on merits for named preschools and parents

March 15, 2024: Additional Discovery Deadline for Merits (if needed)

April 15, 2024: Completion of all expert reports and rebuttals

June 2024: Jury Trial on the Merits

Question 4: “whether the set hearing will be for a preliminary injunction or on the final merits”

Plaintiffs' Answer: Plaintiffs request that the hearing on December 19 through December 21 resolve the final merits. If this Court agrees with Plaintiffs that the material facts necessary to resolve Plaintiffs' claims are not in dispute, Plaintiffs request oral argument on their pending Motion. *See* ECF No. 61. If this Court believes there are material facts that must be resolved before a final determination, however, Plaintiffs request that this Court conduct a bench trial and find the

facts necessary to resolve this case on the merits. Should this Court order a bench trial, Plaintiffs will be prepared to present witness testimony regarding any disputed material facts.

Regardless, this Court should order the parties to engage in merits briefing based on the current factual record and following the schedule Plaintiffs proposed above. This will allow the Court to assess whether there are indeed any factual disputes that require additional discovery. If this Court instead believes that final resolution is not warranted at this time, Plaintiffs' ask that this Court resolve Plaintiffs' alternative request for a preliminary injunction by the end of the year. *See* ECF No. 61. Should this Court determine that it will resolve only Plaintiffs' request for a preliminary injunction at this time, Plaintiffs ask that, in an effort to avoid unnecessary expense, the Court resolve the preliminary injunction portion of this case either on the papers or with oral argument limited to 45 minutes per side. Both parties have already engaged in (or are currently engaging in) the deposition process. Transcripts of these depositions have been (or will soon be) submitted to the Court. Requiring additional witness testimony from these same witnesses solely to resolve Plaintiffs' preliminary injunction motion would be an unnecessary waste of party and judicial resources when the Court can instead resolve Plaintiffs' preliminary injunction motion on the undisputed facts already in the record. Plaintiffs don't believe this case is sufficiently complex to require an additional status conference and would ask the Court to simply enter a briefing schedule which provides the parties with notice regarding what type of hearing the Court will hold on December 19.

Defendants' Answer: Defendants restate their above proposals. Defendants also ask the Court for a forthwith status conference to confirm a case plan.

Dated: November 27, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on all parties via CM/ECF and as required by the relevant federal and local rules.

Dated: November 27, 2023

/s/ Eric C. Rassbach
Eric C. Rassbach

INDEX OF PLAINTIFFS' EXHIBITS

Ex. 1	Declaration of Elias Moo, dated November 27, 2023
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 23-cv-02079-JLK

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

Plaintiffs,

v.

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

Defendants.

ORDER ON THE PARTIES’ JOINT STATUS REPORT (ECF NO. 62)

Kane, J.

Plaintiffs in this case—the Archdiocese of Denver, two Catholic parishes that operate preschools, and two Catholic parents of a preschool-aged child—bring assorted claims under the First Amendment to the U.S. Constitution challenging the application of the Colorado Universal Preschool Program’s nondiscrimination requirements to them specifically. Shortly after filing their Complaint, Plaintiffs filed a Motion for Preliminary Injunction (ECF No. 32), requesting that the Court “preliminarily enjoin Defendants from denying Plaintiffs participation in [the

Colorado Universal Preschool Program (“UPK Colorado”)], based on their religious beliefs, character, and exercise, including:

- (i) prioritizing Catholic families in admission;
- (ii) requiring employees to abide by and uphold Catholic teachings, including on life, marriage, gender, and human sexuality;
- (iii) considering for purposes of admission or retention whether a family or child seeking placement abides by and upholds Catholic teachings; and
- (iv) operating their schools in accordance with Catholic teachings.”

Mot. for Prelim. Inj. at 8, ECF No. 32. Plaintiffs later filed an Amended Complaint that seeks similar injunctive relief on a permanent basis, as well as declarations that UPK Colorado’s nondiscrimination requirements “violate the First Amendment to the United States Constitution as applied to Plaintiffs’ religious exercise.” Am. Compl. at 35-36.

After the case was assigned to me, I held a status conference to explore with the parties whether consideration of the preliminary injunction Motion could be consolidated with the determination of the final merits. *See* Fed. R. Civ. P. 65(a)(2). The parties agreed at that time to engage in limited initial discovery and then to propose how to move forward with the case. Pursuant to that plan, I ordered the parties to submit a joint status report on or before November 16, 2023. *See* Order Re: Initial Discovery at 2, ECF No. 36. In the status report, the parties were to address:

- (1) whether the parties believe[d] additional discovery [would] be necessary beyond the December 1 cutoff date, the scope of any such discovery, and desired deadlines;
- (2) whether Plaintiffs intend[ed] to file a supplement to their Motion for Preliminary Injunction or intend[ed] to convert that Motion to a Motion for Summary Judgment, which would result in the Motion for Preliminary Injunction being withdrawn;
- (3) a briefing schedule for Plaintiffs’ Motion (either for Preliminary Injunction or for Summary Judgment) that would result in the Motion

being fully briefed by December 14, 2023; and (4) whether the set hearing [would] be for a preliminary injunction or on the final merits.

Id.

The parties filed a Joint Status Report (ECF No. 56) by the deadline. It was stricken, however, because Plaintiffs submitted a version of the document that Defendants had not seen, indicating the parties had not fully conferred on the relevant issues. *See* 11/21/2023 Minute Order, ECF No. 59. Three days ago, the parties submitted a revised Joint Status Report (ECF No. 62) that reveals the parties' additional efforts to come to an agreement. Nevertheless, the parties continue to disagree on the appropriate path forward.

Plaintiffs contend that no additional discovery is necessary and filed a Motion for Summary Judgment or, in the Alternative, for a Preliminary Injunction (ECF No. 61). Plaintiffs insist that “the material facts necessary to resolve [their] claims are not in dispute.” Joint Status Report II at 13, ECF No. 62. If the Court disagrees, however, Plaintiffs request that a bench trial be conducted during the previously scheduled setting on December 19, 20, and 21, 2023. *Id.* at 13-14.

In significant respects, Defendants' proposal aligns with Plaintiffs'—Both parties agree that a final merits determination, at least in part, may occur by the end of the year. Allegations in the Amended Complaint have caused Defendants to believe that it is necessary to conduct broad discovery on all the preschools operated by parishes within the Archdiocese. “The Archdiocese oversees, guides, and supports 36 preschools,” including those operated by the parishes named as Plaintiffs in this case (the “Named Preschools”) and those operated by other parishes within the Archdiocese (the “Unnamed Preschools”). Am. Compl. ¶¶ 67, 99, ECF No. 30. “Each parish within the Archdiocese is a separately incorporated legal entity under Colorado law, subject to the control and direction of its pastor.” Joint Status Report II at 4. Yet, the Amended Complaint

alleges that the Archdiocese “speaks for and advances the interests of all of [its] Catholic schools and preschools.” *Id.* ¶ 100. Its use of the collective “Plaintiffs” and description of the Archdiocese’s conduct also appears to indicate that the Archdiocese is representing the interests of the Unnamed Preschools in this case.

Defendants consequently propose that the merits determination on the claims of the Named Preschools be bifurcated from a determination on the Archdiocese’s claims involving the Unnamed Preschools. Defendants urge the Court to put off deciding the final merits of the latter claims until mid-2024 so that sufficient discovery can be completed.

Plaintiffs assert that Defendants’ proposal “fundamentally misunderstands Plaintiffs’ claims.” Joint Status Report II at 2. According to Plaintiffs:

The Archdiocese, as a result of the UPK Colorado non-discrimination provisions it challenged, has been required to direct its 36 Archdiocesan preschools not to participate in UPK Colorado. The Archdiocese therefore seeks a ruling from this Court that would allow it to withdraw that prohibition, allowing any Archdiocesan preschool that would like to participate in UPK Colorado to be able to do so.

Id. at 2-3 (citation omitted). The parties’ positions highlight that the interests represented by the Archdiocese in this case are unclear and must be defined for the case to proceed.

In the Joint Status Report, the parties also disagree on whether expert testimony should be allowed. Defendants seek to “present expert testimony to place sexual orientation and gender identity protections in their proper context . . . and [to] unpack[] the State’s interest in preventing the pain and loss and long-term trauma suffered by families when schools (or governments) intrude into this sensitive space.” *Id.* at 11. Plaintiffs argue that expert testimony is unnecessary and that Defendants did not disclose their expert in time for Plaintiffs to depose the witness or challenge the admissibility of the witness’s opinions. *Id.* at 7.

Accordingly, there are four distinct matters that I must address to provide a plan for how this case will move forward: (1) the timing of future proceedings, (2) the scope of the litigation, (3) the propriety of expert testimony, and (4) whether a bench trial should be held or the case should be decided applying the summary judgment standard.

Timing of Proceedings

My prior Order on the initial discovery in this case indicated that if Plaintiffs chose to convert their Motion for Preliminary Injunction to one for summary judgment, that “would result in the Motion for Preliminary Injunction being withdrawn.” Order Re: Initial Discovery at 2. Plaintiffs have filed a 50-plus-page Motion for Summary Judgment that, in the alternative, seeks a preliminary injunction. Based on the filing of the Motion for Summary Judgment, the original Motion for Preliminary Injunction should be withdrawn. However, I will allow Plaintiffs to pursue relief as they see fit. While a request for a preliminary injunction ordinarily would receive priority on my docket, the time needed to adjudicate any matter is directly related to the materials submitted, including the plethora of citations contained in the parties’ briefs and the work to be done before any ruling is possible. I am appalled at the effrontery of Plaintiffs’ counsel in filing over 500 pages while at the same time asking for expedited decisions. I follow the law and the facts to the proper conclusion. Doing so demands that I review all the submissions, and I will not be rushed to judgment.

For this reason and the ones that follow, I vacate the setting presently scheduled for December 19, 20, and 21, 2023, and reset it for January 2, 3, and 4, 2024.

The Scope of the Litigation

As mentioned, the inclusion of the Archdiocese as a Plaintiff has muddled the boundaries of this litigation. Plaintiffs bring as-applied constitutional claims. *See* Am. Compl. 35-36 (seeking declaratory and injunctive relief in relation to “Plaintiffs” only). The specific interests Plaintiffs represent thus dictate the scope of this litigation. Plaintiffs’ filings in this case suggest both that the Archdiocese brings its claims on behalf of its own interests as well as those of the 36 preschools within the Archdiocese. To proceed with this case, I must assess the Archdiocese’s specific claims and determine the extent to which the Archdiocese has standing to assert those claims.¹

In the Amended Complaint, Plaintiffs do not explicitly articulate the basis for the Archdiocese’s standing. And, in their Motion to Dismiss, Defendants do not present arguments focused on the Archdiocese. As noted above, however, Plaintiffs indicate in the revised Joint Status Report that the Archdiocese’s claims arise from their allegation that it was “required to direct its 36 Archdiocesan preschools not to participate in UPK Colorado.” Joint Status Report II at 2; *see also id.* at 6 (describing the Archdiocese’s injury as “the fact that it had to issue a blanket instruction prohibiting all 36 of its schools from participating” in the Program). The Amended Complaint and Plaintiffs’ other filings, however, suggest that the Archdiocese brings its claims as an agent or representative of the Unnamed Preschools. *See, e.g.,* Am. Compl. ¶ 100 (asserting that the Archdiocese “speaks for and advances the interests of all of [its] Catholic schools and preschools”); *id.* ¶¶ 171-72 (alleging the Archdiocese “provide[s] education” and “hire[s] teachers”); *id.* ¶ 173 (citing the interests of the Archdiocese’s preschools); *id.* ¶ 176

¹ Defendants have filed a Motion to Dismiss (ECF No. 38) arguing that Plaintiffs do not have standing to bring their claims and that Defendants’ claims are not ripe for adjudication. I intend to rule on that motion in full in a future order.

(stating “Plaintiffs” must agree to UPK Colorado’s nondiscrimination requirements); *id.* ¶¶ 190-91 (suggesting the Archdiocese selects preschool teachers and administrators); *id.* ¶¶ 200-01 (implying that the Archdiocese operates preschools); *id.* ¶ 234 (indicating that the Archdiocese “admit[s] families and hire[s] faculty”); Mot. for Prelim. Inj. at 8 (requesting that the Court “preliminarily enjoin Defendants from denying Plaintiffs participation in [UPK Colorado]” even though the Archdiocese itself would not participate in the Program); Am. Compl. at 35-36 (seeking similar injunctive relief on a permanent basis and declarations that UPK Colorado’s nondiscrimination requirements “violate the First Amendment to the United States Constitution as applied to Plaintiffs’ religious exercise,” despite the fact that there is no indication the Archdiocese is or would be subject to the requirements).

I am inclined to find the Archdiocese has not demonstrated it has standing to assert its claims as they are framed. Because of the parties’ lack of precision, however, additional briefing would be beneficial. As such, I direct both parties to submit supplemental briefing on Defendants’ Motion to Dismiss. In their briefing, the parties should discuss the Archdiocese’s potential standing as an agent or representative of the Unnamed Preschools, any basis for it to independently have standing, and any prudential doctrine that might counsel against the exercise of jurisdiction. The plan I set out below assumes that the challenges brought in this case relate to UPK Colorado’s nondiscrimination requirements as they are applied to the Named Preschools only. If the Archdiocese demonstrates that it has standing and that consideration should be given to application of the requirements to the Unnamed Preschools, I will permit an additional period of discovery and a second bench trial on those merits.

Expert Witnesses

Regarding expert witnesses, I find the expert testimony described by Defendants is potentially relevant and helpful for determining the questions that must be resolved in this case. Besides the initial fact discovery deadline of December 1, 2023, no deadline was provided for expert witness disclosures. If Defendants provide an expert disclosure by December 5, 2023, it will be considered timely. Plaintiffs should be given the opportunity to respond to that disclosure in the manner they deem appropriate. As a result, Plaintiff is permitted to depose any expert outside the fact discovery period, may file a motion challenging any expert opinions on or before December 11, 2023, and will be subject to a rebuttal expert deadline of December 26, 2023.²

Bench Trial vs. Summary Judgment

Lastly, the January setting will be a bench trial limited to the claims asserted by the Named Preschools and Plaintiffs Daniel and Lisa Sheley. In the revised Joint Status Report, Defendants acquiesce to having the final merits of these claims resolved in short order. Plaintiffs contend I should decide the merits of the case on their Motion for Summary Judgment, without conducting a bench trial. From the evidence presently submitted, however, I believe that at least some material facts are in dispute. Consequently, I intend to conduct a bench trial and rule as a matter of law where appropriate. The parties should consult my Civil Pretrial and Trial

² Recent amendments to Federal Rule of Evidence 702 take effect tomorrow, December 1, 2023. The Court and counsel will be governed accordingly.

Procedures Memorandum on the District of Colorado's website, including the section on the use of deposition testimony.³

Conclusion

This case will, therefore, proceed as follows: The parties will complete fact discovery this week, expert discovery will be permitted as stated above, and a bench trial on the final merits will be held on January 2, 3, and 4, 2024, beginning at 9:30 a.m. each day. Defendants are DIRECTED to file, on or before December 8, 2023, a supplemental brief to their Motion to Dismiss that specifically addresses the Archdiocese. Plaintiffs are DIRECTED to file a related supplemental brief on or before December 15, 2023. Defendants are further DIRECTED to file, on or before December 18, 2023, a Response to Plaintiffs' Motion for Summary Judgment, incorporating any trial brief, as well as any arguments under Federal Rule of Civil Procedure 12(b)(6) and any cross-motion for partial summary judgment.⁴ Plaintiffs are further DIRECTED to file, on or before December 29, 2023, a Reply to Defendants' submission, incorporating any trial brief of their own.⁵ Proposed Findings of Fact and Conclusions of Law will be due ten days after the conclusion of the bench trial. The previously scheduled setting for December 19, 20,

³ Since the timeline for the trial has been expedited, the parties should generally follow the deadlines provided in my Procedures Memorandum for hearings, unless I order otherwise.

⁴ I am allowing the inclusion of motions in Defendants' Response as an exception to the Local Rules.

⁵ In their future filings, the parties must refer to the claims in the Amended Complaint and the individual parties with specificity. Generic statements about "Plaintiffs" will not be permitted. The parties must clearly argue which party should or should not succeed on which claim and on what basis. Additionally, any "incorporation by reference" of briefs, motions, or other non-pleadings into future filings will be stricken and not considered. *See* Fed. R. Civ. P. 7(a) & 10(c); *Atl. Richfield Co. v. NL Indus., Inc.*, 20-cv-00234-NYW-KLM, 2023 WL 3096809, at *4 (D. Colo. Apr. 26, 2023).

and 21, 2023, is VACATED, and Plaintiffs' initial Motion for Preliminary Injunction (ECF No. 32) is DENIED AS MOOT.

DATED this 30th day of November, 2023.



JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:23-cv-02079-JLK

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

Plaintiffs,

v.

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

Defendants.

**DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS
(ECF NO. 38)**

Defendants Dr. Lisa Roy and Dawn Odean file this supplement to their Motion to
Dismiss (Doc. 38) as directed by this Court in the Order dated November 30, 2023 (Doc. 65).
Plaintiffs, St. Mary Catholic Parish in Littleton ("St. Mary"), St. Bernadette Catholic Parish in
Lakewood ("St. Bernadette"), and the Archdiocese of Denver ("Archdiocese"), filed the initial
Complaint on August 16, 2023. On September 13, 2023, Plaintiffs filed an Amended Complaint
with two additional plaintiffs: Lisa Sheley and Daniel Sheley. On October 6, 2023, Defendants
filed a Motion to Dismiss ("Motion"), arguing that Plaintiffs' claims are not ripe, and that
Plaintiffs lack standing (Doc. 38).

The Motion was fully briefed on November 3, 2023, and remains pending. On November
30, 2023, the Court directed both parties to submit supplemental briefing on the Motion,
specifically discussing "the Archdiocese's potential standing as an agent or representative of the

Unnamed Preschools, any basis for it to independently have standing, and any prudential doctrine that might counsel against the exercise of jurisdiction.” Doc. 65 at p. 7.

BACKGROUND

According to the Amended Complaint, the Archdiocese oversees, guides, and supports 36 preschools serving roughly 1,500 preschoolers. Doc. 30 ¶ 99. Plaintiffs seek injunctive relief on behalf of *all* 36 of those preschools. Doc. 30 ¶ 99. *Id.* ¶ 104, Doc. 62 at p. 5. Despite these assertions and the relief requested, only two Archdiocesan preschools, St. Mary and St. Bernadette, are Plaintiffs in this case and the Archdiocese has repeatedly refused to provide discovery or relevant information for any of the other 34 preschools. The Archdiocese has not demonstrated that it has standing in its own right, associational standing, or any other basis for standing and should therefore be dismissed as a plaintiff. To the extent that this Court grants any relief, it should be limited to St. Mary and/or St. Bernadette and their respective preschools.

Moreover, the Defendants maintain that none of the Plaintiffs have established standing or ripeness. In fact, Plaintiffs’ discovery responses and the initial depositions of the Archdiocese, St. Mary, St. Bernadette, and Mrs. Sheley further establish the absence of any Article III case or controversy.

LEGAL STANDARD

A plaintiff has standing when “(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Utah Physicians*

for a Healthy Env't v. Diesel Power Gear, LLC, 21 F.4th 1229, 1241 (10th Cir. 2021) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

ARGUMENT

I. The Archdiocese does not have standing

Although the Archdiocese claims that all Archdiocese of Denver Catholic preschools are “categorically” excluded from participation in the UPK Program, Doc. 30 ¶ 7, it concedes that six Catholic Charities preschools that are part of the Archdiocese are *already* participating in the UPK Program. Moo Tr. at 75:20-23 attached as Exhibit 1. According to the Archdiocese, Catholic Charities is “ultimately subject to the authority of the Archbishop” and “the Archbishop is responsible for Catholic Charities as an ecclesiastical entity” and holds ultimate direction over it. *Id.* at 71:8-72:1; 79:12-4. In fact, some of these preschools are even located on Archdiocese parish properties. *Id.* at 79:15-17. That these schools are currently participating in the Program demonstrates the inaccuracy of the Archdiocese’s claim of categorical exclusion.

Along with its inaccurate assertion that it is “categorically” excluded from the UPK Program, the Archdiocese also alleges that its “36 Archdiocesan preschools” are precluded from participating in the UPK Program and it seeks injunctive relief on behalf of itself and *all* 36 of those preschools, including the Unnamed Preschools, even though each of these schools is a legal entity distinct from the Archdiocese. Doc. 30 ¶ 104, Doc. 62 at 5. According to the Amended Complaint, St. Mary is a Colorado corporation sole and St. Mary Catholic Preschool is a ministry of St. Mary. Doc. 30 ¶ 31; Seul Rough Tr. At 17:5-11 attached as Exhibit 2. St. Bernadette is a Colorado corporation sole and Wellspring Catholic Academy of St. Bernadette is a ministry of St. Bernadette’s. Doc. 30 ¶ 32. The Archdiocese is also a Colorado corporation

sole. *Id.* ¶ 34. Additionally, each parish within the Archdiocese is a “separately incorporated legal entity under Colorado law, subject to the control and direction of its pastor and the Archdiocese does not control the operations, finances, or day-to-day decision-making of the nonparty preschools.” Doc. 62 at 4.

Furthermore, the Archdiocese 30(b)(6) witness testified that each individual school has exclusive authority to create policies and make school-wide decisions around “the complexities of issues pertaining to [] gender identity [and] sexual identity.” Moo Tr. at 194:22-195:2; *see also id.* at 195:8-13 (stating each school would determine how it could “work with the situation”); *id.* at 128: 10-11 (stating that pastors, “as the ultimate responsible” party, have to ensure compliance with the Archdiocese). The same witness testified that the Archdiocese would not be “driving the process” behind those decisions but instead, the Archdiocese would expect the school’s local school leadership, including the school principal, principal/director and the pastor at the local level “to really drive it.” *Id.* at 196:4-25. This process for decision-making was reiterated by the 30(b)(6) witnesses for both St. Mary and St. Bernadette. Seul Rough Tr. 18:17-25; Coats Rough Tr. 22:3-5 attached as Exhibit 3. Ultimately, since each school is a separate and distinct legal entity from the Archdiocese and makes contractual and admissions decisions at the parish level, the Archdiocese is not a proper party in this case.

a. Standing of the Archdiocese

As the Court pointed out, the interests represented by the Archdiocese in this case are unclear and must be defined before the Archdiocese can carry its burden of establishing standing, and thus Article III justiciability. Doc. 65 at p. 4. The Archdiocese has not carried this burden. None of the pleadings have established that the Archdiocese suffered an injury as *the*

Archdiocese does not seek to participate in the UPK Program. Rather, the Archdiocese asserts that “[a]ll Catholic *preschools* that provide a religious education within the Archdiocese of Denver are therefore precluded from participating in the UPK program.” Doc. 30 ¶ 104. (emphasis added). And those preschools are separate and distinct legal entities from the Archdiocese.

Nor could the Archdiocese 30(b)(6) witness identify an injury in fact. The most recent enrollment numbers gathered by the Archdiocese show that preschool enrollment is “holding steady” across the Archdiocese and has not declined due to its decision to not participate in the UPK Program. Moo Tr. 109:24-110:15. The Archdiocese 30(b)(6) witness could not point to a specific instance where the Archdiocese was asked to offer guidance on enrolling a 4-year-old asserting an identity at odds with their biological sex. Moo Tr. 121:18-23. Given these assertions, any possible injuries could only be to the Plaintiff preschools. As such the Archdiocese has not and cannot establish injury, causation, or redressability. Any potential relief at this point would necessarily be only for the Plaintiff preschools.

b. Associational Standing

Additional requirements must be satisfied when the plaintiff is an organization suing on behalf of its members, such as the Archdiocese in this case. Courts first consider whether a plaintiff has standing in its own right. If the court determines that an organizational plaintiff has its own standing, the court “need not consider associational standing.” *Colorado Montana Wyoming State Area Conf. of NAACP v. United States Election Integrity Plan*, No. 22-CV-00581-PAB, 2022 WL 1266612, at *8 (D. Colo. Apr. 28, 2022). But if the organization plaintiff does not have standing, a court will consider when it has standing on behalf of its members.

That occurs **only** when “[1] when its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization’s purpose, **and** [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Utah Physicians for a Healthy Env’t*, 21 F.4th at 1241. As already discussed, the Archdiocese does not have standing in its own right. And the Archdiocese lacks associational standing on behalf of its members.

i. The Archdiocese has not established that its members would otherwise have standing to sue in their own right

For an association to establish associational standing, it must first show that its “members” would otherwise have standing to sue in their own right. According to the Amended Complaint, the Archdiocese of Denver is the spiritual home to roughly 610,000 Catholics across 149 parishes, stations, and mission parishes in northern Colorado. Doc. 30 ¶ 95. The Archdiocese has not explained whether these Catholics, parishes, stations, or schools are its “members.” Without a better understanding of who the members of the Archdiocese are, it is impossible to understand whether those members would have standing in their own right. As such, the Archdiocese has not satisfied the first requirement to establish associational standing.

ii. The interests at stake are not germane to the organization’s purpose

The second factor for establishing associational standing is that the interests at stake are germane to the organization’s purpose. The Archdiocese’s 30(b)(6) witness described the Archdiocese’s purpose as follows: “The Archdiocese of Denver exists so that in Jesus Christ all might be rescued and have abundant life for the glory of the Father.” Moo Tr. at 29:19-23, *See also* <https://archden.org/who-we-are/>. This type of sweeping language is not enough to give an organization standing. “The federal courts have abjured appeals to their authority which would

convert the judicial process into ‘no more than a vehicle for the vindication of the value interests of concerned bystanders.’ Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of ‘standing’ would be quite unnecessary. But the ‘cases and controversies’ language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.” *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 473 (1982) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

The interests at stake in this case are whether the two named Plaintiff preschools can participate in a state-funded preschool program and still discriminate against LGBTQ+ children, families, employees, and prospective employees. These interests are not germane to the Archdiocese’s stated purpose of existing “so that in Jesus Christ all might be rescued and have abundant life for the glory of the Father.” Moo Tr. at 29:19-23.

iii. Both the claim asserted and the relief requested require the participation of individual members in the lawsuit

Finally, to establish associational standing, the Archdiocese must establish that neither the claim asserted, nor the relief requested requires participation of its individual members in the lawsuit. Even if the Court determines that all 36 preschools are “members” of the Archdiocese, participation of the allegedly impacted schools is necessary to the litigation since all 36 preschools are separate and distinct legal entities with individual parishes, and different handbooks, policies, populations, and operations.

