

No. 25-581

In the
Supreme Court of the United States

ST. MARY CATHOLIC PARISH, LITTLETON, COLORADO,
ET AL.,

Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE
DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY
CHILDHOOD, ET AL.

Respondents.

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

**BRIEF OF COLORADO ASSOCIATION OF
PRIVATE SCHOOLS AS *AMICUS CURIAE*
SUPPORTING PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

Amicus Curiae the Colorado Association of Private Schools (CAPS) is the statewide voice of private schools in Colorado. Its mission is to preserve the independence of Colorado's private schools and uphold parental choice in education. CAPS believes in the vital role of private schools in American education, and it educates others about these schools' significant contributions to the common good. CAPS member schools espouse a variety of faiths, doctrines, and educational models. But they are united in their belief that all Colorado families should have access to private educational options in early childhood through twelfth grade that align with their specific needs and values, and that private schools should remain free to determine how best to provide these options for families consistent with their beliefs. CAPS seeks to ensure that its member schools, regardless of faith, can participate in Colorado's Universal Preschool Program and compete on a level playing field with other preschool providers.

¹ Consistent with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties' counsel of record received timely notice of the intent to file this *amicus curiae* brief pursuant to Rule 37.2.

INTRODUCTION & SUMMARY OF ARGUMENT

Colorado’s Universal Preschool Program (“UPK”) is grounded in the insight that early childhood education is strongest when it is pluralistic. Rather than channeling families into a single, state-defined model of preschool, the General Assembly adopted a “mixed-delivery system” that empowers families to choose from a broad range of providers—public, charter, and private—based on their unique needs and values.

Within that pluralistic landscape, private schools are indispensable. From the Founding onward, private and religious schools have educated millions of American children and formed students for virtuous citizenship in our democratic republic. See Patrick M. Garry, *The Myth of Separation: America’s Historical Experience with Church and State*, 33 *HOFSTRA L. REV.* 475, 491–92 (2004). Religious schools do this in their own distinct ways, partnering with families who share a faith tradition and integrating moral, spiritual, and civic formation into their curricula. This Court repeatedly has recognized the right to choose a religious education as a cornerstone of American liberty, uniquely consonant with a constitutional tradition that “knows no heresy” and “is committed to . . . establishment of no sect.” *Watson v. Jones*, 80 U.S. 679, 728 (1871); see *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Espinoza v. Mont. Dep’t of Revenue*, 592 U.S. 464 (2020); *Mahmoud v. Taylor*, 606 U.S. 522 (2025).

Properly administered, a mixed-delivery preschool program honors these constitutional commitments. It allows religious families to select preschools that align with their beliefs and practices, and it permits religious schools to participate on equal terms without surrendering the distinct characteristics that define their mission.

Colorado's UPK, however, departs from that model. Through an administratively imposed "nondiscrimination" requirement, the State conditions participation on whether a preschool surrenders its religious selectivity and conforms to the State's preferred views on sexual orientation and gender identity. In practice, this requirement does not operate neutrally. It divides religious preschools into favored and disfavored classes, allowing participation by those whose faith commitments align with the State's policy preferences and excluding those who don't conform.

That regime cannot be reconciled with either of the Religion Clauses. Under the Establishment Clause, the government may not prefer some religious sects over others or condition public benefits on theological conformity. *Catholic Charities Bureau, Inc. v. Wis. Labor & Indus. Rev. Comm'n*, 605 U.S. 238, 249 (2025). Under the Free Exercise Clause, the State may not exclude otherwise qualified participants from a generally available public benefit because of their religious exercise. *Carson v. Makin*, 596 U.S. 767, 781 (2022). Yet Colorado's non-discrimination mandate does both.

The First Amendment’s requirement of religious neutrality is “absolute” and “fundamental to our constitutional order.” *Catholic Charities*, 605 U.S. at 254. In publicly funding preschools, Colorado is free to insist on quality and safety. What it may not do is leverage its spending power to restructure the internal life of religious schools or sort religious communities based on whether they conform to official orthodoxy.

The decision below is grounded in an erroneous understanding of the Religion Clauses—itself a product of the doctrinal incoherence that *Employment Division v. Smith*, 494 U.S. 872 (1990), continues to wreak in this area. The Court should grant the petition for certiorari and reverse.