As outlined above, each school and its leadership have policy and decision-making authority around issues pertaining to gender identity and sexual identity. For example, each school’s principal and/or its parish pastor make contractual and admissions decisions at the

“local level.” Moo Tr. 196:8-22; Seul Rough Tr. 18:17-19 (“St. Mary is wholly and completely under the auspices of the parish and our pastor”); *Id.* at 51:15-19 (St. Mary admission decisions are approved by the principal and not the Archdiocese.); Coats Rough Tr. 25:2-10 (the final decision maker at St. Bernadette for hiring and firing is the parish pastor, Father Joe McLagan, who works together with the principal of the school); *Id.* at 36:16-17 (“Father Joe would be the ultimate decider”).

Each school also has its own handbook and dress code as described by both the St. Mary and St. Bernadette 30(b)(6) witnesses. Coats Rough Tr. at 33:14-34:13, 45:8-46:3 (St. Bernadette) Seul Rough Tr. at 28:21-29:34, 44:8-25 (St. Mary). To illustrate the point, St. Mary holds itself out to be a strict “virtue-based school” with a stricter dress code, while St. Bernadette allows for casual Fridays and more leniency. *Id.* St. Mary is also run by an order of priests from Spain who, although invited to run the school by the Archdiocese, are not from the Archdiocese. Seul Rough Tr. at 27:8-17; 28:2-6. And importantly, these schools, and not the Archdiocese, make the decision whether to participate in the UPK Program. In fact, the Archdiocese’s 30(b)(6) witness testified that at least one Archdiocesan preschool had no interest in participating in the UPK Program, regardless of the nondiscrimination requirements. Moo Tr. at 140:13-18 and 141:1-3. The Unnamed Preschools, like the Plaintiff Preschools, are separate entities with independent decisionmakers, and they may or may not be interested in participating in the UPK program. Based on this, individual preschool participation is necessary in the lawsuit, and the Archdiocese cannot participate in the preschools’ stead. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) (no associational standing where the record lacked information about members’ injuries).

Because the Archdiocese has not established all three factors to support that it has associational standing, it must be dismissed as a party to this litigation.

c. The Archdiocese does not have standing as an agent of the Unnamed Preschools or Plaintiff Preschools

To the extent that the Archdiocese contends that it is acting as the agent for the Unnamed Preschools or the two Plaintiff preschools, it has not shown an agency relationship or that an agency relationship would confer standing. Generally, “litigants cannot sue in federal court to enforce the rights of others.” *RMA Ventures Calif. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1073 (10th Cir. 2009). An exception to this doctrine is where the litigant is the agent of the principal and can act on the principal’s behalf. “[T]he agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” Restatement (Third) Of Agency § 1.01 (2006); *see also Alfaro-Huitron v. Cervantes Agribusiness*, 982 F.3d 1242, 1251 (10th Cir. 2020). “The agent is acting in the principal’s stead, as the principal’s representative.” *Alfaro-Huitron*, 982 F.3d at 1251. The Archdiocese has presented no evidence that it acts as an agent of the Unnamed Preschools. On the contrary, the Archdiocese contends that it has no “legal or practical control” over the 34 Unnamed Preschools. Doc. 62 at 5. The Archdiocese asserts that it cannot provide discovery from the Unnamed Preschools because they are separately incorporated legal entities, subject to the control and direction of individual pastors and the Archdiocese does not control the operations, finances, or day-to-day decision-making of the nonparty preschools.” Doc. 62 at 4-6.

Further, the two named Plaintiff Preschools, St. Mary and St. Bernadette, chose to stand as plaintiffs in this lawsuit rather than have the Archdiocese act in their stead.¹ They did not manifest by their conduct an intent to have the Archdiocese act as their agent. “An agent's apparent authority originates with expressive conduct by the principal toward a third party.” *BWP Media USA, Inc. v. Clarity Digital Grp., LLC*, 820 F.3d 1175, 1180 (10th Cir. 2016) (quoting Restatement (Third) of Agency § 3.03 cmt. b (Am. Law. Inst. (2015))). The Unnamed Preschools have not expressed to the CDEC that the Archdiocese is acting in their stead. The Archdiocese’s representative, Elias Moo, testified that he was unaware whether all of the 34 Unnamed Preschools desired to participate in the UPK Program and acknowledged that some might not be interested. Moo Tr. at 137:19-138:21, 141:18-19 (“I can tell you of one that, at least at the outset said, you know, they weren’t necessarily interested.”).

The Archdiocese relies on case law stating that an archdiocese cannot be held responsible for actions taken by its parishes to state that it has no legal control over the 34 Unnamed Preschools and cannot produce discovery related to them. Doc. 62 at 5. For instance, the bankruptcy court of the Southern District of New York found that the Brooklyn Diocese and the New York Archdiocese were not responsible for debts incurred by parish schools ordered to pay survivors of sexual abuse inflicted on them by various schools’ pastors. *In re Roman Cath. Diocese of Rockville Ctr.*, 650 B.R. 765, 782 (Bankr. S.D.N.Y. 2023). Similarly, the Archdiocese relies on *ARK270 Doe v. Archdiocese of New York*, which holds that the Archdiocese of New York showed that “they had no control, supervision, hiring, or retention of employees at Salesian

¹ The Plaintiff preschools’ choice to file on their own behalf further shows that the 36 Archdiocese preschools are not “members” of the Archdiocese for the purposes of associational standing.

High School” who abused students. No. 950302/2020, 2022 WL 2316696, at *2 (N.Y. Sup. Ct. June 28, 2022).² Consistent with this assertion, the Archdiocese representative testified that each pastor “has the ability to, again, to run and operate his program as he sees necessary and best fit” (Moo Tr. at 44:7-11) and “at the end of the day, the authority lies with the pastor of the parish where the preschool program is located.” *Id.* at 44:14-16. The Archdiocese does not have the power to unilaterally terminate the principal at a parish school — the pastor would need to consent and support such a decision. *Id.* at 55:18-24. Nor could the Archdiocese determine whether to disenroll a student – the local school and pastor would need to evaluate the situation and make that decision. *Id.* at 196:4-197:6. The Archdiocese’s representative also confirmed that each pastor was the corporate sole of each parish. *Id.* at 42:24-25.

Because the Archdiocese, by its own admission, has no legal control over the Unnamed Preschools, it does not have standing to seek relief on their behalf as their agent.

II. Further evidence that supports Defendants’ standing and ripeness arguments

Standing and ripeness ensure quality judicial decision-making by requiring that federal courts are presented only with concrete controversies that “sharpen[] the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions.” *Schaffer v. Clinton*, 240 F.3d 878, 883 (2001) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1969)). Standing and ripeness requirements also avoid the unwise use of scarce judicial resources to resolve speculative or conjectural disputes that may never come to fruition. *See*

² That decision, however, was vacated on reargument because the Archdiocese of New York’s evidence consisted “mainly of legal conclusions and denials” and the case is still pending. *ARK270 Doe v. Archdiocese of New York*, No. 950302/2020, 2023 WL 2744171, at *1 (N.Y. Sup. Ct. Mar. 27, 2023).

Keyes v. Sch. Dist. No. 1, Denver, Colo., 119 F.3d 1437, 1443 (10th Cir. 1997) (“The case or controversy requirement of Article III admonishes federal courts to avoid ‘premature adjudication’ and to abstain from ‘entangling themselves in abstract disagreements’”) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). As the Supreme Court has made clear, a “claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998).

The following evidence acquired through discovery and depositions make clear that Plaintiffs’ claims of injury are hypothetical and speculative, further supporting Defendants’ arguments that in fact *none* of the Plaintiffs have standing and that this case is not ripe for review:

1. Neither the Archdiocese nor either Plaintiff preschool can identity any instances, during at least the last five years, when they had to act in any of the ways they allege are prohibited by the UPK Program’s nondiscrimination requirements.³
2. Plaintiff preschools and the Archdiocese concede that those schools have agreed to similar nondiscrimination requirements prohibiting discrimination on the basis of religion, sexual

³ Moo Tr. 121:18-23 (The Archdiocese can’t recall a 4-year-old demonstrating gender confusion attempting to enroll in an Archdiocesan school.); *See also* Plaintiffs’ Supplemental Responses to Defendants’ First Set of Interrogatories attached as Exhibit 4 at 5-6 (No instances since January 1, 2018, in which St. Mary or St. Bernadette denied an applicant’s request to enroll in preschool because of the applicant or a family member’s sexuality, sexual identity, sexual orientation, gender identity, religious beliefs or the sexuality, sexual identity, sexual orientation, gender identity, or religious beliefs; No instances since January 1, 2018, in which St. Mary or St. Bernadette have denied an enrolled preschool student or family member’s request for an accommodation regarding the student’s pronouns, use of bathroom facilities, or school uniform; No instances since January 1, 2018 of adverse action against an employee or prospective employee based on sexuality, sexual identity, sexual orientation, gender identity, or religious beliefs.)

orientation, and gender variance, and that those requirements have never interfered with their sincerely held religious beliefs.⁴

3. Neither Plaintiff preschool nor the Archdiocese could determine when, if ever, they would need to engage in conduct prohibited by the UPK Program's nondiscrimination requirements, as they would need to do a "case-by-case" analysis, meet with families, and determine whether or not they could serve them or make accommodations.⁵
4. Plaintiffs Mr. and Mrs. Sheley are not "losing out on about \$6,000 per year for their youngest three children" and will not have to pay "the full cost out of pocket"⁶ as alleged in the Amended Complaint Doc. 30 ¶¶ 90-93.
5. The Archdiocese admitted that amendments to the UPK provider agreement could alleviate some and potentially all of the Plaintiff preschool's concerns about participation in the UPK

⁴CCCAP Fiscal Agreement attached as Exhibit 5 at 5 ¶ 12; DPP Agreement attached as Exhibit 6 at 26 ¶ 3; Seul Rough Tr. at 122:20-123:15 (St. Mary is currently serving one family through CCCAP and is able to participate based on the guidance of the Archdiocese and the parish); Moo Tr. at 160:9-16 (The CCCAP nondiscrimination requirement has never created a "hardship"); *Id.* at 163:22-24 (The Archdiocese agrees that by signing DPP and CCCAP agreements the preschools are "agreeing to [the nondiscrimination] terms"; Coates Rough Tr. at 105:9-11 (the guidance from the Archdiocese was that entering into DPP was fine.)

⁵ Moo Tr. at 194:22-195:20; *see also id.* at 84:12-20 ("it's not a simple yes-or-no answer. . . . But is there a hard fast rule? For example, if there's a family that says, you know, I don't agree on this, that they can't be admitted? No, there's not.") Coats Rough Tr. at 34:23-35:13; *see also id.* at 35:2-4 ("it would be case by case and we would ask the family further questions to understand the situation"). Seul Rough Tr. at 41:21-42:12 (St. Mary would evaluate whether to disenroll a student who was transgender or had parents in a same-sex relationship "on a case-by-case basis").

⁶ Seul Rough Tr. at 96:3-19 (The tuition rate at St. Mary preschool for 21 hours week is \$4,700 per year compared to the UPK rate of about \$6,000 per year for 15 hours per week.); Sheley Rough Tr. at 19:16-21 *See* Exhibit 7 (Ms. Sheley is a full-time employee at St. Mary and receives a 50% tuition discount.); *Id.* at 24:18-22 (The Sheley family receive additional tuition discounts for having multiple children enrolled); *Id.* at 30:24-31:2 (St. Mary, and not the Sheleys, would be reimbursed the UPK tuition rate, if it participated in UPK.).

Program.⁷

6. The Archdiocese’s definition of “parishioner⁸” is consistent with the Department’s proposed draft definition of “congregation” which will go through the rulemaking process next month. The Department’s proposed definition would allow both St. Mary and St. Bernadette to participate in the UPK Program and continue to prefer not only St. Mary and St. Bernadette “parishioners”, but also any “parishioners” within the geographic region of the Archdiocese of Denver, which they allege they presently are not able to do. Doc. 30 ¶¶ 60, 89.

As these facts show, Plaintiffs’ alleged injuries are hypothetical and speculative, and the Plaintiffs thus have not established injury. Nor have the Plaintiffs established that this dispute is ripe; indeed, this premature and speculative claim is not fit for judicial decision as it involves “uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.” *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (citing 13A Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3532 at 112).

CONCLUSION

This Supplemental Brief provides additional support for Defendants’ argument that the Archdiocese lacks standing, and that, indeed, none of the Plaintiffs have standing; nor are the

⁷Moo Tr. at 168:1-15 (Archdiocese identifying language in the DPP contract that “gives us a measure of comfort in allowing schools to participate in DPP” and “language like this would be welcome.”)

⁸“Parishioner” refers to Catholic individuals residing within the geographic boundaries of a parish or who have registered with the parish, typically by submitting basic demographic information to the parish’s office. Ex. 4 at 10 ¶ 10; “Congregation” means a religious-based convocation, or multiple religious-based convocations, of individuals in a particular geographic area who share a common set of beliefs and who collectively engage in conduct with a direct nexus to that shared common set of beliefs. Draft UPK Rules attached as Exhibit 8 at 2.

Plaintiffs' claims ripe for review. Defendants respectfully request the Court grant Defendants' Motion to Dismiss and dismiss Plaintiffs' Amended Complaint for lack of standing and ripeness. In the alternative, Defendants request that this Court dismiss the Archdiocese for lack of standing.

Dated: December 8, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2023, I electronically filed the foregoing **DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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**Exhibit List to Defendants' Supplemental Brief in Support of Motion To Dismiss Plaintiffs'
Amended Complaint**

Ex. 1: Elias Moo Deposition Transcript Nov. 27, 2023 (Cited Excerpts)

Ex. 2: Tracy Seul Deposition Rough Transcript Dec. 1, 2023 (Cited Excerpts)

Ex. 3: Avery Coats Deposition Rough Transcript Nov. 28, 2023 (Cited Excerpts)

Ex. 4: Plaintiffs' Supplemental Answers to Defendants' First Set of Interrogatories November 9,
2023

Ex. 5: CCCAP Provider Self-Service Portal Registration Information Letter for St. Bernadette
April 22, 2015

Ex. 6: Denver Preschool Program 2022-2023 DPP Provider Renewal Agreement Excerpts

Ex. 7: Lisa Sheley Deposition Rough Transcript Dec. 1, 2023 (Cited Excerpts)

Ex. 8: UPK Draft Rules, 8 CCR 1404-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 1:23-cv-2079-JLK

RULE 30(b)(6) DEPOSITION OF:
Superintendent of Catholic Schools
at Denver Archdiocese
ELIAS MOO
November 27, 2023
Via RemoteDepo

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

Plaintiffs,

v.

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

Defendants.

PURSUANT TO NOTICE, the Rule 30(b)(6)
deposition of Superintendent of Catholic Schools at
Denver Archdiocese, ELIAS MOO, was taken on behalf of
the Defendants in Denver County, Colorado, by remote
means, on November 27, 2023, at 8:09 a.m., before
Lisa B. Kelly, Registered Professional Reporter,
Certified Realtime Reporter, and Notary Public within
Colorado, appearing remotely from Larimer County,
Colorado.

EXHIBIT

1

<p style="text-align: right;">Page 2</p> <p>1 REMOTE APPEARANCES</p> <p>2 For the Plaintiffs:</p> <p>3 JOSEPH C. DAVIS, ESQ.</p> <p>4 NICHOLAS R. REAVES, ESQ.</p> <p>5 AMANDA DIXON, ESQ.</p> <p>6 The Becket Fund for Religious Liberty</p> <p>7 1919 Pennsylvania Avenue, N.W., Suite 400</p> <p>8 Washington, D.C. 20006</p> <p>9 jdavis@becketlaw.org</p> <p>10 nreaves@becketlaw.org</p> <p>11 adixon@becketlaw.org</p> <p>12 For the Defendants:</p> <p>13 VIRGINIA R. CARRENO, ESQ.</p> <p>14 NICOLE RUST, ESQ.</p> <p>15 J. GREGORY WHITEHAIR, ESQ.</p> <p>16 JANNA FISCHER, ESQ.</p> <p>17 Colorado Attorney General's Office</p> <p>18 1300 Broadway</p> <p>19 Denver, Colorado 80202</p> <p>20 virginia.carreno@coag.gov</p> <p>21 niki.rust@coag.gov</p> <p>22 greg.whitehair@coag.gov</p> <p>23 Janna.fischer@coag.gov</p> <p>24 Also Present:</p> <p>25 Bonnie Miller</p> <p>Jennifer Reynard</p>	<p style="text-align: right;">Page 4</p> <p>1 Exhibit 9 Universal Preschool (UPK) 143</p> <p>2 Colorado Program Service</p> <p>3 Agreement</p> <p>4 Exhibit 10 Letter to St. Mary Preschool 156</p> <p>5 from Jefferson County Division</p> <p>6 of Human Services, 8/28/23,</p> <p>7 Exhibit 11 2022-2023 DPP Provider 165</p> <p>8 Renewal Questions/Information</p> <p>9 Exhibit 12 Guidance for Issues Concerning 171</p> <p>10 the Human Person and Sexual</p> <p>11 Identity</p> <p>12 (Exhibits provided electronically to the reporter.)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 3</p> <p>1 I N D E X</p> <p>2 EXAMINATION OF ELIAS MOO: PAGE</p> <p>3 November 27, 2023</p> <p>4 By Ms. Carreno 6</p> <p>5 By Mr. Davis 231</p> <p>6 DEPOSITION EXHIBITS: INITIAL</p> <p>7 REFERENCE</p> <p>8 Exhibit 1 Notice of Rule 30(b) (6) 15</p> <p>9 Deposition</p> <p>10 Exhibit 2 1000 Series Organization and 64</p> <p>11 Administration, Canonical</p> <p>12 Overview, Effective: August 2002</p> <p>13 Exhibit 3 Archdiocese of Denver Office of 85</p> <p>14 Catholic Schools Statement on</p> <p>15 Universal Pre-K (UPK)</p> <p>16 Barriers/Impacts</p> <p>17 Exhibit 4 Letter to Governor Polis, 2/17/23 98</p> <p>18 Exhibit 5 Update on Guidance for 105</p> <p>19 Participation in UPK</p> <p>20 Exhibit 6 Email string ending with an 124</p> <p>21 email to Brandorff and Neuman</p> <p>22 from Dudzic, 1/14/23, Subject:</p> <p>23 Fwd: NOTICE: Direction for</p> <p>24 Parishes and Schools on</p> <p>25 "Universal (UPK) Pre-School</p> <p>Colorado"</p> <p>Exhibit 7 Email to Rogers from Vessely, 128</p> <p>5/11/23, Subject: UPK/Polis</p> <p>meeting</p> <p>Exhibit 8 Email string ending with an 133</p> <p>email to Moo from Nesbitt,</p> <p>5/15/23, Subject: Re:</p> <p>Invitation to Private Meeting</p> <p>for Pastors-School Leaders:</p> <p>Update on Universal Preschool</p> <p>Program</p>	<p style="text-align: right;">Page 5</p> <p>1 WHEREUPON, the following proceedings were</p> <p>2 taken pursuant to the Federal Rules of Civil</p> <p>3 Procedure.</p> <p>4 * * * * *</p> <p>5 THE REPORTER: All counsel participating</p> <p>6 in this deposition acknowledge that I am not</p> <p>7 physically present in a deposition room with the</p> <p>8 deponent and that I will be reporting this deposition</p> <p>9 and providing an oath remotely.</p> <p>10 You further agree that, in lieu of an</p> <p>11 oath administered in person, the witness declares his</p> <p>12 testimony in this matter is given under penalty of</p> <p>13 perjury.</p> <p>14 All parties and counsel consent to this</p> <p>15 arrangement and waive any objections to this manner of</p> <p>16 reporting and manner of providing the oath.</p> <p>17 Counsel, please indicate your agreement</p> <p>18 by stating your name and your agreement on the record,</p> <p>19 and then I will swear in the witness.</p> <p>20 MS. CARRENO: Virginia Carreno, attorney</p> <p>21 for Defendants Roy and Odean.</p> <p>22 MR. DAVIS: Joseph Davis, attorney for</p> <p>23 the Plaintiffs. We agree.</p> <p>24</p> <p>25</p>

<p style="text-align: right;">Page 26</p> <p>1 do they have their own?</p> <p>2 A. Yes. So those preschool programs are</p> <p>3 part of -- the K to 8 or a Preschool-to-8 program all</p> <p>4 have the same policies, operate by the same policies</p> <p>5 and systems.</p> <p>6 Q. What would you say that your role is</p> <p>7 within the Archdiocese, beyond what you've already</p> <p>8 described?</p> <p>9 MR. DAVIS: Objection. Asked and</p> <p>10 answered.</p> <p>11 But you can answer, if you can.</p> <p>12 A. I suppose the other thing I would add is</p> <p>13 one of my primary areas of responsibility, on behalf</p> <p>14 of the Archbishop of Denver, is to supervise and</p> <p>15 direct, especially when it pertains to the matters of</p> <p>16 faith and morals in doctrine.</p> <p>17 And so my interaction with schools also</p> <p>18 centers around the way that our schools carry out the</p> <p>19 Catholic mission and charter for schools, for our</p> <p>20 schools here.</p> <p>21 Q. (BY MS. CARRENO) Have you had any other</p> <p>22 jobs within the Archdiocese, other than superintendent</p> <p>23 of Catholic Schools?</p> <p>24 A. Have I had any other jobs? Is that what</p> <p>25 you asked?</p>	<p style="text-align: right;">Page 28</p> <p>1 December 5th.</p> <p>2 Q. And what are you going to be doing in</p> <p>3 Oregon?</p> <p>4 A. I will be director for Catholic education</p> <p>5 at the Archdiocese of Portland.</p> <p>6 Q. Do you know who will be taking over your</p> <p>7 current role yet?</p> <p>8 A. I do not know.</p> <p>9 Q. Do you have any idea when that decision</p> <p>10 will be made? Or where is that -- where is that</p> <p>11 process, if you know?</p> <p>12 A. Yeah. It's in the -- it's in process.</p> <p>13 What I know is they're hoping to have a new</p> <p>14 superintendent named by the middle of December, if not</p> <p>15 by the first of the new calendar year. That's a rough</p> <p>16 timeline.</p> <p>17 Q. Will you be in the Denver area December</p> <p>18 19th, 20th, and 21st?</p> <p>19 A. Yes. I've made arrangements to be</p> <p>20 present on those dates.</p> <p>21 Q. Okay. So I just want to back up a little</p> <p>22 bit. I know we started jumping into talking about</p> <p>23 your position as superintendent of Catholic schools,</p> <p>24 but I'm hoping that you can give me a little bit more</p> <p>25 information about the Catholic Archdiocese of Denver</p>
<p style="text-align: right;">Page 27</p> <p>1 Q. Have you had any other positions or</p> <p>2 titles within the Archdiocese?</p> <p>3 A. Yes. Prior to becoming superintendent, I</p> <p>4 was a principal at St. Rose of Lima Catholic Academy</p> <p>5 in Denver.</p> <p>6 Q. How long were you in that position?</p> <p>7 A. Four years as principal there.</p> <p>8 Q. And prior to being a principal at</p> <p>9 St. Rose, what was your job before that?</p> <p>10 A. I was an assistant principal for two</p> <p>11 years, also at St. Rose of Lima.</p> <p>12 Q. And what about before being assistant</p> <p>13 principal?</p> <p>14 A. I was a teacher, classroom teacher. And</p> <p>15 all I've known professionally, up to my job at the</p> <p>16 Archdiocese, was at St. Rose of Lima at Denver.</p> <p>17 Q. How many years did you work at St. Rose?</p> <p>18 A. Starting in 2007 to 2014. I'm sorry.</p> <p>19 2018. Excuse me.</p> <p>20 Q. According to some of the pleadings and</p> <p>21 some of the information exchanged in this case, it</p> <p>22 sounds like you're moving to Oregon. Is that correct?</p> <p>23 A. Yes, that's correct.</p> <p>24 Q. When are you moving to Oregon?</p> <p>25 A. We are beginning to relocate on</p>	<p style="text-align: right;">Page 29</p> <p>1 in general.</p> <p>2 What is the Catholic Archdiocese of</p> <p>3 Denver?</p> <p>4 A. If you could clarify if you mean in terms</p> <p>5 of geographic area. What precisely were you looking</p> <p>6 for here with respect to what makes up the</p> <p>7 Archdiocese?</p> <p>8 Q. So is the Catholic Archdiocese a</p> <p>9 corporation? Is it a nonprofit? What is it?</p> <p>10 A. Yeah.</p> <p>11 MR. DAVIS: Objection to the extent it</p> <p>12 calls for a legal analysis.</p> <p>13 But you can answer otherwise.</p> <p>14 A. Yeah. The Archdiocese of Denver is a</p> <p>15 corporation. I wouldn't be able to tell you what kind</p> <p>16 of a corporation at this point. But it's run by the</p> <p>17 Archbishop of Denver, who is the corporate sole of the</p> <p>18 Archdiocese of Denver.</p> <p>19 Q. (BY MS. CARRENO) What is the mission or</p> <p>20 purpose of the Archdiocese of Denver?</p> <p>21 A. The Archdiocese of Denver exists so that</p> <p>22 in Jesus Christ all might be rescued and have abundant</p> <p>23 life for the glory of the Father.</p> <p>24 Q. And what is the geographic region of the</p> <p>25 Archdiocese of Denver?</p>

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1 Q. And that would be for all employees?

2 A. Yes. Yep. Yep. For all employees, I

3 would say. Again, I think it's -- this is something

4 we have delineated in our work agreements and the

5 documents that we have all employees sign.

6 Q. I believe in the amended complaint that

7 was filed in this case, it says that the Archdiocese

8 is made up of 148 parishes; is that accurate?

9 A. Yes.

10 Q. And 36 schools?

11 A. Yes.

12 Q. And in the complaint, it says that there

13 was 148 parishes and 38 schools under the care and

14 direction of the Archdiocese. What does that mean?

15 MR. DAVIS: Objection. I think that

16 misstates the complaint.

17 Did you say 38 schools, Virginia?

18 MS. CARRENO: I'm sorry. I misspoke.

19 Q. (BY MS. CARRENO) So 148 parishes and 36

20 schools. What does it mean that there was 148

21 parishes and 36 schools under the care and direction

22 of the Archdiocese?

23 A. Yeah. So those parishes are given a

24 pastor, and that pastor is the corporate sole of those

25 parishes. Canonically, according to church law, that

Page 43

1 pastor is appointed by the Archbishop of Denver to

2 exercise the archbishop's authority and duty, again,

3 to teach, govern, and sanctify over that particular

4 parish community.

5 And so the archbishop ultimately is the

6 one directing, and he exercises that direction through

7 his priests, through the pastors specifically, who he

8 appoints to oversee those parish communities.

9 So while the parishes themselves exist as

10 individual corporate soles, the pastors, nonetheless,

11 report to the archbishop. And the archbishop is

12 directing and instructing his pastors, and then

13 through his pastors, to the faithful of the parishes.

14 Q. And did you say the archbishop appoints

15 those pastors?

16 A. Yes.

17 Q. And if I'm not using the right

18 terminology, I apologize, but who would fire those

19 pastors?

20 A. Yeah. It would be a removal of the

21 pastor, and that would also fall to the archbishop,

22 ultimately.

23 Q. Who has decision-making authority for the

24 Archdiocese?

25 MR. DAVIS: Objection to the form.

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1 But you can answer, if you understand.

2 A. Yeah. If you can clarify. Who has

3 decision-making authority over the -- over what

4 specifically?

5 Q. (BY MS. CARRENO) Who has decision-making

6 authority for the Archdiocese over the preschools?

7 A. The -- so the first line would be the

8 pastors. So the preschool programs operate as

9 ministries of parishes. And so the pastor would be

10 the authority that has the ability to, again, run and

11 operate his program as he sees necessary and best fit.

12 He cooperates and hires a preschool director or a

13 school principal, right, to administer the day-to-day.

14 But at the end of the day, the authority

15 lies with the pastor of the parish where the preschool

16 program is located.

17 Q. Okay. And you had described a geographic

18 area that sounds really large for the Archdiocese of

19 Denver, but mentioned that there's only 36 preschools.

20 Does every -- does that encompass all of

21 the Catholic preschools within the geographic area

22 that falls in the Archdiocese of Denver?

23 A. Yes. That's right.

24 Q. Is every Catholic Church in that

25 geographic area required to be a member of the Denver

Page 45

1 Archdiocese?

2 A. Yeah. I guess I wouldn't say it's a

3 requirement as much as that's just how -- that's how

4 it's set up canonically. So yes.

5 So in short, every parish is -- that

6 holds the Catholic name is under the jurisdiction of

7 the Archbishop of Denver and the Archdiocese of

8 Denver.

9 Q. Okay. How does the church become or

10 parish become a member of the Archdiocese?

11 A. So, yeah. I guess I wouldn't look at it

12 in terms of membership in perhaps the way you're

13 suggesting.

14 Churches are erected by the archbishop,

15 ultimately. So it's not like there's a community of

16 faith that all of a sudden says, We want to be

17 Catholic and can we be admitted? There doesn't exist

18 a mechanism, to the best of my understanding, such as

19 that.

20 But if there is a well-known need for a

21 parish community to be erected, then the archbishop

22 would establish it as such through decree, through a

23 canonical decree, which then allows a church, a

24 Catholic Church to begin with -- alongside the

25 appointment of a pastor, as well, to be able to

Page 54

1 answered.

2 But you can answer, if you can.

3 A. Can I clarify? Are you asking how do

4 we -- how do we ensure that they're completing the

5 templates out and the forms? Is that what you're

6 getting at?

7 Q. (BY MS. CARRENO) Yes. Yes. I believe

8 you said what they are required to do, but I'm asking

9 how you require they actually do that.

10 A. Yeah. Yeah. We're not -- we don't

11 actually see them physically doing it. We distribute

12 the documents. We conduct audits every so often

13 during official visits and that's one way, you know,

14 to guarantee or ensure that certain things are

15 happening, such as, you know, the Statement of

16 Catholic Community Beliefs being distributed and

17 signed by employees.

18 But we're not asking for copies to be

19 sent to us. But we expect our professionals to be

20 professional and, in particular, our leaders to

21 exercise their leadership and comply with the

22 directive. So we leave it to them to ensure that that

23 happens.

24 Q. What would happen if, during one of the

25 audits, you realized that one of the schools was not

Page 55

1 taking the actions that are required? Would there be

2 any sanctions or any recourse that would happen?

3 MR. DAVIS: Objection to the extent it

4 calls for speculation.

5 But you can answer, if you can.

6 A. Yeah. If there was a situation like

7 that, yeah, we would go through a process of

8 identifying what failed, why didn't it happen, having

9 conversations with the leadership, the principal first

10 or the preschool director, and then ultimately the

11 pastor as well.

12 But we would engage and ensure we could

13 exhaust kind of typical means at the local level,

14 before we get into anything like disciplinary, for

15 example.

16 Q. (BY MS. CARRENO) And would the Office

17 have authority to take disciplinary action?

18 A. With respect to the parish schools, we

19 would -- we would have to be in lockstep with the

20 pastor of that school.

21 So we could not, for example,

22 unilaterally come in and terminate a principal at a

23 parish school. The pastor would have to be onboard

24 and be willing to sign off.

25 So we would -- again, this is why the

Page 56

1 communication with the pastor would be really

2 important for us to ensure we're on the same page.

3 But in the case of parish schools, we

4 are -- no. We just can't come in and say -- or

5 terminate an employee, for example, in a leadership

6 role without their support and cooperation.

7 Q. But, ultimately, the archbishop has

8 authority over the pastor; is that correct?

9 A. Yes.

10 Q. And I think you mentioned that you

11 supervised the principals, alongside of the pastor;

12 isn't that correct?

13 A. That's correct. Yes.

14 Q. You had talked about, when we were

15 talking about the Archdiocese generally, some of the

16 employees that you would be responsible for hiring and

17 firing.

18 Is the Office of Catholic Schools

19 involved in hiring or firing decisions within the

20 preschool?

21 A. No. Not within a preschool program.

22 Again, our primary line of authority is through school

23 leadership roles.

24 And so let me -- let me take a step back

25 and clarify here. So I might go, again, to the two

Page 57

1 structural situations that we have in the Archdiocese

2 of Denver Catholic schools.

3 So, again, we have four regional schools,

4 then we have the other parish schools, right?

5 Starting with the four regional schools, that is --

6 for example, if we run into a situation or scenario

7 where the leadership or teachers there are not

8 complying with policies or -- or have carried

9 themselves out or done something that violates policy

10 that would result in, let's say, termination, we do

11 have authority there to come in and to tell the

12 principal, in those four regional schools, to move

13 forward with termination of employment.

14 In the parish schools, it does not work

15 that way. So in the parish schools, the -- again, we

16 lead through -- alongside pastors and then,

17 ultimately, through the school leadership. And so it

18 falls to the pastor of that parish, and the school

19 leader of that parish school, oversight for their

20 preschool program.

21 So we would not be involved in any

22 matters pertaining to that preschool program at that

23 point, again, unless it surfaces through a pastor and

24 they want to -- they want to consult with us. But

25 we're not directly involved in how they go about their

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1 the Archdiocese of Denver through shelters and food
2 ministries, but also carries out pro life activities
3 on behalf of the Archdiocese and also provides kind of
4 emergency pregnancy support for women, especially
5 single mothers or women who are victims of abuse as
6 well.

7 So, ultimately, Catholic Charities is the
8 entity that carries out a lot of the social work and
9 social ministry that the Archdiocese has.

10 Q. And, Mr. Moo, I just want to make sure I
11 understood. Did you say pro life activities? Or what
12 was the --

13 A. Yes. Pro life. Pro life activities,
14 yes.

15 Q. Okay. And so you said that Catholic
16 Charities is under the Archdiocese of Denver?

17 A. Yes.

18 Q. Does Catholic Charities receive any
19 funding or assistance from the Archdiocese of Denver?

20 A. Yes. So Catholic Charities does receive
21 an allocation -- I couldn't tell you how much -- but
22 it does receive an allocation from the Annual
23 Archbishop's Catholic Appeal.

24 So the appeal is one of the large
25 fundraisers that the Archdiocese has to be able to

Page 71

1 provide the various different services. And so the
2 charity work of Catholic Charities is one of the
3 aspects of the annual appeal.

4 Q. And does the Archdiocese exercise any
5 control over Catholic Charities?

6 A. I'm sorry. Exercise any --

7 Q. Control.

8 A. Control. Well, Catholic Charities has a
9 CEO. Ultimately, it is a Catholic entity,
10 ecclesiastical entity. Catholic Charities is
11 considered an ecclesiastical entity of the Archdiocese
12 of Denver, so ultimately subject to the authority of
13 the archbishop.

14 But, again, I think there are -- there's
15 particular layers in the chain of command here. So
16 there's a CEO that oversees Catholic Charities. That
17 CEO is responsible to or reports to a board.

18 There are -- the archbishop, I believe,
19 and the chief operating officer sit on that board.
20 And so the board supervises, oversees the CEO, who's
21 tasked then with the administration of Catholic
22 Charities.

23 But ultimately, again, in terms of
24 matters of faith and morals, the archbishop is
25 responsible for Catholic Charities as an

Page 72

1 ecclesiastical entity.

2 Q. And can you tell me what an
3 ecclesiastical entity is?

4 A. Yeah. I think it's just a fancy way to
5 say church entity. So, yeah. An organization that
6 exists to provide a service in the church.

7 Q. Okay. That's a little easier for me to
8 pronounce so thank you.

9 And, again, apologies if I'm
10 mispronouncing any of the terms. I'm not doing it on
11 purpose. So please correct me if I pronounce anything
12 incorrectly.

13 A. Yeah. Thank you.

14 Q. Does the Archdiocese have any hiring or
15 firing authority over Catholic Charities?

16 A. Yeah. You know, I don't know. I don't
17 know that I could tell you specifically the lines.
18 Now, again, the primary way that the Archdiocese
19 exercises its authority over Catholic Charities is
20 through the board and the board's structure. And then
21 everything else, again, that falls to the ministries
22 of Catholic Charities, ultimately, is at the direction
23 of the CEO of Catholic Charities.

24 Q. And who appoints the CEO or how is the
25 CEO hired?

Page 73

1 A. Yeah. The CEO is appointed by the -- is
2 elected by the board, hired by the board of Catholic
3 Charities, ultimately.

4 Q. And how do members get appointed to the
5 board?

6 A. Yeah. That's a process I'm not familiar
7 with. I couldn't -- yeah. I'm sorry. I can't speak
8 to that.

9 Q. Okay. And I think that you said the
10 person who might be better able to speak to that is
11 the CEO, Father Dollins; is that correct?

12 A. No. That would be the COO, the chief
13 operating officer, Keith Parsons.

14 Q. Okay. Great.

15 MR. DAVIS: Virginia, is this question
16 about Catholic Charities or is it about the
17 relationship between the Archdiocese and Catholic
18 Charities?

19 MS. CARRENO: I think it's both.

20 MR. DAVIS: Okay.

21 Q. (BY MS. CARRENO) Okay. In your
22 supplemental declaration that you completed in
23 October, you had said that Catholic Charities are a
24 part of -- the preschool programs are a part of
25 Catholic Charities' ministry. What did you mean by

Page 74

1 **ministry?**

2 A. Just to clarify, you're speaking of the

3 Head Start programs?

4 Q. Yes.

5 A. Yeah. So the Head Start programs, those

6 are government preschool programs that Catholic

7 Charities extends to the community primarily to

8 provide a service, social service to the community.

9 So that, again, is I think what we would

10 say is a ministry that they provide, like they provide

11 through homeless shelters or through food lines, for

12 example. So ministries to the poor, work on behalf of

13 the church to the poor.

14 So, yeah. So that ultimately is, I

15 think, what I was getting at with that.

16 Q. And I believe, when you were testifying

17 earlier about the Catholic schools, you described

18 those as having educational ministries; is that

19 correct?

20 A. Yes.

21 Q. Okay. When you were describing Catholic

22 Charities, you talked about the faith and morals for

23 Catholic Charities. Are those the same faith and

24 morals as the Archdiocese of Denver?

25 MR. DAVIS: Objection to the form.

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1 You can answer, if you understand the

2 question.

3 A. If I could clarify. So, yeah. I guess

4 I'm having -- I'm a bit confused. So faith and

5 morals -- so you're asking my understanding of the --

6 or how I'm using the term "faith and morals" and if

7 that applies in a similar way to Catholic Charities?

8 Q. (BY MS. CARRENO) Yeah. So when you were

9 explaining what Catholic Charities was, you talked

10 about faith and morals. And when you were talking

11 about the preschools, you also used the term "faith

12 and morals."

13 So I just want to understand whether

14 you're using the term to mean the same thing or you're

15 using those differently?

16 A. Oh, okay. Yes. Thank you for that.

17 Yeah. No. Absolutely. There's no difference.

18 Q. I assume that you're aware that

19 Archdiocese -- sorry. Strike that.

20 I assume that you're aware that Catholic

21 Charities preschools are participating in Universal

22 Preschool?

23 A. Yes.

24 Q. Did the Archdiocese have any

25 conversations with Catholic Charities about them

Page 76

1 **participating?**

2 A. No. And the Head Start programs are not

3 something that we were involved with. Again, they

4 fall out of the realm of the authority of jurisdiction

5 of the Archdiocese of Denver Catholic schools and the

6 Office of Catholic Schools.

7 Q. And can you repeat that? They fall out

8 of the authority of the Office of Catholic Schools and

9 what else?

10 A. Yeah. They fall out of the authority of

11 the Office of Catholic Schools, the Archdiocese of

12 Denver Catholic schools.

13 Q. Do you know or are you aware of whether

14 the Archdiocese itself had conversations with Catholic

15 Charities about participating in Universal Preschool?

16 A. Yeah. No. I'm not aware of a

17 conversation and, yeah, wouldn't even be able to

18 speculate on whether one took place or not. I was not

19 involved in any conversations with them.

20 Q. Do any of the 36 Catholic preschools

21 serve low-income families or families experiencing

22 homelessness?

23 A. I can definitely say that some of our

24 schools serve low-income families. The extent to

25 which they serve homeless families, I wouldn't be able

Page 77

1 to ascertain for you.

2 But knowing some of the communities that

3 we have, I wouldn't be surprised if there were

4 families that were homeless that also had their

5 children in our schools.

6 Q. So why would the Catholic Charities Head

7 Start schools or Head Start programs be different than

8 the Catholic schools preschools?

9 MR. DAVIS: Objection to the form.

10 You can answer the question, if you

11 understand it.

12 A. Well, I guess I would offer this: The

13 Head Start programs are not meant to be

14 religious-based programs. To the best of my

15 understanding, there is -- there is no integration of

16 catechesis or theology in the curriculum and they're

17 primarily meant to be childcare, early ed centers for

18 the poor.

19 And so while there is an educating

20 component, it is devoid of what really we desire and

21 we expect to see in our Archdiocese of Denver Catholic

22 schools, which is the program that flows from the

23 heart of the church.

24 That is directly and intentionally

25 offering moments of catechesis and theology

<p style="text-align: right;">Page 78</p> <p>1 instruction, but also that every subject in the school</p> <p>2 is imbued with a Catholic world view and Catholic</p> <p>3 religious instruction.</p> <p>4 So even math and history and reading, all</p> <p>5 of that is strong in making connections to the</p> <p>6 teaching in a Catholic world view, which, again, to</p> <p>7 the best of my knowledge, is not taking place in any</p> <p>8 of those Head Start programs.</p> <p>9 So, yeah. So I would consider them to be</p> <p>10 varied and even, perhaps at a fundamental level, very</p> <p>11 distinct forms of education.</p> <p>12 Q. (BY MS. CARRENO) So would you say that</p> <p>13 faith and morals does not apply to the Head Start</p> <p>14 programs?</p> <p>15 A. Yeah. I don't know if -- I don't know if</p> <p>16 I would go to that length. Because here's the thing.</p> <p>17 You know, the church -- the church commands us --</p> <p>18 well, Jesus and the Gospel commands us to go and to</p> <p>19 serve the poor, to cloth the -- to provide these</p> <p>20 corporal works of mercy. Excuse me.</p> <p>21 And that's primarily how Catholic</p> <p>22 Charities views their Head Start programs, as a</p> <p>23 corporal work of mercy and as a work on behalf of the</p> <p>24 church for the poor. And that very much flows from</p> <p>25 our faith and from our morals. But -- so it's -- so</p>	<p style="text-align: right;">Page 80</p> <p>1 information to families in the Head Start programs?</p> <p>2 Is that the question?</p> <p>3 Q. (BY MS. CARRENO) Yeah. That's the</p> <p>4 question.</p> <p>5 A. Yeah. Yeah. I don't know that. I</p> <p>6 wouldn't be able to tell you if that was happening or</p> <p>7 not.</p> <p>8 What I can tell you is that Catholic</p> <p>9 Charities offers its services without, you know, a</p> <p>10 litmus test for faith, right, or without an</p> <p>11 expectation to want to convert people.</p> <p>12 So, yeah. That's all I can offer to that</p> <p>13 point.</p> <p>14 Q. Okay. And I think you may have already</p> <p>15 answered this already, but just want to make sure I</p> <p>16 get this. Let me just start over and strike what I</p> <p>17 said.</p> <p>18 Does the Office of Catholic Schools</p> <p>19 within the Archdiocese have any direction or oversight</p> <p>20 over the curriculums that are used in Catholic</p> <p>21 Charities preschools?</p> <p>22 A. No. Yeah. We do not have any</p> <p>23 involvement with that.</p> <p>24 Q. Are the Head Start employees required to</p> <p>25 be Catholic?</p>
<p style="text-align: right;">Page 79</p> <p>1 it's a work that's coming from a point of faith,</p> <p>2 ultimately.</p> <p>3 So, again, I guess I wouldn't go to the</p> <p>4 extent of saying that faith and morals don't apply,</p> <p>5 but the way that the work itself is carried out is</p> <p>6 fundamentally different.</p> <p>7 And so faith and morals aren't taught --</p> <p>8 perhaps that might be the distinction -- in a Head</p> <p>9 Start program -- or would be taught in a Head Start</p> <p>10 program like they're taught in one of our Archdiocese</p> <p>11 of Denver Catholic school programs.</p> <p>12 Q. And you said that the archbishop held</p> <p>13 ultimate direction over Catholic Charities; correct?</p> <p>14 A. Yes.</p> <p>15 Q. Aren't the Catholic Charities preschools</p> <p>16 located on properties owned by Catholic parishes?</p> <p>17 A. Yes. I believe there are some.</p> <p>18 Q. And do the Catholic Charities preschools</p> <p>19 provide children or families with information about</p> <p>20 any of the Archdiocese parishes or the Catholic faith</p> <p>21 generally?</p> <p>22 MR. DAVIS: Objection to form.</p> <p>23 You can answer, if you understand.</p> <p>24 A. If I could clarify. So do Catholic</p> <p>25 Charities -- does Catholic Charities provide that</p>	<p style="text-align: right;">Page 81</p> <p>1 A. I do not believe they are, no.</p> <p>2 Q. So none of the -- or well, strike that.</p> <p>3 Are any of the Catholic Charities</p> <p>4 employees required to be Catholic?</p> <p>5 A. No. No. To the best of my knowledge,</p> <p>6 no.</p> <p>7 Q. Are any of the Catholic Charities</p> <p>8 employees expected to not display public or private</p> <p>9 behaviors that would be inconsistent with the beliefs</p> <p>10 of the Catholic Church?</p> <p>11 A. Yeah. To the best of my knowledge, I</p> <p>12 believe that that is the expectation for employees.</p> <p>13 Q. Are the Catholic Charities' employees</p> <p>14 required to sign the same employment contracts as the</p> <p>15 parish preschools?</p> <p>16 A. I do not believe so. I haven't -- to be</p> <p>17 clear, I haven't seen what the work agreement or</p> <p>18 employment contract for Charities' employees looks</p> <p>19 like, but I do not believe that they're using the same</p> <p>20 one.</p> <p>21 Q. Okay. In your October declaration, you</p> <p>22 said, "This charitable ministry of the Archdiocese,</p> <p>23 like Archdiocese soup kitchens and homeless shelters,</p> <p>24 does not condition its care for the poor and needy on</p> <p>25 adherence to Catholic beliefs or an agreement to</p>

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1 Q. What is this?

2 A. It's the slide deck that was used at a

3 meeting that we hosted for our pastors and school

4 leaders of the preschool programs.

5 Q. And what pastors and what school leaders?

6 A. Oh, yeah. I don't have the official

7 attendance or roster in front of me, but we invited

8 all the pastors and school leaders, preschool

9 directors of all Archdiocese of Denver Catholic

10 preschools. I don't recall how many were in person,

11 but we had -- we had a number with us here in person

12 and we also had a few join us via Zoom as well.

13 Q. And who wrote this? Who prepared this

14 document?

15 A. I prepared this.

16 Q. Did anyone assist you with preparing

17 this?

18 A. No. It was shared with counsel, but I

19 don't recall them making any changes.

20 Q. And so --

21 MR. DAVIS: We're not going to divulge

22 attorney-client information.

23 Q. (BY MS. CARRENO) And so the intended

24 audience and recipient of this document was pastors

25 and school leaders of preschools; is that correct?

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1 A. That's correct.

2 Q. Anyone else?

3 A. Just them and members of the Office of

4 Catholic Schools team.

5 Q. And you said this was for a meeting?

6 A. Yes.

7 Q. What was the purpose of the meeting?

8 A. Yeah. It was to provide them an update

9 on where we stood following the January directive to

10 not participate in UPK, to provide them an update on

11 where we stood with potential participation in UPK in

12 the future.

13 Q. And this is dated May 25th of 2023. Is

14 that when the meeting was held?

15 A. Yes. That's correct.

16 Q. I want to direct your attention to the

17 third page of this document. And the second bullet

18 point says that the target is -- "one of the targets

19 is to discuss a path towards securing participation

20 and the implications of engaging in this manner."

21 Does that participation refer to UPK or

22 what does that refer to?

23 A. It does refer to UPK, yes.

24 Q. And what did you mean by securing or

25 discussing a path for securing participation?

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1 A. Yeah. There was still a hope that our

2 preschool programs would be willing to participate in

3 UPK for the sake of families that were looking for a

4 Catholic preschool education.

5 And so the intent of the work that we

6 have done and continue to do, on behalf of our

7 preschool programs, is to identify ways for securing

8 access to -- or participating in UPK without

9 compromising on our religious beliefs.

10 Q. And this was after the coalition's

11 response for religious exemption was denied; is that

12 correct?

13 A. Yes. This was after that.

14 Q. And the Archdiocese believed that there

15 might still be, I think you said a hope that the

16 Archdiocese could still participate; is that correct?

17 A. Yep. The hope was and continues to be

18 participation for those that want it, yes.

19 Q. And then if I could direct your attention

20 to page 7. And in the second bullet of the Current

21 Reality references, "The Denver Preschool Program:

22 Nine schools currently participating in DPP receiving

23 a total of \$587,699. Support ranging from 14K to

24 126K."

25 Why was the Denver Preschool Program

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1 listed under the Current Reality for this group?

2 A. Yeah. This is -- this is still coming

3 from that point of misunderstanding on the extent to

4 which DPP was being impacted by UPK or absorbed by

5 UPK. In fact, it was actually right after this

6 meeting that we were -- that this was clarified for

7 us.

8 One of our preschool directors brought to

9 our attention that we might have a misunderstanding,

10 and we looked into it further, and that's where we

11 received clarification.

12 But up to this point and up to the date

13 of this presentation, we still had this understanding

14 of the Denver Preschool Program.

15 Q. And so, again, the misunderstanding was

16 that the Denver Preschool Program was being rolled

17 into the Universal Preschool Program?

18 A. Correct. Yes.

19 Q. And so that was why the Archdiocese was

20 concerned that it might no longer be able to

21 participate in the Denver Preschool Program at the

22 time?