ARGUMENT

I. Private schools, and religious schools in particular, are a vital part of the American educational landscape.

The Colorado General Assembly enacted the UPK with the laudable goal of expanding “access to voluntary, high-quality, universal preschool services.” C.R.S. § 26.5-4-204(1)(a). Research has demonstrated the positive short- and long-term effects of high-quality preschool, including improved literacy, better test scores, and higher graduation rates. *Id.* § 26.5-4-202(1)(a)(III). The legislature chose to create and fund a “mixed-delivery system” of education, a public benefit that follows families to a qualified preschool program of their choice—public, charter, or private. *See* C.R.S. §§ 26.5-4-202(1)(a)(V),

(1)(b), 26.5-4-208(5). The aim is “to make preschool programming universally available to children throughout Colorado.” *Id.* § 26.5-4-202(1)(a)(VI). And the legislature specifically directed that parents be able to “select preschool providers for their children from *as broad a range as possible* within their respective communities.” *Id.* § 26.5-4-204(2) (emphasis added).

Pluralism and choice are hallmarks of a mixed-delivery system. Families can choose among different program types and select the one that best meets their needs. *See* Bipartisan Policy Ctr., Examples of Mixed-Delivery Early Care and Education Systems, June 17, 2021, <https://bit.ly/48pxD7W>. The UPK’s director, Dawn Odean, rightly has emphasized that these are “critical” and “unique” aspects of Colorado’s program, ensuring that families “have choice in finding the just-right provider” that “fits for their family,” which for some “might be a faith-based provider.” *St. Mary Catholic Parish in Littleton v. Roy*, No. 1:23-CV-02079-JLK, Doc. 77-8, at 19:16–20, 38:8–17.

Private schools are a key component of Colorado’s mixed-delivery system. In addition to public school districts and charters, qualified “preschool providers” include preschools “operated in conjunction with . . . a private or parochial school.” C.R.S. § 26.5-4-203(12); *id.* § 26.5-5-303(3). For the 2023-24 school year, some 1900 preschool providers, enrolling almost 40,000 children, participated in the UPK, including 40 faith-based preschools encompassing more than 900 students. *St. Mary Catholic Parish in Littleton v. Roy*, 736 F. Supp. 3d 956, 968 (D. Colo. 2024).

Beyond Colorado, private schools are a vital part of the American educational landscape, and religious schools play an outsized role. Students at religious schools consistently outperform students at both traditional public and public charter schools. See William Jeynes, “The Assessment of Various Dimensions of Religious Faith Based on Four Meta-Analyses,” *Interdisciplinary J. Research on Religion*, vol. 9, art. 9 (2013), p.10. The effect shows up in both academics and behavior. The “academic advantage” of religious-over-public schools is about “one half of a grade point.” *Ibid.* And “students attending Christian and other faith-based schools were more likely to show more positive behavior than were their counterparts in traditional public schools.” *Id.* at 12.

Catholic schools especially stand out. Based on standardized test scores, Catholic school students are one-and-a-half to two grade levels ahead of their public school peers. Kathleen Porter-Magee, “Amid the Pandemic, Progress in Catholic Schools,” *Wall St. J.*, Oct. 27, 2022, <https://on.wsj.com/496F6YP>. “Today, the divergence between Catholic schools and public ones is so great that if all U.S. Catholic schools were a state their 1.6 million students would rank first in the nation” in fourth- and eighth-grade reading and math assessments. *Ibid.*

The positive impact goes beyond test scores and reading comprehension. Private schools also excel at something far more fundamental to the educational enterprise: forming young people for citizenship in a democratic republic. While some posit that traditional public schools are more effective than private schools at promoting civic values like political tolerance,

political participation, civic knowledge, and community engagement, the data show otherwise. “The evidence is especially strong that private schooling is correlated with higher levels of political tolerance and political knowledge and skills.” M. Danish Shakeel et al., “The Public Purposes of Private Education: a Civic Outcomes Meta-Analysis,” 36 *Educ. Psych. Rev.* 40, 41 (2024). The correlation is even more pronounced for religious schools. “Religious private schooling is strongly associated with positive civic outcomes,” and indeed “the Catholic school civic advantage acknowledged by some scholars . . . appears to be a more general religious school civic advantage.” *Id.* at 41, 73.