23 A. Correct.

24 Q. This third bullet also says that the

25 current reality at the end of May was that preschool

<p style="text-align: right;">Page 110</p> <p>1 numbers are holding steady despite the current</p> <p>2 do-not-participate directive. What does that mean?</p> <p>3 A. Yeah. We polled our preschools to</p> <p>4 identify to what extent they had seen enrollment hits</p> <p>5 because of UPK launching and Catholic preschool</p> <p>6 programs not participating yet.</p> <p>7 And so at the time, there did not seem to</p> <p>8 be a major hit on enrollment, so that's what this is</p> <p>9 referring to here.</p> <p>10 Q. Did that change at some point?</p> <p>11 A. Yeah. I think it depends on the school.</p> <p>12 I would say at this point, largely, numbers are</p> <p>13 probably still holding steady. But, yeah. Have we</p> <p>14 seen a significant change one way or another?</p> <p>15 Probably not.</p> <p>16 Q. I'm sorry. Can you say that last</p> <p>17 sentence again?</p> <p>18 A. Yeah. Have we seen a significant shift</p> <p>19 one way or another on enrollment numbers to a large</p> <p>20 increase or a large decrease? No. Probably not.</p> <p>21 Q. In that same bullet it says, "Impact on</p> <p>22 low- to middle-income families," with a -- "Impact on</p> <p>23 low- to middle-income families," with a question mark.</p> <p>24 What does that mean?</p> <p>25 A. One of the real concerns we have had and</p>	<p style="text-align: right;">Page 112</p> <p>1 able to afford a Catholic preschool education and</p> <p>2 would like to be able to send their child.</p> <p>3 But have we surveyed or collected data to</p> <p>4 a larger extent than a one-off comment sent to us?</p> <p>5 No.</p> <p>6 MS. CARRENO: And, Mr. Davis, do you know</p> <p>7 if that letter was exchanged in discovery, that email?</p> <p>8 MR. DAVIS: I'm not sure. We'll</p> <p>9 coordinate with that at our next break and get back to</p> <p>10 you.</p> <p>11 MS. CARRENO: Great. Thank you.</p> <p>12 Q. (BY MS. CARRENO) On the next page, or</p> <p>13 page 8 of that document, the first bullet says that</p> <p>14 "The Archdiocese does not desire schools to become</p> <p>15 overly dependent on state/federal money, but also</p> <p>16 holds with the church that," and then there's a quote.</p> <p>17 What did you mean by the Archdiocese does</p> <p>18 not desire schools to become overly dependent on state</p> <p>19 or federal money?</p> <p>20 A. You know, one of the things that we are</p> <p>21 constantly asking our school leaders to do is to</p> <p>22 ensure that they have a really well-balanced income</p> <p>23 portfolio.</p> <p>24 Unfortunately, we don't receive public</p> <p>25 funding, in the way that public schools do, to run our</p>
<p style="text-align: right;">Page 111</p> <p>1 continue to have is to what extent our low- to</p> <p>2 middle-income families are going to be able to afford</p> <p>3 preschool education in a Catholic school, if they so</p> <p>4 wish to provide their children a Catholic preschool</p> <p>5 education.</p> <p>6 We know that these are usually the ones</p> <p>7 that are, with many sacrifices, sending their children</p> <p>8 to our Catholic schools. And our hope was that by</p> <p>9 participating in UPK, our Catholic preschools would be</p> <p>10 able to serve many more low- to middle-income families</p> <p>11 who, you know, anecdotally, schools have heard, are</p> <p>12 not able to send their children to Catholic preschool</p> <p>13 because of the cost impediment there.</p> <p>14 Q. And you said "anecdotally" for that.</p> <p>15 What do you mean by that?</p> <p>16 A. Yeah. Reports from preschool leaders,</p> <p>17 school leaders, yeah. Just what they have -- what</p> <p>18 they have shared with us with respect to some of the</p> <p>19 challenges that they're experiencing.</p> <p>20 Q. Does the Archdiocese have anything to</p> <p>21 support those concerns, other than anecdotes?</p> <p>22 A. No. Nothing in terms of, you know -- we</p> <p>23 have one letter that we received from a family, in</p> <p>24 light of the suit that we filed, noting that they were</p> <p>25 grateful for what we were doing because they're not</p>	<p style="text-align: right;">Page 113</p> <p>1 school operations. And so by and large, it's a</p> <p>2 tuition-based operating model.</p> <p>3 And given that we have made, over the</p> <p>4 last six to seven years, an effort to welcome families</p> <p>5 that don't necessarily have the means, especially more</p> <p>6 low- to middle-income, schools have had to figure out</p> <p>7 how to generate additional income, fundraising or</p> <p>8 other sources, right, so just state, federal grants,</p> <p>9 or funding opportunities.</p> <p>10 But at the same time, as we've told them,</p> <p>11 right, I mean -- I guess we would say colloquially,</p> <p>12 all your eggs in one basket, you know, could result in</p> <p>13 a real hardship in the future if that basket goes away</p> <p>14 or something happens where drawing from that source is</p> <p>15 not going to be a possibility.</p> <p>16 So that's what's fundamentally, I think,</p> <p>17 being conveyed here, as I shared with them during this</p> <p>18 meeting. You know, if, without compromising, we can</p> <p>19 receive support, without compromising on our beliefs</p> <p>20 and our religious freedom, we can receive a benefit</p> <p>21 from state or federal sources, great. But that can't</p> <p>22 be the only source, ultimately. And so that's what</p> <p>23 that is referring to here.</p> <p>24 Q. So has the Archdiocese had to make</p> <p>25 determinations not to participate in other state or</p>

<p style="text-align: right;">Page 118</p> <p>1 problematic regulations that we saw in the agreement.</p> <p>2 So that was the -- that was the pathway</p> <p>3 that we said we -- if a preschool program wanted to</p> <p>4 pursue, that they could pursue as a way to continue to</p> <p>5 engage further and see if that would open up, for</p> <p>6 individual schools, access to UPK, with some</p> <p>7 exemptions granted in writing to them.</p> <p>8 MS. CARRENO: And, Mr. Davis, do we have</p> <p>9 a copy of the provided letter referenced in Number 2?</p> <p>10 MR. DAVIS: A copy of the letter that we</p> <p>11 have that was actually sent? I can get you the Bates</p> <p>12 label for it.</p> <p>13 MS. CARRENO: Okay. Great.</p> <p>14 Q. (BY MS. CARRENO) Did any of the parishes</p> <p>15 or any of the schools take either or both of those</p> <p>16 steps, Mr. Moo?</p> <p>17 A. Yes. Yes. We know of one parish that</p> <p>18 took both of those steps. I believe there is one</p> <p>19 other that went to the step of signing up online, but</p> <p>20 they did not send a letter in. Yeah.</p> <p>21 MR. DAVIS: So, Virginia, the one that I</p> <p>22 was referring to is at PL3244.</p> <p>23 MS. CARRENO: Thank you.</p> <p>24 Q. (BY MS. CARRENO) Which parish took both</p> <p>25 those steps?</p>	<p style="text-align: right;">Page 120</p> <p>1 happened.</p> <p>2 Q. (BY MS. CARRENO) And who made this</p> <p>3 direction or instruction?</p> <p>4 A. Well, this one on May 26th came from me.</p> <p>5 Q. Let me back up for a second.</p> <p>6 So you said that if the Archdiocese found</p> <p>7 out that any of the preschools signed the agreement,</p> <p>8 that you would have a conversation and look into that</p> <p>9 more. What action would the Archdiocese take?</p> <p>10 MR. DAVIS: Objection. Calls for</p> <p>11 speculation.</p> <p>12 A. Yeah. I mean, I think it would -- it</p> <p>13 would depend. Ultimately, you know, I think this gets</p> <p>14 to the realities of our structure. And so it could --</p> <p>15 yeah, it could result in a number of different</p> <p>16 actions, if you will.</p> <p>17 If this was a regional school that we had</p> <p>18 direct jurisdiction over and we found out that a</p> <p>19 school leader had done that against the directive,</p> <p>20 then we would have a noncompliance issue and that</p> <p>21 would be dealt with according to our policies and</p> <p>22 procedures with potentially some disciplinary action</p> <p>23 involved for the people who were ultimately</p> <p>24 responsible for the non-compliance.</p> <p>25 In the parish setting, again, I think it</p>
<p style="text-align: right;">Page 119</p> <p>1 A. That was St. Michael the Archangel.</p> <p>2 Q. And which ones signed up online?</p> <p>3 A. If I'm recalling correctly, I believe it</p> <p>4 was St. Mary in Littleton.</p> <p>5 Q. And did both of those parishes return the</p> <p>6 agreement with the provider letter or just one?</p> <p>7 A. Return the agreement with the letter we</p> <p>8 gave them?</p> <p>9 Q. Yeah. Did both of them do that?</p> <p>10 A. No. I believe it was only St. Michael</p> <p>11 the Archangel.</p> <p>12 Q. One second. In plaintiff's amended</p> <p>13 complaint, it says that the Archdiocese instructed all</p> <p>14 its Catholic parishes and preschools not to sign the</p> <p>15 UPK program agreement as written.</p> <p>16 What did you mean by instructed?</p> <p>17 A. Yeah. We told our preschool programs not</p> <p>18 to sign the agreement.</p> <p>19 Q. And what would happen if any of them</p> <p>20 signed the agreement?</p> <p>21 MR. DAVIS: Objection. Calls for</p> <p>22 speculation.</p> <p>23 A. Yeah. If we found out, then that would</p> <p>24 lead to a conversation with the pastor to ensure that</p> <p>25 they understood the directive and identify what</p>	<p style="text-align: right;">Page 121</p> <p>1 would come down to a conversation with the pastor to</p> <p>2 find out where the noncompliance came from, and then</p> <p>3 taking action according to where it falls in the chain</p> <p>4 of command there.</p> <p>5 Q. (BY MS. CARRENO) Would one possible</p> <p>6 action for those four regional schools be removal from</p> <p>7 the Archdiocese?</p> <p>8 A. Removal of the school?</p> <p>9 Q. Yes.</p> <p>10 A. No. Yeah. No. That wouldn't be a --</p> <p>11 no. Yeah. I think we would be talking about</p> <p>12 termination of employment of the responsible party,</p> <p>13 ultimately, before -- yeah.</p> <p>14 Q. Has an Archdiocese preschool ever been</p> <p>15 asked to serve a 4-year-old who was asserting a gender</p> <p>16 identity at odds with their biological sex, that</p> <p>17 you're aware of?</p> <p>18 A. Let me restate for my understanding. Has</p> <p>19 an Archdiocese preschool been asked to enroll, you</p> <p>20 said --</p> <p>21 Q. A 4-year-old who is asserting a gender</p> <p>22 identity at odds with their biological sex.</p> <p>23 A. Not that I can recall. No. No. I can't</p> <p>24 recall a situation of a 4-year-old demonstrating</p> <p>25 gender confusion being asked to enroll in the Catholic</p>

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1 were you and Father Dollins referring to?

2 A. Yeah. I think -- specifically the agenda

3 here? You're asking about the word "agenda"?

4 Q. Yeah. Whose agenda?

5 A. Yeah. I mean, I think this can be

6 interpreted in two ways and our thinking was twofold;

7 one, it felt like the State's agenda to want to

8 continue to impose a particular ideology on the nature

9 and identity of the human person that was incongruous

10 with our own, and to do so through these

11 nondiscrimination agreements around gender identity

12 and sexual orientation.

13 And then more broadly, probably an agenda

14 that's prevalent in mainstream culture also that -- on

15 the issues of sexual and gender identity and

16 expression that are incongruous with church teaching

17 as well.

18 Q. And did you think that -- or did the

19 Archdiocese think that that agenda was trying to be

20 imposed specifically on the Catholic Church?

21 A. I don't think I would say that. It

22 seemed that the agenda was attempting -- there was an

23 attempt to impose the agenda overall, and the Catholic

24 Church, as a participant in society and culture,

25 certainly also then experiencing the imposition.

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1 But was it specifically against the

2 Catholic Church or intended to be imposed specifically

3 against the Catholic Church? I don't know that I

4 could say that or would say that.

5 Q. And what was the specific ideology that

6 was being imposed that was inconsistent with the

7 Catholic Church's beliefs?

8 A. Yeah. The notion that gender is fluid;

9 that there are more identities beyond the sexual

10 identity that we each receive at the moment of birth;

11 the notion that sexual expression and orientation is

12 also not only fluid, but has the same legitimacy and

13 kind of the same standing as an -- I'm sorry. Step

14 back -- that sexual -- that same-sex marriages, for

15 example, or same-sex couples would have the same

16 standing as heterosexual couples in marriages.

17 Yeah. Those would be some of the aspects

18 of the ideology I think that we would be referring to

19 here.

20 Q. And so if I understood your prior

21 testimony, the agenda isn't the issue so much as

22 specific conduct; is that correct?

23 A. Yes.

24 Q. The letter also says -- the third -- or

25 the second full paragraph down, there's a sentence

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1 that's bulleted, and it says, "Therefore, due to the

2 significant risk involved and until such time as

3 religious exemptions can be guaranteed by UPK,

4 parishes and their preschool programs are directed to

5 not enter into any agreements with the State for UPK."

6 Do you see that sentence?

7 A. Yes.

8 Q. What does it mean, that the parishes are

9 directed not to enter into any agreements?

10 A. That the pastors, the ultimate

11 responsible, are being told that they're to ensure

12 that their preschool programs are not signing any

13 agreements with the State for UPK.

14 Q. I want to show you another document, an

15 email dated May 11 of 2023. And I believe this is

16 going to be marked as Exhibit 7. Yes, this will be

17 marked as Exhibit 7.

18 Mr. Moo, do you recognize this document?

19 Let me know if you need a minute to review it.

20 A. Yeah. If I can have just one minute.

21 Okay. Yes, I do recognize this.

22 Q. And what is this document?

23 A. I'm sorry. What was your question?

24 Q. What is this document?

25 A. This is an email from Brittany Vessely,

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1 who is the executive director of the Colorado Catholic

2 Conference, to Trey Rogers, just laying out next steps

3 with respect to what emerged at the bishops -- the

4 Colorado Catholic Conference bishops meeting that was

5 had not too long before this email was sent.

6 Q. And you're cc'd on this email?

7 A. I am. Yes.

8 Q. And the second paragraph refers to you by

9 saying, "I can go through Governor Polis' scheduler,

10 but I hoped you may have a more direct line to engage

11 him on. I cc'd Dietrich, Scott and Elias, too."

12 Who is Brittany Vessely?

13 A. Brittany is the executive director of the

14 Colorado Catholic Conference.

15 Q. And you talked a little bit about the

16 Colorado Catholic Conference a few minutes ago, but

17 what is the Archdiocese's relationship with the

18 Colorado Catholic Conference?

19 A. In terms of the corporate relationship,

20 structural relationship, or --

21 Q. Does the Archdiocese have a relationship

22 with the Colorado Catholic Conference?

23 A. Yeah. Yeah. Again, the Catholic

24 Conference is the primary arm that unites and links

25 the three bishops in the state together. So when the

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1 And, Mr. Moo, please review this and let
2 me know if you recognize this, after you've had a
3 chance to review.
4 MS. CARRENO: And, Bonnie, if you can
5 scroll down. I am focusing on the email from Mr. Moo
6 to Barbara and some others.
7 THE DEPONENT: Was there another part at
8 the bottom to this?
9 Okay. Yeah. Thank you. I do recognize
10 this. Yes.
11 Q. (BY MS. CARRENO) And what is this email?
12 A. This was my email inviting pastors and
13 school leaders to the meeting that we hosted here on
14 Friday, May 26th, where we talked about the -- we were
15 going to update them and talk about the possible
16 pathway to continue to pursue access to UPK.
17 Q. And that was the email that we just
18 looked at the PowerPoint slides for?
19 A. Yes. That's correct.
20 Q. Sorry. I think I misspoke. That was the
21 meeting on May 26th that we looked at the PowerPoint
22 slides for?
23 A. Yes. Yes. Correct.
24 Q. In the first paragraph of that email, the
25 last sentence says, "We wanted to ensure we could

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1 provide this form as quickly as possible to assist you
2 in your discernment and decision-making."
3 And when you say "your discernment and
4 decision-making," who are you referring to?
5 A. Here referring to pastors and their
6 school leaders.
7 Q. And the pastors of all 36 preschools or
8 something else?
9 A. No. Yeah. Of the preschool -- of the
10 parishes of the preschools.
11 Q. And so when you said "to assist in your
12 discernment and decision-making," what did you mean by
13 this?
14 A. Yeah. I think it was to, if you will,
15 tease that there was a potential opportunity for them
16 to discern and make a decision on, ultimately.
17 Again, prior to this, the only directive
18 was the one from January from Father Dollins, and we
19 had heard that there was a registration window opening
20 up in early June.
21 And so we wanted to provide this
22 opportunity for pastors and school leaders to come
23 together to hear what potential pathway there might be
24 to continue to pursue access to UPK, without
25 compromising our religious beliefs.

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1 And so that's what we wanted to put in
2 front of them and what was -- what I was -- excuse
3 me -- what I was alluding to, ultimately, by noting to
4 them that we wanted to assist them in their
5 discernment and decision-making.
6 Q. And so you just said, at that point there
7 was still the hope that the Archdiocese would be able
8 to -- the Archdiocese preschools would be able to
9 participate in UPK; is that correct?
10 A. Yes. Yes. That's correct. Yes.
11 Q. And I think we covered this when we were
12 talking about the slides, but it sounds like the only
13 two preschools that decided to participate were the
14 two that you referenced a little bit ago that
15 registered and/or returned the form and the letter?
16 MR. DAVIS: Objection. Misstates
17 testimony.
18 Q. (BY MS. CARRENO) And, Mr. Moo --
19 A. Yes.
20 Q. Was that a yes?
21 A. What was the -- I'm sorry. I didn't get
22 the --
23 THE REPORTER: Yeah. The question cut
24 out, Virginia. I didn't get that either.
25 Q. (BY MS. CARRENO) So the question was --

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1 actually, I'm just going to ask a new question.
2 Did any of the preschools express a
3 desire to participate in the UPK program at that time?
4 A. At the time of the meeting or following
5 the meeting?
6 Q. Yes.
7 A. You know, I don't recall. At that point,
8 it would have been just verbal conversations at that
9 point. I don't recall anyone at that meeting saying,
10 We're in. We want to do this this way. No. I don't
11 recall that.
12 I think it was after that we heard -- we
13 heard from some schools. They had more questions
14 around what this entailed ultimately, but we didn't
15 hear any affirmative declarations at that point, at
16 the time of the meeting.
17 Q. Did any school express any interest to
18 participate in UPK after that meeting?
19 A. Yeah. I think -- I think after the
20 schools -- so, generally speaking -- I'll say this:
21 Our schools have -- we've had a lot -- a number of
22 schools that have been interested in participating in
23 UPK.
24 I don't think that interest ever went
25 away. I think, in large part, our schools, you know,

<p style="text-align: right;">Page 138</p> <p>1 were trusting in our ability to be able to direct them</p> <p>2 in the right way, and that right way being that they</p> <p>3 weren't going to lock themselves into a situation that</p> <p>4 would compel them or place them in a situation of</p> <p>5 noncompliance for carrying out their work and their</p> <p>6 operations according to the church's belief.</p> <p>7 So the ones that we've interacted with, I</p> <p>8 think, have always expressed interest in being part of</p> <p>9 the UPK, even after that January directive that went</p> <p>10 out, you know. There was always -- even though that</p> <p>11 directive said, Do not participate, I think there was</p> <p>12 still, just through conversations I had with schools,</p> <p>13 a desire to get to a point where that wouldn't be the</p> <p>14 case.</p> <p>15 So yes. So I don't know if May 26th is a</p> <p>16 delineating line -- or dividing line, I should say,</p> <p>17 between interest or not. Because it's been there to</p> <p>18 some extent. Maybe it was there and expressed a bit</p> <p>19 more after. I wouldn't be able to tell you, you know,</p> <p>20 in what volume because that I can't recall at this</p> <p>21 point.</p> <p>22 But what I can tell you is there's always</p> <p>23 been a general interest in wanting to participate</p> <p>24 because of the benefit this would bring to families,</p> <p>25 ultimately.</p>	<p style="text-align: right;">Page 140</p> <p>1 So was a hard decision made on May 26th</p> <p>2 or on May -- whenever we met with the bishops board</p> <p>3 or -- no. I think there was always just this</p> <p>4 generalized sense that it could result in this if the</p> <p>5 appeals and the attempts of appeals to the right</p> <p>6 officials to receive relief and get exemptions would</p> <p>7 come. But if not, then, yeah, then we would pursue</p> <p>8 action.</p> <p>9 So I think it was, you know, early after</p> <p>10 this meeting on the 26th, and then waiting to see how</p> <p>11 many schools sent letters that, ultimately, then a</p> <p>12 decision to take additional action came.</p> <p>13 Q. (BY MS. CARRENO) Did some of the schools</p> <p>14 determine that they didn't want to participate in the</p> <p>15 UPK program, regardless of an exemption or rule change</p> <p>16 or any other assurances? They just didn't want to</p> <p>17 participate?</p> <p>18 A. Yeah. Certainly. I can tell you of one</p> <p>19 that, at least at the outset said, you know, they</p> <p>20 weren't necessarily interested. And -- but the great</p> <p>21 majority, I think -- well, to be clear, many others</p> <p>22 didn't say a thing, which, again, is okay.</p> <p>23 We didn't, you know, necessarily ask them</p> <p>24 specifically one way or another to give us a hard,</p> <p>25 hard commitment. But, yeah. We had, I think, at</p>
<p style="text-align: right;">Page 139</p> <p>1 Q. When did the Archdiocese make the</p> <p>2 decision to initiate this lawsuit?</p> <p>3 MR. DAVIS: Objection to the extent it</p> <p>4 calls for attorney-client privileged communication.</p> <p>5 You can answer otherwise.</p> <p>6 A. Yeah. So the reality is, I think our</p> <p>7 deepest desire was always to work with the typical</p> <p>8 channels and communicate with State officials to try</p> <p>9 to appeal to receive rule changes or exemptions that</p> <p>10 would give us the sufficient comfort to participate.</p> <p>11 At the time of the May 26th meeting, that</p> <p>12 was still the case. But I think even then we had come</p> <p>13 in with a sense that if this last effort -- in some</p> <p>14 ways this felt like a last effort -- to have schools</p> <p>15 sign up, register online, not sign the agreement but</p> <p>16 turn in this letter requesting exemptions and</p> <p>17 requesting of the recipients of the letter, State</p> <p>18 officials, to provide in writing a support for that,</p> <p>19 that, you know, our hope was maybe this could be the</p> <p>20 way, the individual communities, right, reaching out</p> <p>21 and appealing.</p> <p>22 But I think that there was the sense,</p> <p>23 though, for the officials here in the Archdiocese that</p> <p>24 if this didn't work out, then we would have to pursue</p> <p>25 and look at all options, including legal action.</p>	<p style="text-align: right;">Page 141</p> <p>1 least to the best of my recollection right now, one</p> <p>2 that did say this wasn't something that they were</p> <p>3 interested in, from what I can recall.</p> <p>4 Q. Which school wasn't interested?</p> <p>5 A. Yeah. Again, you're testing my memory</p> <p>6 here. Yeah. I don't want to be inaccurate here. I</p> <p>7 can tell you there was one. The name is not coming to</p> <p>8 me right now. And without having documents in front</p> <p>9 of me, I'm hard-pressed to tell you what school that</p> <p>10 is.</p> <p>11 Q. And did they say why they weren't</p> <p>12 interested?</p> <p>13 A. No, not particularly. It was just a</p> <p>14 pretty simple like, no, not interested. Yeah. No.</p> <p>15 Q. So if you didn't hear from all</p> <p>16 36 schools, is it fair to say that others may also</p> <p>17 just not have been interested in participating in UPK?</p> <p>18 MR. DAVIS: Objection. Calls for</p> <p>19 speculation.</p> <p>20 A. Yeah. I don't know. Could there have</p> <p>21 been some that say, We're just not interested at all?</p> <p>22 Yes. Were there others that were just waiting to see</p> <p>23 what happens? That's probably, in my view at least,</p> <p>24 where the majority were at. But, yeah. I couldn't</p> <p>25 quantify or even begin to quantify that one for you.</p>