The reasons for a “religious school advantage” are many. For one thing, “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 753–54 (2020). In other words, religious schools are serious about moral formation, and moral formation is essential to raising virtuous citizens. Relatedly, private schooling is “highly pluralistic, allowing parents to choose the specific conception of the good life to be inculcated in their child”—an environment that is “more conducive to instilling civic values in students.” Shakeel et al., *supra*, at 48.

Finally, because families are able to self-select into schools that reflect their values and priorities, private schools tend to be “strong-culture” institutions that foster a sense of community identity and belonging. *Ibid.*; see George A. Akerlof & Rachel E.

Kranton, “Identity and Schooling: Some Lessons for the Economics of Education,” 40 *J. Econ. Literature* 1167, 1170–71 (2002) (because private schools “have greater freedom to invest in the identity of their students,” they’re able to “reduce the initial social differences among students and create a community”). That sense of togetherness infuses everything a school does, creating habits of mind and heart—ways of being and acting together that train students, parents, and teachers for democratic self-government.

Private and religious schools don’t imperil our constitutional republic. They are essential to it. “Educational pluralism seems to be a boon, and not a bane, for civic outcomes.” Shakeel et al., *supra*, at 73. Any mixed-delivery system that emphasizes “high quality” options for families will welcome private and religious schools as vital partners.

II. Properly administered, a mixed-delivery system allows religious families to select quality preschools that align with their unique beliefs and practices.

The Tenth Circuit failed to appreciate the religious-associational dimensions of a mixed-delivery system, diminishing the First Amendment’s importance here because “[t]his is a case about preschoolers.” *St. Mary Cath. Parish in Littleton v. Roy*, 154 F.4th 752, 776 (10th Cir. 2025). “No one,” the court said, would “mistake the views of preschool students for those of their school,” and “[t]eachers and staff are the ones responsible for disseminating a

preschool’s message, not the preschool children they teach.” *Ibid.*

This commits three errors simultaneously. First, it ignores the values-inculcating function of education, which is “core” to the “mission” of religious schools. *Our Lady*, 591 U.S. at 754. As the “archetype of associations formed for expressive purposes,” religious groups, and schools especially, are dedicated to both “expression *and incultation* of religious doctrine.” *Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 565 U.S. 171, 200–01 (2012) (Alito & Kagan, JJ., concurring) (emphasis added). Religious schools are not simply proclaiming a message outwardly to the world. They are forming students inwardly, transmitting a way of life—moral excellence, civic virtue, and faith—“to the next generation.” *Id.* at 200.

The second error is a crabbed view of what it means to be a religious school. The Constitution specifically “protects . . . a parent’s decision to send his or her child to a private religious school,” *Mahmoud*, 606 U.S. at 547, yet this part of the Tenth Circuit’s analysis doesn’t mention parents at all. A religious school is not a randomized cluster of students and teachers. It is an organic community formed around shared values in which parents partner with teachers and entrust them with educating their children.² Absent the right of parents to voluntarily sort themselves in this way, religious

² See, e.g., Dayspring Christian Acad., What We Believe, <https://dayspringeagles.org/what-we-believe/> (“We view our academy as a God-glorifying extension of the Christian home [W]e are dedicated to partnering with Christian parents to educate and train students from Pre-K to 12th grade.”).

schools can't do their faith-transmitting, values-inculcating work. See Michael W. McConnell, Why Is Religious Liberty the “First Freedom”?, 21 CARDOZO L. REV. 1243, 1257 (2000) (“Education, like religion, is a powerful instrument for the inculcation of values, in which the institutions of civil society, not just of government, should play a prominent role.”).

Finally, the Tenth Circuit gets the age logic backwards. To dismiss a First Amendment claim because this case is “about preschoolers” is to suggest that academic and faith formation matter less at younger ages. But the opposite is true. The UPK itself prioritizes “early learning” and “early literacy” precisely because of their “long- and short-term impacts,” extending even to “high school graduation.” C.R.S. § 26.5-4-202(1)(a)(I), (III). “And for many people of faith across the country, there are few religious acts more important than the religious education of their children.” *Mahmoud*, 606 U.S. at 547. That concern is acute when children are “young [and] impressionable” and are more “likely to accept without question any moral messages conveyed by their teachers’ instruction.” *Id.* at 551. That makes parents’ selection of a preschool all the more weighty—morally and constitutionally.

The promise of the UPK is that it prioritizes pluralism, including religious pluralism, allowing religious families to select schools that best align with their beliefs and practices. Consider a few examples.