<p style="text-align: right;">Page 162</p> <p>1 its admissions process and procedures. They would</p> <p>2 have vet families and so forth. So, yeah. That</p> <p>3 ultimately is what triggered, I think, our engagement,</p> <p>4 understanding the system, understanding the provisions</p> <p>5 and the agreements as a part of that.</p> <p>6 But the CCAP is distinct. My</p> <p>7 understanding is it's very different. Families are</p> <p>8 applying through their local counties. They are able</p> <p>9 to receive the support. They're going through the</p> <p>10 admissions process at their schools, parallel or</p> <p>11 separate from that. So even just the way it functions</p> <p>12 is all distinct.</p> <p>13 And, again, in practice, we haven't -- to</p> <p>14 the best of my memory, there have been no issues</p> <p>15 raised to me with respect to concerns from local</p> <p>16 schools that would trigger our weighing in or our</p> <p>17 intervention on something like this.</p> <p>18 Q. And paragraph 12 says that the</p> <p>19 provider -- sorry.</p> <p>20 MS. CARRENO: Please scroll up a little</p> <p>21 bit. I need the heading.</p> <p>22 Q. (BY MS. CARRENO) "The provider agrees</p> <p>23 to," and then if we go down to paragraph 12, "The</p> <p>24 provider agrees to accept referrals for childcare</p> <p>25 without discrimination with regard to race, color,</p>	<p style="text-align: right;">Page 164</p> <p>1 nondiscrimination requirement is also prohibiting</p> <p>2 discrimination based on sexual orientation, is your</p> <p>3 understanding?</p> <p>4 A. Yes.</p> <p>5 Q. You mentioned that there's never been a</p> <p>6 hardship with any of the preschools, that you know of,</p> <p>7 agreeing to this nondiscrimination provision.</p> <p>8 What did you mean by there's never been a</p> <p>9 hardship?</p> <p>10 A. Yeah. Again, I think it would -- that,</p> <p>11 to me, would be that CCAP would pull funding or remove</p> <p>12 funding because the school has been found to be</p> <p>13 noncompliant with their procedures or that the school</p> <p>14 has been asked by CCAP to correct the situation due to</p> <p>15 a complaint that's been received by them suggesting</p> <p>16 that the school has been discriminatory.</p> <p>17 Those would be, I guess, examples of what</p> <p>18 a potential hardship would be. I haven't heard of any</p> <p>19 of those. There's probably others. But those are the</p> <p>20 two that come to mind.</p> <p>21 Q. And so as far as you know, none of the</p> <p>22 Archdiocese preschools that participate in CCAP have</p> <p>23 ever had a hardship from having to agree with</p> <p>24 paragraph number 12 in the CCAP fiscal agreement?</p> <p>25 A. As far as I know, they haven't had any</p>
<p style="text-align: right;">Page 163</p> <p>1 national origin, age, sex, religion, marital status,</p> <p>2 sexual orientation, or physical, intellectual, or</p> <p>3 mental health disability."</p> <p>4 So wouldn't you agree that by signing</p> <p>5 this contract, the Archdiocese preschools would have</p> <p>6 to agree to accept these referrals without considering</p> <p>7 sexual orientation or sex?</p> <p>8 MR. DAVIS: Objection. Calls for</p> <p>9 speculation. Calls for legal conclusion.</p> <p>10 A. Yeah. I suppose it would come down to</p> <p>11 what's the -- what would be the CCAP's understanding</p> <p>12 of those terms. But, yeah. Largely here, would I say</p> <p>13 that they're agreeing to not discriminate on the basis</p> <p>14 of sex? Sure. We would say that that's not</p> <p>15 inconsistent with our position, that we ask persons</p> <p>16 not to discriminate on the basis of sex.</p> <p>17 We -- with respect to sexual orientation,</p> <p>18 you know, I think I've noted previously that the topic</p> <p>19 really isn't orientation. The question comes down to</p> <p>20 lifestyle. So, you know, a school could well read</p> <p>21 that in that manner as well.</p> <p>22 But -- so, yes. So are they agreeing to</p> <p>23 these terms by signing? I would agree that they're</p> <p>24 agreeing to those terms.</p> <p>25 Q. (BY MS. CARRENO) And the UPK</p>	<p style="text-align: right;">Page 165</p> <p>1 conflicts on that yet.</p> <p>2 Q. Okay. I want to direct your attention to</p> <p>3 what we're marking as Exhibit Number 11. And this is</p> <p>4 a copy of the Denver Preschool Program contract.</p> <p>5 And, Mr. Moo, are you familiar -- I know</p> <p>6 we've talked about it a little bit earlier today, but</p> <p>7 are you familiar with the Denver Preschool Program or</p> <p>8 DPP?</p> <p>9 A. I am familiar with DPP, yes.</p> <p>10 Q. And do you know whether any Denver</p> <p>11 Archdiocese preschools are participating in DPP?</p> <p>12 A. Yes. I know of a number. Exactly how</p> <p>13 many, I can't recall. But I know there are a number</p> <p>14 of Denver -- or Catholic schools in Denver that</p> <p>15 participate with DPP.</p> <p>16 Q. And Wellspring Catholic Academy of</p> <p>17 St. Bernadette, are you aware that they're</p> <p>18 participating in DPP?</p> <p>19 A. Yes.</p> <p>20 Q. And are you aware that the DPP contract</p> <p>21 also has a nondiscrimination requirement or provision?</p> <p>22 A. Yes.</p> <p>23 MS. CARRENO: And, Bonnie, if you can go</p> <p>24 to page 26, paragraph 3.</p> <p>25 Q. (BY MS. CARRENO) And, Mr. Moo, the DPP</p>

<p style="text-align: right;">Page 194</p> <p>1 Q. And to the best of your knowledge,</p> <p>2 neither of the Plaintiff preschools has reached out to</p> <p>3 you regarding that situation in the last five years?</p> <p>4 A. For their preschool programs, no.</p> <p>5 MS. CARRENO: Okay. And I think now is a</p> <p>6 great time to take a break. Do you want to come back</p> <p>7 at 3:00?</p> <p>8 MR. DAVIS: Yes. Sure.</p> <p>9 THE DEPONENT: Yes.</p> <p>10 THE REPORTER: Off the record.</p> <p>11 (Recess from 2:42 p.m. to 3:01 p.m.)</p> <p>12 THE REPORTER: Back on the record.</p> <p>13 Q. (BY MS. CARRENO) And, Mr. Moo, I just</p> <p>14 want to back up a little. You said a bunch of times,</p> <p>15 when we were talking about the guidance on -- guidance</p> <p>16 for issues concerning the human person and sexual</p> <p>17 identity, that the Archdiocese schools and the</p> <p>18 Archdiocese would make decisions on a case-by-case</p> <p>19 basis.</p> <p>20 Can you tell me a little bit more about</p> <p>21 what you mean by that?</p> <p>22 A. Yeah. We have found that it would,</p> <p>23 actually, in one sense be really difficult and in</p> <p>24 another not, just to be able to have one policy that's</p> <p>25 black and white and addresses the complexities of</p>	<p style="text-align: right;">Page 196</p> <p>1 that further.</p> <p>2 How would the Archdiocese or the</p> <p>3 preschool look into that type of situation further?</p> <p>4 A. Yeah. The process would be -- again, it</p> <p>5 would be a process. And it primarily -- so to be</p> <p>6 clear, the Archdiocese would not be driving this</p> <p>7 process.</p> <p>8 We would expect the school, the local</p> <p>9 school leadership, to really drive it, and that being</p> <p>10 the school principal, principal/director, the pastor,</p> <p>11 all involved and all understanding and ascertaining</p> <p>12 what's presenting.</p> <p>13 What do the parents think about it? What</p> <p>14 are their thoughts? What are their requests? What</p> <p>15 type of support is this child receiving? Is this a</p> <p>16 diagnoses of dysphoria? Have they been receiving</p> <p>17 mental health support?</p> <p>18 So trying to really kind of understand</p> <p>19 all the different aspects of the situation, right?</p> <p>20 But that's not -- that's happening through dialogue.</p> <p>21 That's happening through dialogue, again, at the local</p> <p>22 level with the leadership of the school.</p> <p>23 So our Archdiocesan officials are not the</p> <p>24 ones coming out and engaging in the investigation or,</p> <p>25 you know, talking to the kids or talking to the</p>
<p style="text-align: right;">Page 195</p> <p>1 issues pertaining to, again, gender identity, sexual</p> <p>2 identity.</p> <p>3 So we have a very clear foundation of</p> <p>4 church teaching, is what we believe. The guidance</p> <p>5 itself provides a sense of what that foundation --</p> <p>6 what the implications of that foundation and the</p> <p>7 church's teaching would be.</p> <p>8 And that's the starting point for them</p> <p>9 looking at each situation and determining what is</p> <p>10 there. How can the school work with the situation?</p> <p>11 Where can it not? And then working with pastors and</p> <p>12 school leaders who, ultimately, can discern the right</p> <p>13 course of action.</p> <p>14 Yeah. So I think when we refer to case</p> <p>15 by case, that's precisely it. That when an issue</p> <p>16 arises in this realm, that we want to treat the</p> <p>17 situation not necessarily as a problem to be solved</p> <p>18 but really as a family or child situation to be worked</p> <p>19 with, and then for it to be determined the extent to</p> <p>20 which the school can move forward with the situation.</p> <p>21 Q. And the example that -- one of the</p> <p>22 examples that we talked about was a child that might</p> <p>23 be in distress over usage of the restroom. And you</p> <p>24 had said that, you know, the school would need to --</p> <p>25 potentially the Archdiocese would need to look into</p>	<p style="text-align: right;">Page 197</p> <p>1 families.</p> <p>2 Really, the onus is placed on the local</p> <p>3 school leadership, and our role is to work with school</p> <p>4 leadership, accompany them and discern with them, as</p> <p>5 they ascertain the facts of a particular situation,</p> <p>6 ultimately.</p> <p>7 Q. And you said that the Archdiocese</p> <p>8 wouldn't conduct an investigation. But does that mean</p> <p>9 that the school might conduct an investigation?</p> <p>10 A. Yeah. Sure, they would. And, here</p> <p>11 again, I would say the hope would be that they're</p> <p>12 not -- you know, that this is more a result from the</p> <p>13 fruits of dialogue with the parents of the child.</p> <p>14 So that's what I would qualify here as an</p> <p>15 investigation, is to look into it and get all the</p> <p>16 facts of the situation, but, yeah, through dialogue,</p> <p>17 more than anything else.</p> <p>18 Q. And you had mentioned also that</p> <p>19 Archdiocese preschools typically need to have a</p> <p>20 meeting with the family before they can enroll a</p> <p>21 child; is that correct?</p> <p>22 A. Yeah. It's a typical practice. We don't</p> <p>23 mandate that practice in policy. We ask schools to</p> <p>24 ascertain that families can meet the minimum</p> <p>25 requirements of their program.</p>

1

2 DEPOSITION OF: TRACY SEUL

3 DATE: December 1, 2023.

4 DISCLAIMER: This uncertified rough draft
5 transcript is unedited and uncertified and may contain
6 untranslated words, a note made by the reporter, a
7 misspelled proper name, and/or word combinations that
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24 counsel to the case.

25



1 WHEREUPON, the following proceedings were
2 taken pursuant to the Federal Rules of Civil
3 Procedure.

4 * * * * *

5 THE REPORTER: All counsel participating
6 in this deposition acknowledge that I am not
7 physically present in a deposition room with the
8 deponent and that I will be reporting this deposition
9 and providing an oath remotely.

10 You further agree that, in lieu of an
11 oath administered in person, the witness declares her
12 testimony in this matter is given under penalty of
13 perjury.

14 All parties and counsel consent to this
15 arrangement and waive any objections to this manner of
16 reporting and manner of providing the oath.

17 Counsel, please indicate your agreement
18 by stating your name and your agreement on the record,
19 and then I will swear in the witness.

20 MR. REAVES: Nick Reaves. I consent.

21 MS. RUST: Nicole Rust. I consent.

22 THE REPORTER: Thank you.

23 TRACY SEUL,
24 having verbally declared under penalty of perjury that
25 her testimony in this case will be the truth, the

1 whole truth, and nothing but the truth, testified as
2 follows:

3 (Deponent's reply to oath: I do.)

4 THE REPORTER: Thank you.

5 Ms. Rust.

6 MS. RUST: Thank you, Ms. Kelly.

7 EXAMINATION

8 BY MS. RUST:

9 Q. Good morning, Ms. Seul. My name is Niki
10 Rust, and I'm an attorney with the Attorney General's
11 office. I represent the defendants, Dr. Roy and Dawn
12 Odean, from the Colorado Department of Early
13 Childhood.

14 Is there anyone else in the room with you
15 besides Mr. Reaves?

16 A. No, there's not.

17 Q. Thank you. Ms. Seul, do you have any
18 text messages or chats pulled up on your computer at
19 this time?

20 A. No.

21 Q. Okay. Thank you.

22 I would ask just throughout the day that
23 you keep those closed, as you cannot receive
24 assistance on answering questions.

25 A. Okay.

1 A. In November of 2018. Five years ago.

2 Q. How did you become the director?

3 A. I interviewed to become the director at
4 that time.

5 Q. And at that time, was the job just as
6 director of preschool or also development?

7 A. It was just the director of preschool at
8 the time.

9 Q. When did your role as director of
10 development get added?

11 A. I believe it was 2019. Because of having
12 been a director before, many of the -- many of the
13 responsibilities of a director in my other capacities
14 include things like marketing and fundraising and
15 bringing people to the school, so it was a natural
16 place for me to be able to help the school.

17 Q. Okay. Who do you report to?

18 A. I report to Father James DeCendra.

19 Q. In both your roles?

20 A. Yes.

21 Q. What is your job description for director
22 of preschool?

23 A. It's my responsibility to make sure that
24 we bring in students to make sure that we have enough
25 students to be able to come into kindergarten. That

1 Q. Wow. Okay. I'm going to move on to the
2 first deposition topic, Ms. Seul.

3 Can you please explain St. Mary's
4 Preschool's relationship to the parish St. Mary's?

5 A. The preschool and the school are missions
6 of the church, of the parish.

7 Q. What does it mean to be a mission of a
8 parish?

9 A. It means that we are an entity that's
10 part of the parish that is given the opportunity to be
11 able to educate the students at the parish.

12 MS. RUST: Okay. Bonnie, I'm going to
13 ask for you to pull up the student handbook, not the
14 preschool one, the general student handbook.

15 And this will be marked as Exhibit 20.

16 Q. (BY MS. RUST) Ms. Seul, what will happen
17 is Ms. Bonnie will bring up the exhibit. She'll
18 scroll through it so that you can look at it and let
19 me know if it's familiar to you.

20 She's happy to scroll all the way to the
21 end, even though it's quite a few pages. But just let
22 us know once, you know, you recognize the document.

23 A. I recognize the document.

24 Q. Okay. What is it?

25 A. This is our parent and student handbook

1 for the school.

2 MS. RUST: And then, Bonnie, can you
3 scroll to the -- does this have the school year on it?

4 MS. MILLER: Uh-huh.

5 Q. (BY MS. RUST) Is that this year's school
6 year handbook?

7 A. Yes.

8 Q. Great.

9 MS. RUST: Bonnie, can you go to page 12,
10 please?

11 Q. (BY MS. RUST) Ms. Seul, on this page, it
12 talks about the St. Mary Catholic Virtue parish. The
13 first sentence says what you said, that the school is
14 a ministry of the parish.

15 Can you read that second sentence out
16 loud, please?

17 A. "The school is wholly and completely
18 under the auspices of the parish and our pastor,
19 Father Jose Noriega.

20 Q. Thank you. What does that sentence mean?

21 A. That means that if -- that our
22 financials, our policies, procedures, ultimately even
23 though we build them in the school through the
24 guidance of the Archdiocese, we also go through the
25 guidance of Father Jose Noriega.

1 during the time of the application or the hiring
2 process. But we have a lot of conversations about our
3 faith throughout the day and in our meetings.

4 And so any type of teaching that I could
5 help encourage the truth of our faith, I would help
6 people to understand. If I couldn't, our pastors and
7 our priests would be able to do that.

8 Q. Okay. Ms. Seul, another difference I
9 noticed about your school is that it's associated with
10 the Disciples of the Heart of Jesus and Mary.

11 Can you tell me what that is, please?

12 A. They're an order of priests out of Spain.

13 Q. What is their role within the preschool?

14 A. Well, they run the parish and the school,
15 based on the invitation of the archbishop of the
16 diocese. So they're not specifically Archdiocesan
17 priests, but they do work for the Archdiocese.

18 Q. Okay. How does that influence your
19 preschool?

20 A. They are the guidance for all of our
21 moral and faith decisions that we make in all aspects
22 of our school.

23 Q. Are their moral and faith decisions
24 different in some way than the Archdiocese moral and
25 faith decisions?

1 A. No.

2 Q. Then how come they had to get a specific
3 invitation?

4 A. Because they're a separate order.
5 They're not an Archdiocesan -- they're not from the
6 United States, so they're not from the Archdiocese.

7 Q. Do all of your preschool employees, must
8 they sign an Archdiocesan-approved contract?

9 A. Yes.

10 Q. Is that the only contracts they sign when
11 they are hired?

12 A. Yes.

13 Q. Is there any other paperwork specific to
14 St. Mary's Preschool that an employee must sign?

15 A. There's other documents that they sign
16 because we're a licensed preschool with the State. So
17 they need to know what the licensing regulation rules
18 and regulations are and so we have them sign that.

19 We have them sign that they understand
20 and our parent handbook and our staff handbooks.

21 Q. You brought up the handbooks. Does the
22 preschool have the same handbook at your K through 8
23 school?

24 A. We have a different handbook, but it's
25 superseded by the school's handbook. And we have

1 different regulations for the State that we need to
2 make sure that we have for our handbook. So we have
3 some different things that need to be in the handbook
4 that the school might not.

5 Q. Are you familiar with the K through 8
6 handbook?

7 A. Yes.

8 Q. Okay. Who wrote that handbook?

9 A. Father James and Joyce Russell.

10 Q. Who is Joyce Russell?

11 A. She's the assistant principal.

12 MS. RUST: Okay. Bonnie, can you prepare
13 to pull up the preschool handbook? That will be
14 marked as Exhibit 21.

15 Q. (BY MS. RUST) And, Ms. Seul, again,
16 we're going to do the scroll thing where Bonnie will
17 share her screen, and while she scrolls, if you could
18 tell me if you recognize what the document is, I would
19 appreciate it.

20 A. Sure.

21 I recognize it. That's the preschool
22 parent handbook for this year.

23 Q. Thank you. Who wrote this handbook?

24 A. I did.

25 Q. So does St. Mary's Preschool have a

1 share with you about their private life?

2 MR. REAVES: Objection. Hypothetical.

3 Calls for speculation.

4 Q. (BY MS. RUST) You can answer.

5 A. I don't think so.

6 Q. Would you disenroll a student if the
7 family would not talk to you about their private
8 family matters?

9 MR. REAVES: Objection. Calls for
10 speculation. You can answer.

11 A. No.

12 Q. (BY MS. RUST) Would you disenroll a
13 student if a family was not praying together?

14 MR. REAVES: Same objection.

15 A. This is all on a case-by-case basis, I
16 would assume, but I don't think I would.

17 Q. (BY MS. RUST) Would you disenroll a
18 student if the family was not attending mass together?

19 MR. REAVES: Same objection.

20 A. I don't think that I would.

21 Q. (BY MS. RUST) Would you disenroll a
22 student if you found out in their private family life
23 the child was being raised as a different gender than
24 the one assigned at birth?

25 MR. REAVES: Same objection.

1 A. I've not had that situation. Again, it
2 would be a case-by-case basis.

3 Q. (BY MS. RUST) Would you disenroll a
4 preschool student who in their private family life had
5 same-sex parents?

6 MR. REAVES: Objection.

7 A. It would be a case-by-case basis. I
8 would have to talk with the family.

9 Q. (BY MS. RUST) Would you want more facts?

10 A. I would need to know whether they were --
11 could understand the moral teachings and values of our
12 school and of our faith.

13 Q. Okay. Does your preschool have a
14 bullying or harassment policy?

15 A. As it relates to the State regulations,
16 we wouldn't allow bullying or harassing in any way.

17 MS. RUST: Bonnie, can we close the
18 declaration and pull up the K through 8 handbook. I
19 believe that was previously marked as Exhibit 20. If
20 you can go to page 48 of the PDF. I don't think it's
21 page 48 on the -- thank you.

22 MS. MILLER: Sure.

23 MS. RUST: Okay. Yes. Thank you. Right
24 there is great.

25 Q. (BY MS. RUST) Did you have any input on

1 providing a quality environment for their preschoolers
2 where they become lifelong learners and understand
3 their faith.

4 Q. Do you ever have parents decline
5 enrollment because they don't want their child to
6 continue on in your school until 8th grade?

7 A. There are people who don't continue.

8 Q. Okay. What is the uniform policy for
9 preschoolers?

10 A. It matches pretty well with the K-8
11 school, that we wear red or white polos and white
12 Oxford shirts and blue pants or Dunbar plaid skirts
13 and jumpers. There's also blue skirts that are
14 allowed for girls in the preschool.

15 We don't always have the same emblems
16 that the higher grades do because those uniforms are
17 expensive and our little preschoolers get messy and
18 grow quickly.

19 So they have to have just plain and white
20 and red shirts during the school day. But for mass,
21 they have a mass uniform.

22 Q. Okay. Is the same rule in your
23 K through 8 handbook, that boys and girls can wear
24 pants and shorts, apply to preschool?

25 A. Yes.

1 St. Mary's Preschool tuition rate for this school
2 year?

3 A. This school year, for a full day, is
4 8,450 for the school year. That's an 8:00 a.m. to
5 3:00 p.m. schedule, five days a week.

6 Q. Okay. And would you remind me, what is
7 your most popular or frequent schedule at preschool?
8 I think before you said it was three days a week; is
9 that correct?

10 A. I didn't say before, but I would -- I
11 think that there's most -- it's a close -- close
12 schedule between full days, all day, and probably
13 three days a week, is probably the next most
14 prevalent.

15 Q. How much for that three-day?

16 A. I can't think of it off the top of my
17 head, but I think it's around 4,700 a school year.

18 Q. How much was full day, all day, last
19 school year?

20 A. I think it was around 7,900 for the 8:00
21 to 3:00.

22 Q. And do you remember three-day tuition
23 from last school year?

24 A. I don't remember specifically, but it was
25 probably around 4,200.

1 A. Father James.

2 Q. Did I understand your testimony earlier
3 that since your time as director of the preschool,
4 you've never received Denver Preschool Program monies?

5 A. Right.

6 Q. Okay. Have you received any monies from
7 the Paycheck Protection Program?

8 A. We have not.

9 Q. Have you received the Colorado Shines
10 Quality Improvement Program?

11 A. Yes.

12 Q. When did you receive that?

13 A. Last fall, 2022.

14 Q. How much?

15 A. It was \$4,000.

16 Q. And did you have to sign paperwork for
17 that?

18 A. I don't recall signing any paperwork for
19 that.

20 Q. Okay. And am I recalling your testimony
21 correctly that you have two students who receive CCAP
22 this year?

23 A. One student receives CCAP.

24 Q. One. And how much do you receive from
25 CCAP?

1 A. One person is on CCAP, but to tell you
2 the truth, we haven't received money from them yet, so
3 I don't know how much.

4 Q. Okay. Gotcha. Did you have to sign
5 paperwork for that program?

6 A. Yes.

7 Q. Okay. And did you review that contract?

8 A. I did.

9 Q. Okay. Did anyone else review that
10 contract besides you?

11 A. We can participate in CCAP because of the
12 guidance -- based on the guidance of the Archdiocese.
13 So they have reviewed the contract as well as our --
14 as well as the business manager and Father James at
15 the parish.

16 Q. Okay. So your preschool accepts CCAP
17 referrals, then?

18 A. Yes.

19 Q. Have you ever denied a CCAP referral?

20 A. We haven't had that many so I haven't had
21 to deny anyone, that I can think of.

22 Q. Okay. Have you received any other local
23 grants?

24 A. We received the Stabilization grant last
25 year.

1

2 DEPOSITION OF: AVERY COATS

3 DATE: November 28, 2023

4 DISCLAIMER: This uncertified rough draft
5 transcript is unedited and uncertified and may contain
6 untranslated words, a note made by the reporter, a
7 misspelled proper name, and/or word combinations that
8 do not make sense. All such entries will be corrected
9 on the final certified transcript which we will
10 deliver to you in accordance with your requested
11 delivery arrangements.

12 Due to the need to correct entries prior
13 to certification, this rough draft transcript can be
14 used only for the purposes of annotating counsel's
15 notes and cannot be used or cited in any court
16 proceedings or to distribute to other parties to the
17 case who have not purchased a transcript copy.

18 CONSENT: By opting for this rough draft
19 transcript, you have agreed: (1) To purchase the
20 final transcript at the agreed-upon rate; (2) Not to
21 furnish this rough draft transcript, either in whole
22 or in part, on disk or hard copy, via modem or
23 computer, or by any other means, to any party or
24 counsel to the case.

25



1 WHEREUPON, the following proceedings were
2 taken pursuant to the Federal Rules of Civil
3 Procedure.

4 * * * * *

5 THE REPORTER: All counsel participating
6 in this deposition acknowledge that I am not
7 physically present in a deposition room with the
8 deponent and that I will be reporting this deposition
9 and providing an oath remotely.

10 You further agree that, in lieu of an
11 oath administered in person, the witness declares her
12 testimony in this matter is given under penalty of
13 perjury.

14 All parties and counsel consent to this
15 arrangement and waive any objections to this manner of
16 reporting and manner of providing the oath.

17 Counsel, please indicate your agreement
18 by stating your name and your agreement on the record,
19 and then I will swear in the witness.

20 MR. DAVIS: Joseph Davis, counsel for
21 Plaintiffs. I agree.

22 MS. RUST: Niki Rust, counsel for
23 Defendants. I agree.

24

25

1 AVERY COATS,
2 having verbally declared under penalty of perjury that
3 her testimony in this case will be the truth, the
4 whole truth, and nothing but the truth, testified as
5 follows:

6 (Deponent's reply to oath: I do.)

7 THE REPORTER: Thank you.

8 Ms. Rust.

9 MS. RUST: Thank you, Ms. Kelly.

10 EXAMINATION

11 BY MS. RUST:

12 Q. Ms. Coats, my name is Niki Rust, and I'm
13 an attorney with the attorney general's office, and I
14 represent the defendants, Dr. Roy and Dawn Odean, from
15 the Colorado Department of Early Childhood.

16 I'll be doing the deposition today. It's
17 nice to meet you virtually.

18 Could you please identify who else is in
19 the room with you this morning?

20 A. Joe Davis.

21 Q. Okay. And then, Ms. Coats, I would ask,
22 if you have any chat or other type of communication
23 open, that you please close them? You can't get
24 assistance from anyone while answering the questions.