Calendars and holidays. Religious preschools offer school calendars that reflect the needs of Colorado’s diverse religious communities. Jewish

preschools, for example, adopt calendars that ensure students and families can observe Jewish holidays and leave early on Fridays to prepare for Shabbat.³ Catholic preschools provide students with daily prayer and weekly Mass.⁴ Christian preschools practice daily prayer, observe Good Friday or a longer Easter break, and emphasize the biblical roots of Thanksgiving.⁵

Observing religious holidays is not like civic observance of, say, Memorial Day or the Fourth of July. For Jewish families, Rosh Hashanah and Yom Kippur—and for Catholics, holy days of obligation—are obligatory days of prayer, fasting, or celebration, essential to their faith and lives. They’re also morally formative. As Hillel Academy of Denver explains:

Learning about each of the Jewish holidays plays a significant role in the Early Learning Center [i.e., preschool and kindergarten]. From Rosh Hashana to

³ Denver Jewish Day Sch., 2025-26 Summary Calendar, https://resources.finalseite.net/images/v1756926325/denverjdsorg/yf0nb12o0eiwo3htz0qn/2025-26SummaryCalendar_1.pdf; Denver Acad. Of Torah, 2024-2025 School Calendar, <https://datcampus.org/wp-content/uploads/2024/08/2024-2025-School-Calendar-Final.pdf>.

⁴ Blessed Sacrament Catholic Sch., Faith, <https://www.bsccs-denver.net/faith>; Christ the King Catholic School, Preschool & Pre-Kindergarten, <https://www.ckrcs.org/preschool> (“We learn and say daily prayers, read Bible stories and learn about the lives of the Saints.”).

⁵ Dayspring Christian Acad., Calendar, <https://dayspringeagles.org/calendar/>; Dayspring Christian Acad., Pre-K, <https://dayspringeagles.org/pre-k/>; Front Range Christian Sch., Frequently Asked Questions (“What holidays...?”), <https://www.frcs.org/admissions/frequently-asked-questions/>.

Shavuos, the students feel the excitement of the upcoming holiday. Through hands-on activities, projects, and discussions, the children absorb the lessons and *mitzvos* of each Yom Tov [holiday].⁶

A religious preschool's calendar allows families to practice their faith fully, without compromise.

Unique services. Religious schools provide services unique to the needs of the religious families they serve. Jewish schools provide students with kosher meals.⁷ They also have heightened security measures to guard against the all-too-real threats faced by the Jewish community, especially after the horrific antisemitic attack in Boulder.⁸ Catholic schools provide Mass, reconciliation, adoration of the

⁶ Hillel Acad. of Denver, Academics, <https://hillelacademyofdenver.com/academics/#earlychildhood> (italics added).

⁷ Denver Jewish Day Sch., Lunch, <https://www.denverjds.org/academics/lower-division-prek-5/explore-the-lower-division/lunch>. These and other religious services identified *infra* often begin in kindergarten, allowing preschoolers who “graduate” and return to continue a seamless religious education.

⁸ See Marissa Ventrelli, “Colorado grants \$250K to religious groups for security upgrades following Boulder attack,” *Colo. Politics*, Aug. 11, 2025, <https://www.coloradopolitics.com/2025/08/11/colorado-grants-250k-to-religious-groups-for-security-upgrades-following-boulder-attack/>.

Blessed Sacrament, and service opportunities.⁹ Christian schools provide daily or weekly chapel and religious devotional opportunities.¹⁰

Religious instruction. Religious preschools provide instruction in religious faith and traditions. At Jewish preschools, students learn Jewish songs and prayers, and “[t]hrough discussions about stories, holidays, and Jewish values, they learn to ask questions, think through problems, and explore possible answers.” The *parsha*, or Torah portion, of each week provides preschoolers a framework for learning about character development (*middos*) and ethical behavior in the Jewish tradition.¹¹ At Catholic preschools, students are taught the Bible and the liturgy¹² and learn about the lives of the Saints.¹³ More generally, these schools enable Catholic families

⁹ Blessed Sacrament Catholic Sch., Elementary School, <https://www.bscc-denver.net/elementary-school> (weekly mass, reconciliation, adoration of the Blessed Sacrament, school rosaries and divine mercy chaplets); Corpus Christi Catholic Acad., Faith Life, <https://school.corpuschristicos.org/faith-life> (daily mass, confession, and opportunities to serve “at the altar, as lectors, and as music ministers”).