25 So if today you need to see something or

1 that overarching, so we're all employees of
2 St. Bernadette. Wellspring Catholic Academy is a
3 ministry of St. Bernadette. So we're under, but we --
4 it's -- it's essentially the same entity.

5 Q. Okay. And when did you start working at
6 St. Bernadette?

7 A. July 1, 2022.

8 Q. And how did you become the -- and please
9 correct me if I'm using the wrong terminology -- the
10 principal or director for Wellspring? Principal and
11 head of school, is what you said.

12 A. Principal and head of school.

13 Q. Okay.

14 A. Yeah.

15 Q. How did you get that role?

16 A. Yeah. I applied. I went through an
17 interview process of several different rounds, and I
18 was offered late May in 2022.

19 Q. Okay. And during that interview process
20 with St. Bernadette, were you asked to verify your
21 membership in a Catholic parish?

22 A. I don't recall needing to give any
23 paperwork on my registration. I was asked if I was a
24 Catholic, yes.

25 Q. Okay. Who do you report to in your role

1 at St. Bernadette?

2 A. The pastor, Father Joe McLagan,
3 M-c, capital L-a-g-a-n.

4 Q. Thank you. Okay. And what is your job
5 description at St. Bernadette?

6 A. Oh, goodness. I run the day-to-day
7 operations of the school. I oversee all staff and
8 faculty and supervise them. I am in charge of the
9 safety and security of our students, curriculum, all
10 the focus of our schools; so faith, academics, and
11 then our specific school curriculums.

12 I am in charge of aligning us to our
13 mission and vision and maintaining our future, so
14 financial sustainability as well.

15 Do you want me to go into more depth?

16 Q. Well, that's good for now. Thank you.

17 Did you hold any previous positions as a
18 principal before your role at Wellspring?

19 A. I did not.

20 Q. Any previous employment in early
21 childhood?

22 A. No.

23 Q. Okay. Any previous employment within a
24 Catholic school?

25 A. Yes.

1 ministries. The school is one ministry of the church.

2 So we're on the same campus.

3 I have -- so Father Joe is my boss and he
4 does have the final say over even the overall
5 operations and the day to day of the school. We -- I
6 mean, we share a budget. We're very connected. We're
7 just a ministry of the church.

8 Q. What does it mean to be a ministry of a
9 church?

10 A. Each church couldn't -- give me a moment
11 to explain this. Within the Catholic church, we
12 believe that everybody and different ministries have
13 different charisms. So just like that.

14 Different Catholic churches can have
15 different charisms and ministries in which they carry
16 out our duties to be in line with the church.

17 And so we have a ministry to the
18 homeless, we have a ministry to the deaf community,
19 and we have a ministry to children of the school.

20 Q. Okay. Thank you.

21 A. Among others as well.

22 Q. Okay.

23 MS. RUST: So I think at this point I
24 want to bring up the Wellspring Handbook, Bonnie.

25 Q. (BY MS. RUST) So if you'll give me a

1 think we've been provided the preschool addendum, and
2 I would request that you guys review, and if we have
3 not, to please provide that by the end of the week,
4 too.

5 Okay. Can we go back up to page 3,
6 Bonnie?

7 Q. (BY MS. RUST) And, Ms. Coats, does
8 Wellspring Catholic Academy have a nondiscrimination
9 policy? Can you scroll down a little bit, please?

10 MR. DAVIS: Objection to the form of the
11 question. Lacks foundation.

12 MS. RUST: Let me ask a different
13 question, Ms. Coats.

14 Q. (BY MS. RUST) Ms. Coats, have you
15 reviewed the Wellspring Catholic Academy Student
16 handbook?

17 A. Yes.

18 Q. Did you review the Wellspring Catholic
19 Academy Student Handbook for the 2022, 2023 school
20 year?

21 A. I did.

22 Q. You broke up.

23 A. I did.

24 Q. Okay. Who wrote that handbook?

25 A. I honestly don't know. My predecessor

1 had some part in it, but I really don't know who
2 ultimately wrote it.

3 Q. Okay. And when did you say you started
4 working at Wellspring Academy again?

5 A. In July of 2022.

6 Q. Okay. So did this handbook apply when
7 you started working as principal at Wellspring
8 Catholic Academy?

9 A. Yes, it did.

10 Q. Okay. Did you approve this handbook
11 going out to the families and students at Wellspring
12 Catholic Academy?

13 A. Yes, I did.

14 Q. Okay. Does your Wellspring Catholic
15 Academy Handbook from 2022/2023 have a
16 nondiscrimination policy in it?

17 A. As far as what you are showing me, yes.

18 Q. Okay. So this nondiscrimination policy
19 states that admission is open to all families and
20 students who sincerely seek a Catholic education; is
21 that true?

22 A. Yes.

23 Q. What if that student is transgendered?

24 MR. DAVIS: Objection. Calls for
25 speculation.

1 Q. (BY MS. RUST) You may answer.

2 A. Okay. So, again, it would be case by
3 case and we would ask the family further questions to
4 understand the situation.

5 Q. Okay. Can you explain that process about
6 asking the family further questions?

7 A. I -- so this is a hypothetical. I've
8 never faced this. I'm not going off of a written
9 procedure or protocol or experience. We would want to
10 understand what the family -- again, if the family is
11 in line with the mission and vision of the church as
12 well as, obviously, the Archdiocese of Denver.

13 I would want to just gain more
14 information to ensure that what the family and the
15 student needs, Wellspring Catholic Academy can truly
16 provide.

17 Q. Okay. Let's say the family is fully
18 committed to Catholic teaching. They say, We want our
19 transgender kid baptized because the pope says they
20 can be now.

21 Would you allow that child to enroll in
22 Wellspring Catholic Academy?

23 MR. DAVIS: Objection to the form of the
24 question. Calls for speculation and assumes facts not
25 in evidence. Mischaracterizes evidence.

1 A. Our dress code policy? Can you be more
2 specific?

3 Q. No. I think I would like you to answer
4 the question.

5 Is one of the reasons you're suing CDC
6 because of your dress code policy?

7 A. I answered no.

8 Q. Okay. Ms. Coats, what is your current
9 dress code policy for preschoolers?

10 A. They follow the same requirements as the
11 rest of the school. Do you want me to -- are you
12 asking about, like, the specific colors and what it
13 is? Would you like me to say that?

14 Q. Yes, please.

15 A. Okay. We actually have kind of three
16 different -- it's unique. We have a Monday through
17 Wednesday, Navy blue, light blue, white for a shirt
18 option. It's typically a polo. The pants or skirts
19 or jumper option is for -- is khaki, Navy blue.

20 And then on Thursdays, we attend Mass so
21 we have a Mass uniform, which is just more formal. We
22 ask students to wear Navy blue khaki or khaki bottoms,
23 a button-down white-colored shirt, with a tie or a
24 scarf around the neck. And then we also have a school
25 cardigan or a vest.

1 Fridays are our casual Fridays. We allow
2 denim as a bottom and the top is a Wellspring-branded
3 shirt.

4 MS. RUST: Okay. Bonnie, can we go to
5 page 25 of the handbook again? Thank you. That's
6 actually not the page I want. Give my one second.

7 Q. (BY MS. RUST) Okay. Ms. Coats, we're
8 bringing up page 44 of the 2022/2023 handbook which
9 addresses dress code and uniform.

10 You see the top sentence there, it says,
11 "For preschool and Pre-K students are determined by
12 the Pre-K director and addressed in their specific
13 handbook." Is this part of what was changed in this
14 year's handbook?

15 A. I don't believe so.

16 Q. Okay. So what has the Pre-K director
17 decided is the uniform for preschool and Pre-K
18 students? What you just described?

19 A. Yes, ma'am.

20 Q. Okay. And I think in the preschool
21 addendum it also requires a change of clothing to be
22 sent with preschool and Pre-K students; is that
23 correct?

24 A. Yes.

25 Q. Does that change of clothing also have to

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-2079-JLK

**PLAINTIFFS' SUPPLEMENTAL
ANSWERS TO DEFENDANTS'
FIRST SET OF
INTERROGATORIES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiffs St. Mary Catholic Parish in Littleton, St. Bernadette Catholic Parish in Lakewood, Daniel Sheley, Lisa Sheley, and the Archdiocese of Denver, collectively "Plaintiffs," submit the following Answers to Interrogatories in writing and under oath.

Plaintiffs make this response without conceding the relevance or materiality of any Interrogatory and without prejudice to their right to object to admissibility at trial with respect to the subject matter of any Interrogatory. The word usage and sentence structure are that of the attorneys who drafted these responses and objections, and the language does not purport to be the exact language of the responding party.

Plaintiffs make certain general objections, incorporated by reference into the response made with respect to each Interrogatory as described below, with specific objections made on an individual basis to each Interrogatory below. These objections and responses are based on information currently known and reasonably available to Plaintiffs. These responses are made without prejudice to their right to rely on, at any time, including at trial, subsequently discovered

information or information omitted from this response as a result of mistake, error, oversight, or inadvertence. Plaintiffs will supplement these objections and responses if they learn of additional or different responsive information. No incidental or implied admissions are intended by these responses. The fact that they respond or make objections to any Interrogatory should not be taken as an admission that Plaintiffs accept or admit the existence of any “facts” set forth or assumed by such Interrogatory.

GENERAL OBJECTIONS

1. Plaintiffs object to the Interrogatories to the extent they seek to impose obligations beyond those required by the Federal Rules of Civil Procedure or the Local Rules of the United States District Court for the District of Colorado.

2. Plaintiffs object to the Interrogatories to the extent they seek disclosure of information or communications protected by any evidentiary privilege, including but not limited to the attorney-client privilege and the work product doctrine. Plaintiffs further object to these Interrogatories to the extent they seek information protected by any other applicable privilege or immunity, including those secured by the First Amendment to the U.S. Constitution. The inadvertent or unintentional disclosure by Plaintiffs of material or information covered by any privilege or immunity shall not be deemed a waiver of such protection.

3. Plaintiffs object to the Interrogatories to the extent they seek information prohibited from disclosure by federal statutory and regulatory requirements, state and federal privacy laws, including but not limited to the federal Family Educational Rights and Privacy Act, 20 U.S.C. §§ 1232g *et seq.*, and any other provision of law or court order prohibiting the disclosure of information or rendering information subject to confidentiality, as well as third-party confidentiality agreements.

4. Plaintiffs object to the Interrogatories to the extent they seek information protected from disclosure by the federal Constitution, including but not limited to the First and Fourteenth Amendments, the Colorado constitution, or state and federal civil rights laws, including but not limited to the federal Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*

5. Plaintiffs object to the Interrogatories to the extent they are overbroad, unduly burdensome, duplicative, and/or oppressive.

6. Plaintiffs object to the Interrogatories to the extent they seek information that is publicly available, or that may be obtained from another source that is more convenient, less burdensome, or less expensive, or that is solely in the possession, custody, or control of third parties.

7. Plaintiffs object to the Interrogatories to the extent they require Plaintiffs to answer on behalf of non-parties.

8. Plaintiffs object to the Interrogatories to the extent they purport to require them to provide information not within Plaintiffs' possession, custody, or control or already within any of the Defendants' possession, custody, or control.

9. Plaintiffs object to the Interrogatories to the extent they are, or incorporate terms that are vague, ambiguous, impermissibly imprecise, or otherwise unintelligible.

10. Plaintiffs object to the Interrogatories to the extent they are directed to matters which are not relevant to the subject matter at issue in this action or not proportional to the needs of the case.

11. Plaintiffs object to the Interrogatories to the extent they seek legal conclusions and analysis.

12. Plaintiffs object to the use of responses produced pursuant to these Interrogatories for purposes beyond the scope of the above-captioned matter.

INTERROGATORIES

1. Identify and describe all persons or entities assisting YOU in preparing responses to these Requests, including name, contact information (business or residential address, phone number, and email), and position and duties if associated with the Archdiocese of Denver, St. Mary, St. Bernadette, or any preschool under the control, direction, or supervision of the Archdiocese of Denver as described in paragraphs 99-100s of the First Amended Complaint and identified in Interrogatory 2.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs further object on the grounds that it is overly broad and unduly burdensome and not proportional to the needs of this case. Plaintiffs also object

to this interrogatory because it violates the work product doctrine. “[A]n interrogatory asking a party to identify all persons interviewed would contravene work product.” 8 Wright, Marcus, & Miller, Fed. Prac. & Proc. Civ. § 2028 (3d ed.), Ch. 6, Rule 26, § (C) (2023); *United States v. Travelers Casualty & Surety Company of America*, 2023 WL 5275382 (D.N.M. 2023) (finding that interrogatory asking for names of individuals who assisted with answering interrogatories was both a violation of work product and irrelevant). Plaintiffs incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that Elias Moo, Tracy Seul, and Avery Coats assisted in the preparation of these discovery responses, and that to the extent Defendants seek information relevant to the claims and defenses in this case, the organizational Plaintiffs will designate corporate witnesses to testify regarding the facts in this lawsuit pertaining to them. All these individuals may be contacted through counsel for Plaintiffs.

2. Identify each preschool under the control, direction, or supervision of the Archdiocese of Denver as described in paragraphs 99-100 of the First Amended Complaint. For each school, please identify the relevant manager, director, principal, or other individual that oversees the day-to-day operations of each of the preschools identified, including the relevant manager, director, principal, or individual’s name, address, phone number, email address, and other contact information of the individual.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party’s claim or defense. Plaintiffs incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that the following preschools are under the control, direction, or supervision of the Archdiocese of Denver as described in paragraph 99-100 of the First Amended Complaint:

All Souls Catholic School
Annunciation Catholic School
Assumption Catholic School
Blessed Sacrament Catholic School
Christ the King Roman Catholic School
Frassati Catholic Academy
Good Shepherd Catholic School

Guardian Angels Catholic School
 Blessed Miguel Pro Catholic Academy
 Nativity: Faith & Reason Catholic School
 Notre Dame Catholic School
 Our Lady of Fatima Catholic School
 Our Lady of Loreto Catholic School
 Our Lady of Lourdes Catholic Classical Academy - North Campus
 Our Lady of Lourdes Catholic Classical Academy - South Campus
 Sacred Heart of Jesus Catholic School
 Wellspring Catholic Academy at St. Bernadette
 St. James Catholic School
 St. John the Baptist Catholic School
 St. John the Evangelist Catholic School
 St. Joseph Catholic School
 St. Louis Catholic School
 St. Mary Catholic School, Greeley
 St. Mary Catholic School, Littleton
 St. Pius X Catholic School
 St. Rose of Lima Catholic Academy
 St. Stephen Catholic School
 St. Therese Catholic School
 St. Thomas More Catholic School
 St. Vincent de Paul Catholic School
 Sts. Peter and Paul Catholic School
 Holy Name Preschool
 Most Precious Blood ELC
 St. Joan of Arc ELC
 St. Mary's Preschool
 St. Michael the Archangel

Counsel for Plaintiffs does not represent each Archdiocesan preschool; preschool directors at the above listed schools, however, may be contacted through counsel for Plaintiffs. A list of the contact information for each preschool is provided at Document Bates #: PL_0003800-81.

3. Identify and describe any instance since January 1, 2018 in which YOU have denied an applicant's request, or a request from their family or guardian, to enroll in YOUR preschool because of the applicant's sexuality, sexual identity, sexual orientation, gender identity, religious beliefs or the sexuality, sexual identity, sexual orientation, gender identity, or religious beliefs of the applicant's family members or guardians, including but not limited to the factual circumstances involved, the approximate date of YOUR denial, the age of the applicant, and the name, address,

phone number, email address, and other contact information of the applicant and their family members or guardians.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs object to this interrogatory to the extent it requires Plaintiffs to answer on behalf of non-parties. Plaintiffs incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that they are not aware of any instances since January 1, 2018, in which they have denied an applicant's request, or a request from their family or guardian, to enroll in preschool because of the applicant's sexuality, sexual identity, sexual orientation, gender identity, religious beliefs or the sexuality, sexual identity, sexual orientation, gender identity, or religious beliefs of the applicant's family members or guardians.

4. Identify and describe any instance since January 1, 2018 in which YOU have denied an enrolled preschool student's request, or a request from the student's family or guardian, for an accommodation regarding the student's pronouns, use of bathroom facilities, or school uniform, including but not limited to the factual circumstances involved, the approximate date of the denial, the age of the student, and the name, address, phone number, email address, and other contact information of the student and the student's family members or guardians.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs object to this interrogatory to the extent it requires Plaintiffs to answer on behalf of non-parties. Plaintiffs incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that they are not aware of any instances since January 1, 2018, in which they have denied an enrolled preschool student's request, or a request from the student's family or guardian, for an accommodation regarding the student's pronouns, use of bathroom facilities, or school uniform.

5. Identify and describe any instance since January 1, 2018 in which YOU have denied a prospective employee's employment application or request for employment or have taken an adverse action against an employee because of the prospective employee's or employee's

sexuality, sexual identity, sexual orientation, gender identity, or religious beliefs, including but not limited to the factual circumstances involved, the approximate date of the denial or adverse action, and the name, address, phone number, email address, and other contact information of the prospective employee or employee.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs object to this interrogatory to the extent it requires Plaintiffs to answer on behalf of non-parties. Plaintiffs incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that they are not aware of any instances since January 1, 2018, in which they have taken an adverse action against an employee because of the prospective employee's or employee's sexuality, sexual identity, sexual orientation, gender identity, or religious beliefs.

6. Identify all individuals who played a role in the decision-making process leading to the Archdiocese of Denver's instruction to its Catholic parishes and Catholic preschools to not sign the UPK program agreement. Include each individual's name, address, phone number, email address, and other contact information of the individual, as well as a description of the individual's role in the decision-making process.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. A list of who participated in the Archdiocese's religious decision-making regarding the application of its religious beliefs to an Agreement which both facially and in application violates the Archdiocese's publicly stated religious beliefs has no relevance to the claims or defenses in this case or to the sincerity of Plaintiffs' religious beliefs. Plaintiffs further object on the grounds that this interrogatory is overly broad, unduly burdensome, and not proportional to the needs of this case. Plaintiffs further object on the grounds that the Archdiocese's Statement of Community Beliefs and Guidance for Issues Concerning the Human Person and Sexual Identity speak for themselves. Plaintiffs further object on the grounds that the phrase "played a role in the decision-making process" is not defined and is vague, ambiguous, and without reasonable particularity. Plaintiffs further object on the basis that the U.S. Constitution

independently limits discovery when it would impinge on freedoms guaranteed by the First Amendment. The First Amendment's protection of church autonomy prevents inquiries into internal church governance, doctrine, and religious discipline. Here, a detailed identification and description in a judicial proceeding of all persons involved in the Archdiocese's internal religious deliberations would impinge on the Archdiocese's right to conduct its own internal affairs free from government intrusion. A "detailed review of the evidence" regarding internal church governance and procedures is "impermissible" under the First Amendment. *See Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevich*, 426 U.S. 696, 717-18 (1976). Courts must "refrain from trolling through a person's or institution's religious beliefs." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)). "[I]nternal deliberations" regarding church law and doctrine are at the core of that prohibition and should remain "intact from ordinary discovery." *Whole Woman's Health v. Smith*, 896 F.3d 362, 372, 374 (5th Cir. 2018). Without waiving any objections, Plaintiffs respond that Superintendent Elias Moo and Archbishop Samuel J. Aquila played a role in the decision-making process. Both can be contacted through counsel for Plaintiffs.

7. Identify all federal, state, or local grants, funding, reimbursements, or awards YOU or any preschool identified in Interrogatory 2 received since January 1, 2018 related to the education programs or operations of any of school, preschool or otherwise, under the control or direction of the Archdiocese of Denver as described in paragraphs 99-100 of the First Amended Complaint and as identified in Interrogatory 2 including, but not limited to, St. Mary and St. Bernadette. Federal, state, and local grants, funding, reimbursements, or awards may include those received through programs such as the Denver Preschool Program, the UPK program, the Colorado Child Care Assistance Program, and American Rescue Plan Act assistance.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs object to this interrogatory to the extent it requires Plaintiffs to answer on behalf of non-parties. Plaintiffs object to the extent this question seeks information already within Defendants' possession and control, including information about

grants or other funding received from or through the Department of Early Childhood. Plaintiffs object that this request is unduly burdensome, overbroad, and not proportional to the needs of this case. Plaintiffs incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that, to the best of their knowledge, they have received the following:

EANS/GEANS Stability Grants

Health and Mental Health Grants

Denver Preschool Program

Paycheck Protection Program

Colorado Shines Quality Improvement Program, Quality Incentive Merit Awards

Colorado Child Care Assistance Program for Families

8. For each federal, state, or local grant, funding, reimbursement, or award identified in Interrogatory 7, identify the total amount of money received as a result of that grant, funding, reimbursement, or award.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs object to the extent this question seeks information already within Defendants' possession and control, including information about grants or other funding received from or through the Department of Early Childhood. Plaintiffs object that this request is unduly burdensome, overbroad, and not proportional to the needs of this case. Plaintiffs also incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that, to the best of their knowledge, they have received the following grants award amounts. With regard to the amount of CCCAP and DPP funding Plaintiffs have received, Plaintiffs are unable to determine with reasonable effort the total amount of reimbursements received over the past five years based on information within their possession, custody, or control.

EANS/GEANS Stability Grants: \$80,000

Health and Mental Health Grants: \$9,000

Paycheck Protection Program: \$90,700

Colorado Shines Quality Improvement Program, Quality Incentive Merit Award: \$4,000

9. Identify all individuals associated with YOU or any of the preschools identified in Interrogatory 2 that participated in the Faith-Based Working Group. Include each individual's name, address, phone number, email address, and other contact information of the individual.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs object to this interrogatory to the extent it requires Plaintiffs to answer on behalf of non-parties. Plaintiffs incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that Tracy Seul participated in the Faith-Based Working Group. Seul may be contacted via counsel for Plaintiffs.

10. Define and explain what YOU mean by the term "parishioner" as used in paragraphs 60 and 84 of the Amended Complaint.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs object to this interrogatory to the extent it requires Plaintiffs to answer on behalf of non-parties. Plaintiffs incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that "parishioner" as used in paragraphs 60 and 84 of the Amended Complaint refers to Catholic individuals residing within the geographic boundaries of a parish or who have registered with the parish, typically by submitting basic demographic information to the parish's office.

11. Identify and list for St. Mary and St. Bernadette, how many 4-year-old students have been enrolled at each preschool for each year since August 2013, including a breakdown of how many of those students were siblings of other students enrolled in the school or parishioners of the same parish as the school.

ANSWER: Plaintiffs object to this interrogatory on the grounds that the information sought is not relevant to any party's claim or defense. Plaintiffs further object on the grounds that it is overly broad, not proportional to the needs of the case, and unduly burdensome. Plaintiffs also incorporate here the General Objections. Without waiving any objections, Plaintiffs respond that St. Mary's and St. Bernadette's have recently upgraded their student records software and accordingly have limited information regarding student enrollment prior to this upgrade. Accordingly, Plaintiffs

provide the following information, which represents all the information they were able to compile in response to this Interrogatory after a diligent search of their records:

St. Mary's:

2023: 56 enrolled; 35 with siblings; 38 parishioners.

2022: 60 enrolled; 33 with siblings; 33 parishioners.

2021: 38 enrolled; 24 with siblings; 23 parishioners.

2020: 36 enrolled; 19 with siblings; 16 parishioners.

Wellspring Catholic Academy:

2023: 6 enrolled; 6 with siblings; 1 parishioner.

2022: 11 enrolled; 5 with siblings; 2 parishioners.

2021: 21 enrolled; 13 with siblings; 4 parishioners.

2020: 9 enrolled; 3 with siblings; 5 parishioners.

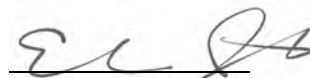
2019: 12 enrolled; 0 with siblings; 7 parishioners.

VERIFICATION

I verify under penalty of perjury that the foregoing answers are true and correct, to the best of my knowledge, information, and belief, based on reasonable inquiry.

Elias Moo, Superintendent of Catholic School at the
Archdiocese of Denver
Name and Position

Date: November 9, 2023


Signature

Dated: November 9, 2023

Respectfully submitted,

/s/ Eric C. Rassbach

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CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing was served on all other parties by email addressed to their counsel of record as follows:

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Dated: November 9, 2023

/s/ Eric C. Rassbach
Eric C. Rassbach

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-2079-JLK

**PLAINTIFFS' SUPPLEMENTAL
RESPONSE TO DEFENDANTS'
MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT (ECF NO. 38)**

Plaintiffs submit this supplemental brief on Defendants' Motion to Dismiss, as ordered by this Court, ECF No. 65 at 7, and in response to Defendants' supplemental filing, ECF No. 72.

This lawsuit arose because Defendants have conditioned participation in Colorado's universal preschool program (UPK) on requirements inconsistent with the religious exercise of Catholic preschools within the Archdiocese of Denver. Two of those preschools, along with the parents of a child who attends one of the preschools, are Plaintiffs here. And they unmistakably have standing to sue—they are being excluded from a government program, and are missing out on a valuable benefit, because of their religious exercise. ECF No. 42 at 15-25. The Court has now asked for additional briefing on whether the remaining Plaintiff—the Archdiocese of Denver—has standing.

The answer is yes. The Archdiocese, no less than its preschools, has the requisite personal stake in this litigation. The Archdiocese's religious mission requires it to provide Catholic education—a mission it discharges through its Catholic schools. The religious exercise preventing the

schools from participating is set out in documents issued by the Archdiocese, which oversees its schools' compliance with Catholic faith and morals. And the Archdiocese is the party that instructed its preschools not to sign the UPK provider agreement, to maintain the integrity of that mission and avoid its schools' being forced to engage in conduct contrary to Catholic teaching.