¹⁰ Pikes Peak Christian Sch., Preschool General Information, <https://www.ppcseagles.org/preschool/> (“Chapel is an important part of each day’s activities.”); Evangel Christian Acad., Evangel House System, <https://www.ecaeagles.org/student-life/house-system/> (“Houses meet throughout the school year for prayer, devotions, service opportunities, and connection.”).

¹¹ Hillel Acad. of Denver, Academics, *supra*, note 6.

¹² Pax Christi Catholic Community, Preschool (About Us), <https://paxchristi.org/preschool/about-us> (“faith-based, rigorous academic education complemented by Catechesis of the Good Shepherd”).

¹³ Christ the King Catholic Sch., Preschool & Pre-Kindergarten, *supra*, note 4.

to fulfill their obligation to send their children to a Catholic school. Christian preschools require teachers to adhere a statement of faith, integrate biblical principles into the curriculum, and reserve part of the day for Bible instruction, character development, and spiritual exhortation.¹⁴

“Religious education is vital to many faiths practiced in the United States,” *Our Lady*, 591 U.S. at 754, and this Court has underscored its importance to meeting the needs of America’s diverse populations, *see id.* at 754–55 (discussing Catholics, Protestants, Jews, Muslims, Latter-Day Saints, and Seventh-Day Adventists); *Yoder*, 406 U.S. at 226 (“Even th[e] idiosyncratic separateness [of the Amish] exemplifies the diversity we profess to admire and encourage.”). Colorado, like the rest of the nation, has a “rich diversity of religious education,” *Our Lady*, 591 U.S. at 756, that a properly administered mixed-delivery system would allow to flourish.

III. The UPK’s “nondiscrimination” requirement flunks neutrality under both Religion Clauses.

Some religious schools welcome LGBTQ families because their faith commends or compels them to do so. *See* App.42a, 115a. Other religious schools impose faith-and-conduct requirements that may screen out some LGBTQ families. *See* Pet. for Cert. at 23. *Obergefell* teaches that both groups reflect “decent and honorable religious or philosophical premises”

¹⁴ Dayspring Christian Acad., Pre-K, *supra* note 5; Front Range Christian Sch., Frequently Asked Questions (“How will my student’s faith grow...?”), *supra*, note 5.

that are accorded First Amendment “protection.” *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). *Obergefell* signaled, in other words, that official legal treatment of religious views on sexual orientation and gender identity must be one of neutrality. The Establishment Clause requires no less. See *Larson v. Valente*, 456 U.S. 228, 246 (1982) (First Amendment’s “mandate” of “neutrality between religion and religion” is “absolute”); *Catholic Charities*, 605 U.S. at 254 (government neutrality “between religion and religion” is “fundamental to our constitutional order”).

But Colorado’s administratively imposed nondiscrimination requirement is not neutral “between religion and religion.” In actual effect, it divides religious preschools into two classes: those that affirm the State’s pro-LGBTQ views and those that don’t. The former are religious winners—they may participate in the UPK and access funding. The latter are religious losers—they’re excluded from the program. In the “competition between sects,” Colorado has picked a side. *Catholic Charities*, 605 U.S. at 248 (cleaned up).

But it’s worse than that. While the UPK’s nondiscrimination requirement facially prohibits discrimination *in either direction* on the basis of religion, sexual orientation, and gender identity, it doesn’t work like that in practice. In practice, schools can discriminate in ways the State favors, granting preferences to LGBTQ families, and yet still qualify for UPK funding. See Pet. for Cert. at 9–10 (citing App.337a, 353a–355a). But schools that are selective in ways the State disfavors—requiring families to

adhere to traditional views on sex and gender, for example—are ineligible for funding. Both types of schools transgress the nondiscrimination requirement in similar ways, but only one set of transgressors—traditionally minded religious schools—is barred from UPK participation. This Court has “consistently and firmly deprecated” such denominational preferences. *Catholic Charities*, 605 U.S. at 252 (quoting *Larson*, 456 U.S. at 246) (internal quotation marks omitted).