These facts give rise to standing on multiple bases. First, the Archdiocese has standing in its own right, because it has had to chill its own religious exercise (making Catholic education broadly accessible, including through its preschools' participation in UPK) in response to an objectively justified threat of real consequences imposed by the State (the requirement that its preschools abandon their religious exercise in order to participate). Second, and even more straightforwardly, the Archdiocese has standing as the representative of its preschools, under the well-settled requirements of associational standing. The Court should deny Defendants' motion to dismiss in full.

LEGAL STANDARD

Defendants claim to make a "factual attack" on Plaintiffs' standing. ECF No. 38 at 8. This Court therefore has "wide discretion" to consider "affidavits" and "other documents" to resolve the issue of the Archdiocese's standing. *Rural Water Dist. No. 2 v. City of Glenpool*, 698 F.3d 1270, 1272 n.1 (10th Cir. 2012) (quotation marks omitted).

ARGUMENT

To have standing, "the plaintiff must have suffered an injury in fact ... that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023). These requirements are applied "somewhat more leniently" in "the First Amendment context," given the "unique interests" at stake. *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022). That is, "[t]he nature of First Amendment rights readily supports recognition of injury," and "the importance of these rights supports recognition" even of "rather attenuated injury." *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1160 (10th Cir. 2023) (quoting 13A Wright & Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 2016)).

I. The Archdiocese has standing.

Where, as with the Archdiocese, “the plaintiff is an organization,” Article III’s standing requirements “can be satisfied in two ways”: the organization can show that (1) “it suffered an injury in its own right”; or (2) it has standing “as the representative of its members.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023). Either basis would suffice for the Archdiocese to have standing; both support it here.

A. The Archdiocese has standing in its own right.

First, the Archdiocese has suffered an injury in its own right: the chilling of its sincere religious exercise. The Archdiocese seeks to engage in a specific religious exercise: providing, through the participation of its preschools in UPK Colorado, increased access to a Catholic education. *See* ECF No. 32-1 ¶¶ 3-6; ECF No. 32-3 at 1; ECF No. 32-4 at 1; ECF No. 32-12; Moo Dep. (attached as Exhibit 1) 111:6-13. But because of the participation conditions challenged here, it has had to curtail that exercise—instructing its schools not to sign the UPK provider agreement to avoid agreeing to engage in conduct inconsistent with their shared faith. ECF No. 32-11. Prevailing in this lawsuit would allow the Archdiocese to rescind that instruction—freeing the schools to participate as they wish. That is an injury “fairly traceable” to the State and “likely to be redressed by” a ruling in the Archdiocese’s favor; thus, it satisfies Article III. *Nebraska*, 143 S. Ct. at 2365.

“[S]elf-censorship through the chilling of protected First Amendment activity” is a “constitutionally sufficient injury.” *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1145 n.6 (10th Cir. 2007); *see also, e.g., Rio Grande Found.*, 57 F.4th at 1160 (“chilled speech” as independent First Amendment claim); *cf. Carson v. Makin*, 979 F.3d 21, 30-31 (1st Cir. 2020) (family’s lost opportunity “to find religious [] education for their children that would qualify for public funding” was sufficient injury), *rev’d on merits grounds*, 596 U.S. 767 (2022). Such a “chilling effect” is cognizable “as long as it arises from an objectively justified fear of real consequences.”

Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) (cleaned up) (collecting cases). This is a “relaxed ... test,” *Peck*, 43 F.4th at 1130, and it is plainly met here.

Clarifying the test, the *en banc* Tenth Circuit explained in *Walker* that “plaintiffs in a suit for prospective relief based on a ‘chilling effect’” on First Amendment conduct can satisfy standing by showing that (1) “in the past they have engaged in the type of” conduct affected by the challenged government action; (2) they have a “present desire” to do so again; and (3) they aren’t presently doing so “*because of*” the challenged law. *Walker*, 450 F.3d at 1089. These requirements are met here. The Archdiocese has long operated Catholic schools, and (as Defendants emphasize) it has previously facilitated access to Catholic education by permitting its preschools to participate in other government-benefits programs, like the Colorado Child Care Assistance Program (CCCAP) and Denver Preschool Program (DPP). ECF No. 72 at 12-13 & n.4. It has alleged a desire for its schools to likewise participate in UPK but for the conditions challenged in this lawsuit. ECF No. 32-11 at 1; Ex. 1 at 108:1-9, 17-18. And it has “plausibl[y] claim[ed]” the challenged conditions are “the reason” they aren’t participating in UPK now. *Walker*, 450 F.3d at 1089-92; *see* ECF No. 32-1 ¶ 36; *see also* ECF No. 32-14 ¶ 50; ECF No. 32-16 ¶ 35. When the *Walker* “factors exist, standing exists,” *Rio Grande Found.*, 57 F.4th at 1161—and those factors exist here.

Indeed, here, as in *Walker*, the threat of “real consequences” isn’t “just credible, but certain.” 450 F.3d at 1088, 1090. As Defendants have affirmed, to participate in UPK, providers “must sign” the provider agreement. ECF No. 61-2 (RFA No. 1). And to sign the provider agreement is to forswear religious exercise that the Archdiocese requires its preschools to follow—thus “compromis[ing] the integrity of [the Archdiocese’s] Catholic schools’ mission.” ECF No. 32-11 at 2.

For example, the provider agreement requires providers to agree to provide “an equal opportunity to enroll and receive preschool services regardless of” a student or family’s “sexual orientation” or “gender identity.” ECF No. 32-15 at 2. Yet under the Archdiocese’s Guidance for Issues Concerning the Human Person and Sexual Identity, Catholic preschools must take into account if

a student or family identifies as a same-sex couple or asserts an identity at odds with biological sex, denying enrollment where it would lead to “intractable conflicts,” ECF No. 32-6 at 6-7, 14-15; and must decline requests to affirm an identity at odds with biological sex through sex-inconsistent pronouns, dress codes, or bathrooms, *id.* at 10-12. Given this, the Archdiocese’s “instruct[ion to] its” preschools not to sign the provider agreement is “the precise sort of ‘chilling effect’ and ‘self-censorship’” that standing doctrine recognizes as cognizable. *Aptive Env’t, LLC v. Town of Castle Rock*, 959 F.3d 961, 976-77 (10th Cir. 2020) (cleaned up).

Nor does it matter that it is the preschools, and not the Archdiocese, who would be signing the provider agreement and directly subject to Defendants’ enforcement authority. In *Aptive*, for example, it was only the plaintiff’s “independent contractors and not [the plaintiff] itself” that “face[d] any threat of enforcement” from the challenged law, yet the court held the plaintiff had “suffer[ed] a First Amendment harm.” 959 F.3d at 977. In fact, the “real consequences” sufficient for standing need not include “prosecution” at all. *Walker*, 450 F.3d at 1088, 1096 (“prosecution or other consequences flowing from the statute’s enforcement” (emphasis added)).

Aptive and *Walker* illustrate a broader point this Court has already recognized: “An independent basis for organizational standing exists when a defendant’s conduct makes it difficult or impossible for the organization to fulfill one of its essential purposes or goals.” *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1269 (D. Colo. 2010) (Kane, J.). And this point applies in full to religious organizations. See *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (“When congregants are chilled from participating in worship activities, ... we think a church suffers organizational injury because its ability to carry out its ministries has been impaired.”). The discriminatory UPK requirements render it “difficult” for the Archdiocese to carry out its religious educational mission by imposing what amounts to a tax on Catholic preschools: making nearly 2,000 other preschools free while requiring families whose children attend

Catholic preschools to pay full freight. *Common Cause*, 750 F. Supp. 2d at 1269. The Archdiocese is therefore injured in its own right and has standing for that reason.

In response, Defendants note that Archdiocese-wide preschool numbers haven't (yet) shown a decline. ECF No. 72 at 5. But most Archdiocesan preschools have empty seats, Ex. 1 at 212:16-19, and St. Mary's and St. Bernadette's witnesses both identified families they believe did not pursue enrollment because of their inability to participate in UPK, Coats Dep. (attached as Exhibit 2) 77:3-10; Seul Dep. (attached as Exhibit 3) 108:24-109:9; *see also* Ex. 1 at 111:22-112:2. Moreover, Archdiocesan preschools have lost out on one-time bonuses that providers are eligible to receive after signing up for UPK. *See* ECF No. 32-14 ¶ 43; ECF No. 32-16 ¶ 33. In any event, the core injury is the chilling of religious exercise—which itself is “irreparable injury.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *see also* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017).

B. The Archdiocese has standing as the representative of its preschools.

Even if the Archdiocese hadn't suffered its own injury (and it has), it still would have standing as the representative of its preschools. The doctrine of associational¹ standing permits an organization to sue on behalf of its members whenever (1) “at least one of” the organization's “members would otherwise have standing,” (2) “the interests” the organization “seeks to protect are germane to the organization's purpose,” and (3) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Citizens for Const. Integrity v. United*

¹ The Supreme Court has recently described the doctrine as “representational or organizational” standing. *See Students for Fair Admissions*, 600 U.S. at 199. Older cases tend to refer to it as “associational” standing. *See, e.g., United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996). For simplicity, Plaintiffs will, like Defendants, use “associational.”

States, 57 F.4th 750, 759 (10th Cir. 2023) (cleaned up), *cert. denied*, No. 22-1186, 2023 WL 6377936 (Oct. 2, 2023). All three requirements are met here.

First, Plaintiffs have already demonstrated that “at least one of” the parish preschools has standing—in fact, two, St. Mary’s and St. Bernadette’s, are parties to this suit and have standing. *Id.* These preschools would participate in UPK, but cannot, because the provider agreement conditions participation on the abandonment of their sincere religious exercise. *See* ECF No. 32-14 ¶ 50; ECF No. 32-15; ECF No. 32-16 ¶ 35. As Plaintiffs have explained, ECF No. 42 at 15-25, this is exactly the sort of injury the Supreme Court has repeatedly found justiciable, including in the same cases most relevant to this one on the merits. *See Trinity Lutheran*, 582 U.S. at 463 (denial of a religious school’s “right to participate in a government benefit program without having to disavow its religious character”); *see also, e.g., Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“[t]he ‘injury in fact’ ... is the denial of equal treatment resulting from the imposition of the barrier”). The first requirement of associational standing is therefore satisfied. *See Roe No. 2 v. Ogden*, 253 F.3d 1225, 1230 (10th Cir. 2001) (“Because John Roe # 2 is a member of the Potter Chapter [of the ACLU], the fact that he has standing is sufficient to satisfy the first requirement.”); *Colo. Manufactured Hous. Ass’n v. Bd. of Cnty. Comm’rs of Cnty. of Pueblo*, 946 F. Supp. 1539, 1548 (D. Colo. 1996) (Kane, J.) (similar).

Second, the interests the Archdiocese aims to protect—the preschools’ equal access to a government educational benefit—are germane to the Archdiocese’s purpose. Among its many religious objectives, the Archdiocese seeks to further a “Catholic educational mission” of “building up the Kingdom of God here on earth ... through partnering with parents in the education and formation of their children.” ECF No. 32-3 at 1. That purpose is precisely why the Archdiocese oversees thirty-six preschools. *See* ECF No. 30 ¶ 1; ECF No. 62-1 ¶ 4. And it “can fulfill this purpose only if its members are allowed to engage in the free exercise of their religion.” *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1279-80 (5th Cir. Mar. 1981).

Moreover, the Archdiocese has a particular responsibility for overseeing its schools' compliance with Catholic "faith and morals." ECF No. 32-1 ¶¶ 3, 5; *accord* Ex. 1 at 26:12-20, 51:15-23. And it is the very guidance issued by the Archdiocese on matters of faith and morals—the Guidance for Issues Concerning the Human Person and Sexual Identity, ECF No. 32-6—that sets out the religious exercise at the heart of the dispute in this case. *See supra* p. 4-5. Given all this, it is difficult to imagine a purpose more germane to the interests involved in this litigation.

Third, neither the Archdiocese's claim nor the relief it requests will require individual participation of the parishes or their school ministries. As for the relief, "'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members," *Brown Grp.*, 517 U.S. at 546—as the Archdiocese does here, ECF No. 30 at 35-36. And as for the claim, the "conduct" that the Archdiocese "challenge[s] ... uniformly affect[s]" every Archdiocesan parish and preschool, making their participation unnecessary. *Church of Scientology*, 638 F.2d at 1280. All preschools have to sign the same provider agreement to participate in UPK, ECF No. 61-3 at 2; all are subject to the same Archdiocesan theological guidance with which the provider agreement conflicts, Ex. 1 at 232:11-17, and all received (and have abided by) the same directive from the Archdiocese instructing them not to sign the agreement, ECF No. 32-1 ¶ 32; ECF No. 61-6 at 1-53; *see also Catholic Benefits Ass'n LCA v. Sebelius*, 24 F. Supp. 3d 1094, 1101 (W.D. Okla. 2014) (finding associational standing for Catholic membership association whose members all were bound "by Catholic conviction that contraceptives violate their conscience"). Because the claims at issue here do not "require[] individualized proof," they are "properly resolved in a group context." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977).

Defendants' counterarguments on associational standing are meritless. First, Defendants claim the Archdiocese "has not explained" who its relevant "members" are for purposes of associational standing. ECF No. 72 at 6. But the Archdiocese has been clear from the start: it "speaks for and advances the interests of" its Catholic "preschools." ECF No. 30 (Amended Compl.) ¶¶ 97-101.

Those thirty-six preschools are “a part of and ... operate under the authority of the Archbishop of Denver,” ECF No. 32-2 at 1; *see* ECF No. 32-1 ¶¶ 3-4; they are called “Catholic” only by virtue of the Archdiocese’s authority, *id.* at 2; and (as not just allegation but *evidence* now reflects) “[t]he Archdiocese ... speaks for and advances the interests of all of the Archdiocesan Catholic Schools and their preschool programs,” ECF No. 32-1 ¶ 15; *see also* ECF No. 61-7 at 4-5 (list of preschools). The preschools are therefore the relevant members for purposes of associational standing. *See Students for Fair Admissions*, 600 U.S. at 201 (“Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates.”); *Church of Scientology*, 638 F.2d at 1276-80 (concluding that a church had associational standing to assert the rights of its members given the “close nexus between the[m]”).

Second, with respect to the germane-interests prong, Defendants suggest that Mr. Moo (the Archdiocese’s 30(b)(6) witness) described the Archdiocese’s purposes too “sweeping[ly]” to support standing. *See* ECF No. 72 at 6 (“The Archdiocese of Denver exists so that in Jesus Christ all might be rescued and have abundant life for the glory of the Father.”). But both Supreme Court caselaw and the record in this case demonstrate that education is central to the overarching Catholic mission. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2065 (2020) (“In the Catholic tradition, religious education is ‘intimately bound up with the whole of the Church’s life.’”); ECF No. 32-3 at 1 (articulating the Archdiocese’s “Catholic educational mission”); *see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 696 n.13 (10th Cir. 2009) (accepting declaration’s description of the organization’s purpose of “environmental conservation” as sufficient to confer associational standing). None of this is defeated by the omission of the magic word “education” in a single snippet of deposition testimony. *See also* Ex. 1 at 123:7-11 (elsewhere referring to the “Catholic Church[’s] ... mission to educate and inform children”).

Defendants also offer several individual-participation arguments, each of which fails. Defendants first suggest standing is inappropriate because the “36 preschools are separate and distinct legal entities with individual parishes.” ECF No. 72 at 7. But in associational-standing cases, the organizational plaintiffs are never identical to the members they represent; that’s what makes it “representational” or associational standing. *Students for Fair Admissions*, 600 U.S. at 199.

Next, Defendants claim individual participation is necessary because schools make admissions decisions “at the ‘local level’” and have their own handbooks. ECF No. 72 at 7-8. But these are red herrings. The Archdiocese does not dictate every enrollment decision or preschool dress code, but it does set *limits* on schools’ discretion in these areas: their enrollment decisions must take into account whether a student or family “asserts an identity at odds with biological sex” or with the Church’s views on same-sex relationships, and Archdiocesan preschools may “not permit a student to wear the uniform appropriate for the opposite sex.” ECF No. 32-6 at 5-8, 11, 14-15; *see* Ex. 1 at 63:3-9, 232:11-17. Establishing such outer bounds is not unusual for associations. The New York Stock Exchange, for example, establishes and enforces standards for its members but does not tell its members how or what securities to trade. So too the Archdiocese establishes limits on how its schools may conduct their affairs without dictating every aspect of the school’s operations. The limits the Archdiocese has set are what conflict with the UPK conditions, *see supra* p. 4-5, and those limits are what matter in this case.

Lastly, Defendants say the Archdiocese lacks associational standing because the “schools, and not the Archdiocese, make the decision whether to participate in” UPK. ECF No. 72 at 8. But this misstates the record: the Archdiocese instructed its preschools *not* to participate, in a directive all evidence shows was religiously binding. *See* ECF No. 32-1 ¶ 32; ECF No. 32-14 ¶ 18; ECF No. 32-16 ¶¶ 12, 28; Ex. 1 at 119:12-121:4. To be sure, the Archdiocese will not *require* all its preschools to participate should it prevail in this case, and Mr. Moo testified that he believed one may not. *See* Ex. 1 at 140:18-22 (“at least at the outset”). But that is irrelevant as a matter of law to

associational standing, which exists even when there is only *one* member who possesses standing. *See Citizens for Const. Integrity*, 57 F.4th at 759. And regardless, this lawsuit seeks “prospective relief,” which, “if granted, will inure to the benefit of those members”—and only those members—“of the association actually injured.” *Hunt*, 432 U.S. at 343.

II. Defendants’ additional arguments addressing standing for all Plaintiffs are meritless.

Pivoting from the Archdiocese in particular, Defendants assert at the end of their brief six “facts” they say support their motion to dismiss as to all Plaintiffs. ECF No. 72 at 11-14. Not so.

First, Defendants repeat their claim that neither Plaintiff preschool has identified “any instances, during at least the last five years, when they had to” deny enrollment based on sexual orientation or gender identity or address a gender-transition request. ECF No. 72 at 12. But that the schools may only rarely encounter situations requiring them to discharge their religious obligations doesn’t change that they are barred from UPK unless they forswear those obligations—which they cannot do. ECF No. 42 at 22. In any event, Plaintiffs’ preschools *have* had recent situations in which they have had to apply the policies—for example, St. Bernadette’s had to turn away a same-sex couple earlier this year. Ex. 2 at 93:17-94:22, 122:3-10; *see also* ECF No. 32-16 ¶ 26. And if anything, that these obligations are only rarely triggered supports *Plaintiffs*—by confirming the needlessness of Defendants’ unlawful insistence that Plaintiffs compromise their religious obligations as a condition of participation in UPK. ECF No. 61 at 40; *see Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1875 (2021).

Second, Defendants assert Plaintiffs’ preschools “have agreed to similar nondiscrimination requirements” in CCCAP and DPP. ECF No. 72 at 12-13. But these requirements are not similar, which is why Plaintiffs have agreed to them. *See also Darren Patterson Christian Acad. v. Roy*, No. 1:23-cv-1557, 2023 WL 7270874, at *7 (D. Colo. Oct. 20, 2023) (“minimal relevance”). As for DPP, its agreement includes an express religious exemption: “Nothing in this Agreement shall

be construed to affect the Provider’s right to engage in privately funded, inherently religious activity or affect the independence of Providers, including any rights protected by the Colorado and U.S. Constitutions.” ECF No. 38-6 at 11. And CCCAP’s nondiscrimination provision, unlike UPK’s, appears to reach only the protected characteristics of students (not their families), and covers only “sexual orientation” (not “gender identity”)—which Plaintiffs don’t believe is relevant to four-year-olds at all. ECF No. 38-3 at 2. Moreover, CCCAP, unlike UPK, has no matching process; it directly reimburses families for preschool expenses *after* enrollment—so Plaintiffs have understood it to permit them to follow their ordinary enrollment process. Ex. 1 at 161:17-162:12.²

Third, Defendants resist standing because the Plaintiff preschools’ decision whether to decline to enroll any family for reasons relating to sexual orientation or gender identity could require “‘case-by-case’ analysis.” ECF No. 72 at 13. But this elides the key point: under the Archdiocese’s sexuality guidance, a preschool must always *consider* a student or family’s identification as transgender or in a same-sex relationship, “find[ing] out more information” to determine whether enrollment is possible, Ex. 1 at 231:19-232:2, or would “lead to intractable conflicts,” ECF No. 32-6 at 15. That is what is forbidden by the UPK conditions challenged here, which require preschools to provide “an *equal opportunity* to enroll ... regardless of” a student or family’s “sexual orientation” or “gender identity.” Colo. Rev. Stat. § 26.5-4-205(2)(b) (emphasis added); *compare* Ex. 1 at 232:6-10 (“Q. So the Archdiocesan preschools, they do not provide an equal opportunity to enroll regardless of sexual orientation or gender identity; is that right? A. On that basis, that’s correct.”). In any event, the sexuality guidance sets out clear principles that all witnesses have agreed are binding and limit the preschools’ exercise of discretion. *E.g.*, ECF No. 32-6 at 10

² That participation in CCCAP has “never interfered with [Plaintiffs’] sincerely held religious beliefs,” ECF No. 72 at 13, is unsurprising in any event, since the Plaintiff preschools combined are currently serving only one CCCAP family, *id.* at 13 n.4, and “sexual orientation” wasn’t even added to the CCCAP agreement until 2022, *see* ECF No. 38-2 ¶ 11; *see also* Ex. 4 at 3 (St. Mary’s CCCAP agreement, applicable from 2020-2023, which does not mention “sexual orientation”).

(“school must refuse” to use preferred pronouns), *id.* at 12 (“Students must use” bathrooms in accord with biological sex); *see* Ex. 2 at 122:11-24; Ex. 3 at 71:23-72:13. And the employment aspects of Plaintiffs’ claims involve no case-by-case decisions at all—by Archdiocesan requirement, all employees at all preschools must agree to “refrain from public promotion or approval of any conduct or lifestyle ... in contradiction with Catholic doctrine or morals.” ECF No. 32-3 at 6; *see* ECF No. 32-1 ¶ 8.

Fourth, Defendants note that Plaintiffs the Sheleys receive certain tuition discounts. ECF No. 72 at 13 & n.6. But that is irrelevant to the Sheleys’ standing. If St. Mary’s were permitted to participate in UPK, there is no question that the Sheleys would be eligible to receive 15 hours of preschool that is not only discounted but *free*. That is a “classic pocketbook injury.” *Tyler v. Hennepin County*, 598 U.S. 631, 636 (2023).

Fifth, Defendants say the “Archdiocese admitted” that changes could be made to the UPK program that would resolve Plaintiffs’ objections, citing the fact that the Archdiocese’s witness pointed to DPP’s broad religious exemption (quoted above) as making the Archdiocese comfortable with its schools’ participation. ECF No. 72 at 13-14 & n.7. But *of course* the Archdiocese “admitted” that adoption of a religious exemption in UPK would allow it to participate—that is precisely what this litigation is about. Defendants denied the Archdiocese’s request for a religious exemption in February, ECF No. 32-13, and they continue to deny it now, necessitating this lawsuit.

Sixth, Defendants muse that the Department may someday adopt a new definition of “congregation” that would allow Plaintiffs to prioritize parishioners from other Catholic parishes. ECF No. 72 at 14. But this future rulemaking is irrelevant for standing, which is measured from “when the suit was filed.” *Rio Grande Found.*, 57 F.4th at 1162. And in any event, this hypothetical rule change would only address Plaintiffs’ claims relating to “religious” discrimination, not “sexual

orientation” or “gender identity.”³ On *those* points, Defendants have been clear: no tweak of the “congregation” exemption will allow Plaintiffs’ preschools to take into account sexual orientation or gender identity. *See* ECF No. 61-4 (Department of Early Childhood 30(b)(6) Dep.) at 108:7-10 (“Q. Okay. So no matter what, [‘congregation’] can’t be defined in a way that would run into the law about equal opportunity regardless of sexual orientation? A. That’s my understanding.”).

CONCLUSION

The Court should hold the Archdiocese has standing and deny the motion to dismiss in full.

Dated: December 15, 2023

Respectfully submitted,

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³ Because of their religious obligation to provide an education to Catholic families, Archdiocesan preschools prioritize Catholic families for admission. ECF No. 32-1 ¶ 28. But the Equal Opportunity Mandate requires providers to provide equal access regardless of “religious affiliation,” which would make the preschools’ practice unlawful. Colo. Rev. Stat. § 26.5-4-205(2)(b).

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on all parties via CM/ECF and as required by the relevant federal and local rules.

Dated: December 15, 2023

/s/ Eric C. Rassbach
Eric C. Rassbach

INDEX OF EXHIBITS

Ex. 1	Excerpts of Elias Moo Deposition, dated November 27, 2023
Ex. 2	Excerpts of Avery Coats Deposition, dated November 28, 2023
Ex. 3	Excerpts of Tracy Seul Deposition, dated December 1, 2023
Ex. 4	2020 CCCAP Licensed Provider Fiscal Agreement

Exhibit 1

Excerpts of Elias Moo Deposition

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 1:23-cv-2079-JLK

RULE 30(b)(6) DEPOSITION OF:
Superintendent of Catholic Schools
at Denver Archdiocese
ELIAS MOO
November 27, 2023
Via RemoteDepo

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

Plaintiffs,

v.

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

Defendants.