Catholic Charities proves the point. Indeed, that case is the mirror image of this one. If *requiring* institutions to be religiously selective in order to qualify for a public benefit is an unconstitutional denominational preference, *see id.* at 250, then *prohibiting* them from being religiously selective is unconstitutional in the same way. In *Catholic Charities*, the government benefit—a legal exemption—was available only if the institution restricted its services based on religious criteria. Though the statute was religiously neutral on its face, Wisconsin’s rule required institutions to limit their services to those who shared their beliefs in order to qualify. Yet because Catholic Charities’ faith barred it from being religiously selective, denying the benefit on that basis amounted to a denominational preference. *Ibid.* (“[A]n exemption that requires proselytization or exclusive service of co-religionists establishes a preference for certain religions based on the commands of their religious doctrine.”).

Here, the state benefit is available only if a school *refuses* to be religiously selective. Colorado requires preschools to surrender their religious selectivity in

order to qualify for the UPK, officially disfavoring institutions who choose to limit services to families who share their beliefs. Yet the faith of many schools requires them to be religiously selective. Denying them a state benefit for maintaining that selectivity is the same kind of denominational preference as in *Catholic Charities*, just in the other direction. There's no reason, either in law or logic, why "requir[ing] ... exclusive service of co-religionists establishes" an unconstitutional "preference for certain religions," *ibid.*, but *prohibiting* exclusive service to co-religionists does not. These are two sides of the same unconstitutional coin.

Larson suggests that genuinely "secular criteria" may pass muster even though they have a disparate impact on different faiths. 456 U.S. at 246 n.23. Whatever the merits of that principle in theory, Colorado's nondiscrimination requirement doesn't satisfy it. The State's ban on religious discrimination requires some preschools, including members of *amicus*, to eject "the very core of the[ir] mission": partnering with like-minded families to build scholastic communities where faith is inculcated, celebrated, and lived out. *Our Lady*, 591 U.S. at 754.

Colorado's prohibition on sexual orientation and gender identity discrimination isn't genuinely secular either. For one thing, Colorado doesn't apply it evenhandedly. *See supra*. Even so, the prohibition affects people and institutions of traditional faith almost exclusively. "[A]lthough one can imagine non-religious objections to" these aspects of the nondiscrimination requirement, "as a whole" they "stan[d] most obviously in opposition to more

traditional understandings of sexuality and gender.” *Bates v. Pakseresht*, 146 F.4th 772, 794 (9th Cir. 2025) (striking down similar nondiscrimination requirement). They “overwhelmingly block” preschools “who hold traditional religious views.” *Ibid.*

Though decided under the Free Exercise Clause, the logic of *Carson v. Makin* points in the same direction. While *Carson*’s predecessors involved the categorical exclusion of religious institutions from a public benefit program, see *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 453 (2017); *Espinoza*, 591 U.S. at 487, *Carson* considered a rule that discriminated *among* religious institutions based on whether they were, in the State’s view, “sectarian,” 596 U.S. at 775. The State officially disfavored schools that were closely affiliated with a “particular faith or belief system.” *Ibid.* (quotation omitted). This Court refused to cabin constitutional protection to categorical-exclusion cases, explaining that the First Amendment embodies a broader principle of neutrality: “members of the community” cannot be “exclude[d]” from “an otherwise generally available public benefit because of their religious *exercise*.” *Id.* at 781 (emphasis added). Even if an exclusion is phrased in religiously neutral terms—for example, requiring religious schools to provide the “equivalent” of a “secular” public education—it still flunks the constitutional test. *Id.* at 784. The analysis “turn[s] on the substance of free exercise protections, not on the presence or absence of magic words.” *Id.* at 785.

There’s no question that the religious selectivity of some Colorado preschools—such as faith-and-conduct requirements, congregational preferences, or

emphasizing a particular faith tradition—is a crucial component of their religious exercise. Nor does Colorado dispute that these schools are just as capable of providing a high-quality education for the State’s preschoolers. Yet the State penalizes their religious selectivity, barring them from a general public benefit for reasons inextricably connected to their religious exercise and their identity as religious institutions.

CONCLUSION

Colorado’s nondiscrimination requirement officially prefers some religious preschools over others “based on theological choices,” which violates the Establishment Clause. *Catholic Charities*, 605 U.S. at 250. And it bars them from participating in the UPK solely “because of their religious exercise,” which violates the Free Exercise Clause. *Carson*, 596 U.S. at 781.

The Tenth Circuit was wrong to conclude otherwise. The Court should issue a writ of certiorari and reverse.

Respectfully submitted,

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