PURSUANT TO NOTICE, the Rule 30(b)(6)
deposition of Superintendent of Catholic Schools at
Denver Archdiocese, ELIAS MOO, was taken on behalf of
the Defendants in Denver County, Colorado, by remote
means, on November 27, 2023, at 8:09 a.m., before
Lisa B. Kelly, Registered Professional Reporter,
Certified Realtime Reporter, and Notary Public within
Colorado, appearing remotely from Larimer County,
Colorado.

1 do they have their own?

2 A. Yes. So those preschool programs are
3 part of -- the K to 8 or a Preschool-to-8 program all
4 have the same policies, operate by the same policies
5 and systems.

6 Q. What would you say that your role is
7 within the Archdiocese, beyond what you've already
8 described?

9 MR. DAVIS: Objection. Asked and
10 answered.

11 But you can answer, if you can.

12 A. I suppose the other thing I would add is
13 one of my primary areas of responsibility, on behalf
14 of the Archbishop of Denver, is to supervise and
15 direct, especially when it pertains to the matters of
16 faith and morals in doctrine.

17 And so my interaction with schools also
18 centers around the way that our schools carry out the
19 Catholic mission and charter for schools, for our
20 schools here.

21 Q. (BY MS. CARRENO) Have you had any other
22 jobs within the Archdiocese, other than superintendent
23 of Catholic Schools?

24 A. Have I had any other jobs? Is that what
25 you asked?

1 A. No worries. I get it all the time.

2 Q. We talked a lot about the Archdiocese
3 generally, but I believe that you said your position
4 is within the Office of Catholic Schools; is that
5 correct?

6 A. Yes. That's correct.

7 Q. What is the Office of Catholic Schools?

8 A. Yeah. The Office of Catholic Schools is
9 the department that, on behalf of the archbishop,
10 oversees the -- and supervises the Catholic schools of
11 the Archdiocese of Denver.

12 Q. What does that mean, that the Office
13 oversees and supervises the Catholic schools within
14 the Archdiocese?

15 A. Consistent with our policy, again, that
16 falls, kind of, in a few buckets. One, it's a policy
17 guidance, policy determination for schools, the
18 evaluation of school principals, alongside school
19 pastors, curriculum, and also and especially most
20 importantly, I would say matters of faith and morals.

21 So ensuring that schools are adhering to
22 the church's teaching in all aspects of the school
23 program.

24 Q. How does that oversight and that
25 supervision work? Are you physically present at the

1 send a copy of their handbooks to us for
2 recordkeeping.

3 So we don't go to the extent of telling
4 them, you know, this is missing, that's missing, or
5 inspecting every handbook in a detailed fashion. But,
6 again, per policy, the expectation is that the
7 Archdiocese of Denver Schools Administrator's Manual
8 would be adhered by and incorporated into their local
9 handbooks and policy manuals.

10 Q. And I think you said before that for the
11 preschools that are associated with kindergarten and
12 higher education, they're not stand-alone preschools,
13 they would typically have one handbook that would
14 apply to both the preschool and the rest of the
15 school?

16 A. Yes, that's correct. There might be some
17 nuance that they build in locally that are
18 preschool-specific procedures. Generally that happens
19 because preschools are more regulated than K-to-8
20 programs, so adult-to-student ratio, things like that,
21 for example. But, yes, largely speaking, they're
22 incorporated.

23 Q. And when you reference the
24 Administrator's Manual, is that the same as the
25 1000-Series?

1 A. Yeah. There was still a hope that our
2 preschool programs would be willing to participate in
3 UPK for the sake of families that were looking for a
4 Catholic preschool education.

5 And so the intent of the work that we
6 have done and continue to do, on behalf of our
7 preschool programs, is to identify ways for securing
8 access to -- or participating in UPK without
9 compromising on our religious beliefs.

10 Q. And this was after the coalition's
11 response for religious exemption was denied; is that
12 correct?

13 A. Yes. This was after that.

14 Q. And the Archdiocese believed that there
15 might still be, I think you said a hope that the
16 Archdiocese could still participate; is that correct?

17 A. Yep. The hope was and continues to be
18 participation for those that want it, yes.

19 Q. And then if I could direct your attention
20 to page 7. And in the second bullet of the Current
21 Reality references, "The Denver Preschool Program:
22 Nine schools currently participating in DPP receiving
23 a total of \$587,699. Support ranging from 14K to
24 126K."

25 Why was the Denver Preschool Program

1 continue to have is to what extent our low- to
2 middle-income families are going to be able to afford
3 preschool education in a Catholic school, if they so
4 wish to provide their children a Catholic preschool
5 education.

6 We know that these are usually the ones
7 that are, with many sacrifices, sending their children
8 to our Catholic schools. And our hope was that by
9 participating in UPK, our Catholic preschools would be
10 able to serve many more low- to middle-income families
11 who, you know, anecdotally, schools have heard, are
12 not able to send their children to Catholic preschool
13 because of the cost impediment there.

14 Q. And you said "anecdotally" for that.
15 What do you mean by that?

16 A. Yeah. Reports from preschool leaders,
17 school leaders, yeah. Just what they have -- what
18 they have shared with us with respect to some of the
19 challenges that they're experiencing.

20 Q. Does the Archdiocese have anything to
21 support those concerns, other than anecdotes?

22 A. No. Nothing in terms of, you know -- we
23 have one letter that we received from a family, in
24 light of the suit that we filed, noting that they were
25 grateful for what we were doing because they're not

1 able to afford a Catholic preschool education and
2 would like to be able to send their child.

3 But have we surveyed or collected data to
4 a larger extent than a one-off comment sent to us?
5 No.

6 MS. CARRENO: And, Mr. Davis, do you know
7 if that letter was exchanged in discovery, that email?

8 MR. DAVIS: I'm not sure. We'll
9 coordinate with that at our next break and get back to
10 you.

11 MS. CARRENO: Great. Thank you.

12 Q. (BY MS. CARRENO) On the next page, or
13 page 8 of that document, the first bullet says that
14 "The Archdiocese does not desire schools to become
15 overly dependent on state/federal money, but also
16 holds with the church that," and then there's a quote.

17 What did you mean by the Archdiocese does
18 not desire schools to become overly dependent on state
19 or federal money?

20 A. You know, one of the things that we are
21 constantly asking our school leaders to do is to
22 ensure that they have a really well-balanced income
23 portfolio.

24 Unfortunately, we don't receive public
25 funding, in the way that public schools do, to run our

1 A. That was St. Michael the Archangel.

2 Q. And which ones signed up online?

3 A. If I'm recalling correctly, I believe it
4 was St. Mary in Littleton.

5 Q. And did both of those parishes return the
6 agreement with the provider letter or just one?

7 A. Return the agreement with the letter we
8 gave them?

9 Q. Yeah. Did both of them do that?

10 A. No. I believe it was only St. Michael
11 the Archangel.

12 Q. One second. In plaintiff's amended
13 complaint, it says that the Archdiocese instructed all
14 its Catholic parishes and preschools not to sign the
15 UPK program agreement as written.

16 What did you mean by instructed?

17 A. Yeah. We told our preschool programs not
18 to sign the agreement.

19 Q. And what would happen if any of them
20 signed the agreement?

21 MR. DAVIS: Objection. Calls for
22 speculation.

23 A. Yeah. If we found out, then that would
24 lead to a conversation with the pastor to ensure that
25 they understood the directive and identify what

1 happened.

2 Q. (BY MS. CARRENO) And who made this
3 direction or instruction?

4 A. Well, this one on May 26th came from me.

5 Q. Let me back up for a second.

6 So you said that if the Archdiocese found
7 out that any of the preschools signed the agreement,
8 that you would have a conversation and look into that
9 more. What action would the Archdiocese take?

10 MR. DAVIS: Objection. Calls for
11 speculation.

12 A. Yeah. I mean, I think it would -- it
13 would depend. Ultimately, you know, I think this gets
14 to the realities of our structure. And so it could --
15 yeah, it could result in a number of different
16 actions, if you will.

17 If this was a regional school that we had
18 direct jurisdiction over and we found out that a
19 school leader had done that against the directive,
20 then we would have a noncompliance issue and that
21 would be dealt with according to our policies and
22 procedures with potentially some disciplinary action
23 involved for the people who were ultimately
24 responsible for the non-compliance.

25 In the parish setting, again, I think it

1 would come down to a conversation with the pastor to
2 find out where the noncompliance came from, and then
3 taking action according to where it falls in the chain
4 of command there.

5 Q. (BY MS. CARRENO) Would one possible
6 action for those four regional schools be removal from
7 the Archdiocese?

8 A. Removal of the school?

9 Q. Yes.

10 A. No. Yeah. No. That wouldn't be a --
11 no. Yeah. I think we would be talking about
12 termination of employment of the responsible party,
13 ultimately, before -- yeah.

14 Q. Has an Archdiocese preschool ever been
15 asked to serve a 4-year-old who was asserting a gender
16 identity at odds with their biological sex, that
17 you're aware of?

18 A. Let me restate for my understanding. Has
19 an Archdiocese preschool been asked to enroll, you
20 said --

21 Q. A 4-year-old who is asserting a gender
22 identity at odds with their biological sex.

23 A. Not that I can recall. No. No. I can't
24 recall a situation of a 4-year-old demonstrating
25 gender confusion being asked to enroll in the Catholic

1 participating in an Archdiocese preschool?

2 A. Gotcha. Okay. Well, again, I think it
3 would come down to not a question of perhaps identity
4 or orientation and more lifestyle.

5 So what is the lifestyle that a parent is
6 carrying out? The lifestyle is very much important
7 because, again, as I noted earlier, the Catholic
8 Church can, from our perspective, only accomplish its
9 mission to educate and to inform children if it's
10 doing so in partnership, right partnership with
11 parents, with a family.

12 Foundational to that partnership is that
13 there's a well-founded hope that the family will
14 support the aims of a Catholic education and a
15 Catholic formation.

16 And if there is something in the family's
17 lifestyle or situation that becomes an impediment to
18 or creates an inconsistency with the church's teaching
19 or with providing that well-founded hope of supporting
20 the aims and the teachings of the church, then we have
21 a potential situation where the family can't properly
22 fulfill its end of the partnership with the school, in
23 which case, then, again, we might have irreconcilable
24 differences that would then lead a school to discern
25 that a family situation may not be the right fit for

1 So was a hard decision made on May 26th
2 or on May -- whenever we met with the bishops board
3 or -- no. I think there was always just this
4 generalized sense that it could result in this if the
5 appeals and the attempts of appeals to the right
6 officials to receive relief and get exemptions would
7 come. But if not, then, yeah, then we would pursue
8 action.

9 So I think it was, you know, early after
10 this meeting on the 26th, and then waiting to see how
11 many schools sent letters that, ultimately, then a
12 decision to take additional action came.

13 Q. (BY MS. CARRENO) Did some of the schools
14 determine that they didn't want to participate in the
15 UPK program, regardless of an exemption or rule change
16 or any other assurances? They just didn't want to
17 participate?

18 A. Yeah. Certainly. I can tell you of one
19 that, at least at the outset said, you know, they
20 weren't necessarily interested. And -- but the great
21 majority, I think -- well, to be clear, many others
22 didn't say a thing, which, again, is okay.

23 We didn't, you know, necessarily ask them
24 specifically one way or another to give us a hard,
25 hard commitment. But, yeah. We had, I think, at

1 our level, we do weigh in and look to see the extent
2 to which it's something that a school can, in good
3 confidence, agree to and abide by.

4 You know, up to this point, my
5 understanding is there have been no concerns, at least
6 in practice, that have surfaced or challenges or
7 difficulties that have surfaced that would have
8 required us to weigh in at this point.

9 And this is, I think -- work with CCAP
10 goes back some time, even before my time here, and I
11 don't think there's -- I don't recall even this being
12 a concern prior to my time.

13 So -- but why UPK? Well, you know,
14 frankly, we were asked to weigh in very early. And
15 part of that was with the way that this -- that UPK
16 was set up.

17 And really, I think what, in some ways,
18 triggered our weighing in was how the system itself
19 was set up, and the fact that families had to, again,
20 register through UPK. They were assigned to schools.
21 Schools were not able to reject applications based on,
22 you know, religious beliefs, even in the way that the
23 system itself was set up.

24 And so what happened there was an
25 imposition, without the school being able to follow

1 its admissions process and procedures. They would
2 have vet families and so forth. So, yeah. That
3 ultimately is what triggered, I think, our engagement,
4 understanding the system, understanding the provisions
5 and the agreements as a part of that.

6 But the CCAP is distinct. My
7 understanding is it's very different. Families are
8 applying through their local counties. They are able
9 to receive the support. They're going through the
10 admissions process at their schools, parallel or
11 separate from that. So even just the way it functions
12 is all distinct.

13 And, again, in practice, we haven't -- to
14 the best of my memory, there have been no issues
15 raised to me with respect to concerns from local
16 schools that would trigger our weighing in or our
17 intervention on something like this.

18 Q. And paragraph 12 says that the
19 provider -- sorry.

20 MS. CARRENO: Please scroll up a little
21 bit. I need the heading.

22 Q. (BY MS. CARRENO) "The provider agrees
23 to," and then if we go down to paragraph 12, "The
24 provider agrees to accept referrals for childcare
25 without discrimination with regard to race, color,

1 the school or affiliation with another parish, let's
2 say. And then there might be nonaffiliated people who
3 say they're Catholic but aren't necessarily involved
4 or active in the parish. And then there's others who
5 are not Catholic that, you know, again, might fall at
6 a lower level of priority, ultimately.

7 So, additionally, too, you know, if they
8 have siblings at the school, that could be another
9 layer of the criteria that bumps them up on the wait
10 list. So just for the purpose of filtering the
11 families on the wait list and being able to give
12 priority if spots were to open up.

13 Q. How often -- you said if schools are
14 fortunate enough to have a wait list. How often do
15 Archdiocese schools have a wait list?

16 A. Yeah. Not very often, unfortunately. It
17 would be a great problem to have. But by and large, I
18 think we see we have a lot of empty seats still in our
19 schools, particularly our preschool programs.

20 Q. So does that mean that the Archdiocese
21 does not prioritize enrolling Catholic families active
22 at parishes within the Archdiocese over non-Catholic
23 families when there's not a wait list?

24 A. Yeah. That's correct. I mean, I think
25 all families are given an equal shot, if you will, at

1 you an as-sent version, which may be the only one --
2 the one that we've seen, but we'll look for that.
3 Yeah. Thanks.

4 MS. CARRENO: And then also, if there's
5 a -- for the May 26th meeting, there was an indication
6 that the parties were asked to register for that
7 meeting. So any registration lists of that meeting,
8 we would ask that that be provided as well.

9 MR. DAVIS: We can look for that.

10 MS. CARRENO: I think that covered
11 everything. So other than that, I think we can just
12 go off of the record and talk housekeeping for
13 tomorrow.

14 MR. DAVIS: Actually, I do have a couple
15 questions for Mr. Moo on redirect.

16 MS. CARRENO: Sure.

17 EXAMINATION

18 BY MR. DAVIS:

19 Q. All right. Mr. Moo, just a few questions
20 for you. First, if a student or a family identifies
21 as LGBTQ, do they get admitted to an Archdiocesan
22 preschool on the same terms as everybody else, or is
23 the school supposed to find out more information about
24 their situation and its congruence with church
25 teaching?

1 A. The school is supposed to find out more
2 information.

3 Q. And sometimes, after considering it
4 further, the school might decline enrollment; right?

5 A. Correct.

6 Q. So the Archdiocesan preschools, they do
7 not provide an equal opportunity to enroll regardless
8 of sexual orientation or gender identity; is that
9 right?

10 A. On that basis, that's correct.

11 Q. Okay. And in making these enrollment
12 decisions, they're expected to follow the Archdiocese,
13 as we discussed earlier, in the Guidance for Issues
14 Concerning the Human Person and Sexual Identity
15 document?

16 MS. CARRENO: Objection to form.

17 A. Correct.

18 Q. (BY MR. DAVIS) Okay. Mr. Moo, you
19 testified earlier about the CCAP program. Do you
20 recall that testimony?

21 A. Yes.

22 Q. Okay. And some Archdiocesan schools
23 participate?

24 A. Yes.

25 Q. Okay. Does CCAP have a matching process

Exhibit 2

Excerpts of Avery Coats Deposition

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 1:23-cv-2079-JLK

RULE 30(b) (6) DEPOSITION OF:
St. Bernadette Catholic Parish in Lakewood
AVERY COATS
November 28, 2023
Via RemoteDepo

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

Plaintiffs,

v.

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

Defendants,

PURSUANT TO NOTICE, the Rule 30(b) (6)
deposition of St. Bernadette Catholic Parish in
Lakewood, AVERY COATS, was taken on behalf of the
Defendants in Denver County, Colorado, by remote
means, on November 28, 2023, at 8:02 a.m., before
Lisa B. Kelly, Registered Professional Reporter,
Certified Realtime Reporter, and Notary Public within
Colorado, appearing remotely from Larimer County,
Colorado.

1 Q. (BY MS. RUST) Yes.

2 A. I don't know if there's a correlation.

3 Q. Okay. You stated in your decoration that
4 you believe not participating in the UPK program led
5 to a decline in enrollment.

6 Why do you believe that?

7 A. I know we've had a couple families ask if
8 we were participating, and then upon hearing that our
9 answer was "not at this time," didn't hear from some
10 families after that.

11 Q. And is this your personal opinion or the
12 opinion of St. Bernadette?

13 MR. DAVIS: Objection to the form of the
14 question.

15 A. I'm here representing St. Bernadette
16 Catholic Church.

17 Q. (BY MS. RUST) Okay. When you spoke to
18 those families, did they tell you they were
19 specifically looking for a Catholic preschool?

20 A. It's a very nuanced statement in a
21 conversation. I assume people, when they are touring
22 our school, are looking for a Catholic education.

23 Q. Were these families who had children
24 previously enrolled at Wellspring?

25 A. No. I don't believe so.

1 MS. RUST: Okay. Perfect. Let's take
2 another ten-minute break.

3 THE REPORTER: Off the record.

4 (Recess from 10:48 a.m. to 11:00 a.m.)

5 THE REPORTER: Back on the record.

6 MS. RUST: Ms. Kelly, could you actually
7 remind my where I left off, the last question I asked?

8 (The last question and answer were read
9 back.)

10 MS. RUST: Thank you, Ms. Kelly.

11 THE REPORTER: You're welcome.

12 Q. (BY MS. RUST) Okay. Ms. Coats, has
13 there been any instance where Wellspring refused
14 enrollment of a child or disenrolled a child based on
15 their religion?

16 A. No. Not to my knowledge.

17 Q. Okay. Has there been any instance where
18 Wellspring refused enrollment of a child or
19 disenrolled a child based on the marital status of
20 their parents?

21 A. Yes.

22 MR. DAVIS: Objection. Just objection to
23 form.

24 But you can answer.

25 Q. (BY MS. RUST) Okay. Would you please

1 describe that instance?

2 A. Yes. To be clear, the family never
3 filled out an application. We did a tour, we met, and
4 ultimately decided, with the guidance of the
5 Archdiocese and, obviously, Father Joe, our pastor,
6 that if the student attended Wellspring, it would
7 cause further conflict in their home and in their
8 family. And we didn't believe -- we didn't want that
9 to happen, so we didn't pursue registration.

10 Q. Okay. A few follow-up questions.

11 Was this a preschool student?

12 A. No.

13 Q. What grade, if you recall?

14 A. 5th grade.

15 Q. Okay. And then what was the marital
16 status of the parents?

17 A. I don't believe they were married.

18 Q. Okay. And then what was the conflict you
19 guys felt enrollment would cause or further?

20 A. Our teaching on theology of the body.

21 Q. What specific part?

22 A. Definition of marriage.

23 Q. Okay. Thank you, Ms. Coats.

24 MS. RUST: Okay. I'm going to jump back
25 to enrollment numbers. Bonnie is going to share the

EXAMINATION

BY MR. DAVIS:

Q. Ms. Coats, earlier you were testifying about a 5th grader that St. Bernadette's wasn't able to enroll because of the church's teachings on marriage. Do you remember that?

A. I remember.

Q. Just to confirm, is that because it was a same-sex couple?

A. Yes.

Q. Earlier there was some discussion of how the school would approach enrolling students or families who identify as LGBTQ. Do you remember that?

A. Yes.

Q. Has the Archdiocese given Wellspring any guidance on that issue?

A. Yes.

Q. Is that the human sexuality documents that we pulled up earlier in the deposition?

A. Yes.

Q. And Wellspring views itself as required to follow that guidance in making particular enrollment decisions; correct?

A. Correct.

MR. DAVIS: That's all for me.

Exhibit 3

Excerpts of Tracy Seul Deposition

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 1:23-cv-2079-JLK

RULE 30(b)(1) DEPOSITION OF:
Director of Development at St. Mary Preschool
TRACY SEUL
December 1, 2023
Via RemoteDepo

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

Plaintiffs,

v.

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

Defendants,

PURSUANT TO NOTICE, the Rule 30(b)(1)
deposition of Director of Development at St. Mary
Preschool, TRACY SEUL, was taken on behalf of the
Defendants in Denver County, Colorado, by remote
means, on December 1, 2023, at 8:59 a.m., before
Lisa B. Kelly, Registered Professional Reporter,
Certified Realtime Reporter, and Notary Public within
Colorado, appearing remotely from Larimer County,
Colorado.

1 Q. Okay. All right. And your preschoolers
2 don't use a locker room; correct?

3 A. I'm sorry. Did you say locker room?

4 Q. Yes. Locker room.

5 A. No. They don't use a locker room.

6 Q. Okay. All right. Ms. Seul, can you
7 please describe an average daily preschool schedule?

8 A. Sure. Our day starts -- we have a few
9 different schedules. They can come from 8:00 to
10 12:00. They can extend that day until 1:00 or extend
11 that day until 3:00. But then also, they can come
12 before or after school from 7:00 until 6:00 at night.

13 Q. And for clarity, is that 7:00 a.m. until
14 6:00 at night?

15 A. Yes. Yes.

16 Q. And we talked earlier about the different
17 curriculum you've used. Is that the curriculum you
18 use for every single preschool student?

19 A. Yes.

20 Q. And is that curriculum inclusive to
21 students with disabilities?

22 A. Yes.

23 Q. Ms. Seul, are you familiar with the
24 document Guidance for Issues Concerning the Human
25 Person and Sexual Identities, that is disseminated by

1 the Office of Catholic Schools at the Archdiocese?

2 A. I'm familiar with it.

3 Q. Okay. Does St. Mary's Preschool use that
4 document as a part of its educational program?

5 MR. REAVES: Objection. Vague.

6 A. Not as part of the program. We use it as
7 guidance from the Archdiocese.

8 Q. (BY MS. RUST) How so? Can you explain
9 that further?

10 A. It helps to make sure that we -- it helps
11 us in the guidance from the Archdiocese to understand
12 how we ensure the dignity and respect of all students
13 that come to our school.

14 MS. RUST: Bonnie, can we pull up that
15 document, please, and go to page 6? And I believe
16 this has been previously marked as Exhibit 12.

17 Q. (BY MS. RUST) Okay. Ms. Seul, the
18 second full paragraph of this page that says, "In
19 addition, schools and religious education" -- yeah,
20 "religious education should address the topic with
21 students directly, at appropriate ages, with notice to
22 or permission from parents."

23 If you read further, it's referring to
24 specialized classes in chastity or theology of the
25 body.

1 A. It was an E&E grant, but I don't know
2 what that stands for right now.

3 Q. Do you remember how much that grant was?

4 A. It was around 48,000. It helped us to
5 build the bathroom.

6 Q. Okay. And then this year your enrollment
7 went from 60 to 56, so it declined by four students.
8 Is your parish population declining?

9 A. I think our parish population has
10 remained stable since COVID.

11 Q. Okay. Is there an increase of aging
12 parishioners in your parish?

13 A. Perhaps, but that wouldn't be
14 preschoolers. That wouldn't affect preschoolers.

15 Q. And then did St. Mary's raise their
16 tuition this year?

17 A. For the 2023-24 school year, we did.

18 Q. How much?

19 A. We've raised the tuition 6 percent the
20 last few years to help with the cost of living.

21 Q. What do you mean by "the last few years"?

22 A. This year we did and the last year we
23 did.

24 Q. Okay. You stated in your declaration
25 that you think not participating in the UPK led to the

1 decline in enrollment. Why do you believe that?

2 A. Because parents have requested Universal
3 Preschool, and we've had to tell them that we couldn't
4 provide it.

5 Q. How many parents?

6 A. At least three, that I can think of, but
7 I'm sure there's more that I don't hear about that
8 went to other schools because they could get UPK
9 instead.

10 Q. Were those parents looking specifically
11 for a Catholic preschool?

12 A. They were -- they came to our school to
13 tour, so they were looking for a Catholic preschool,
14 I'm sure, uh-huh.

15 Q. Did they tell you that?

16 A. Well, they were touring at our school so
17 they wanted to come to a Catholic preschool.

18 Q. Do you think an increase in tuition might
19 have factored into a decline of enrollment?

20 A. It could. There are many factors that
21 could lead to decline in enrollment, but those are two
22 of the big ones for sure.

23 Q. Okay. What are some other factors that
24 could lead to a decline in enrollment this year?

25 MR. REAVES: Objection. Calls for

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made;
2. The hard copies submitted to the clerk are exact copies of the ECF submission;
3. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Defender Antivirus, and according to the program is free of viruses.

Dated: August 15, 2024

/s/ Nicholas R. Reaves
Nicholas R. Reaves

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 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 CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 15, 2024

/s/ Nicholas R. Reaves

Nicholas R. Reaves