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 Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE EDCHOICE, INC., DEFENSE OF FREEDOM INSTITUTE, AND WAGNER FAITH FREEDOM CENTER IN SUPPORT OF PETITIONERS

Thomas M. Fisher
Counsel of Record
Bryan G. Cleveland
Melinda R. Hudson
EdChoice Legal Advocates
111 Monument Circle, Suite 2650
Indianapolis, IN 46204
(317) 681-0745
tfisher@edchoice.org
Counsel for Amici Curiae

Additional counsel listed inside cover

Donald A. Daugherty, Jr.
DEFENSE OF FREEDOM INSTITUTE
1455 Pennsylvania Avenue NW, Suite 400
Washington, DC 20004
(414)559-6902
don.daugherty@dfipolicy.org
Counsel for Defense of Freedom Institute

William Wagner
GREAT LAKES JUSTICE CENTER
5600 West Mount Hope Highway
Lansing, MI 48917
(517)643-1765
Prof.WWJD@gmail.com
Counsel for Wagner Faith & Freedom Center

QUESTIONS PRESENTED BY THE PETITION

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

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

3. Whether *Employment Division v. Smith* should be overruled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTEREST OF AMICUS CURIAE[1]

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

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

---

[1] No party or its counsel authored any of this brief, and no person other than amici curiae, their members, or their counsel contributed monetarily to this brief. Undersigned counsel provided counsel of record timely notice of the amici's intention to file a brief more than ten days prior to the due date. Sup. Ct. R. 37.2.

Housed on the campus of Spring Arbor University, the Wagner Center serves as a national academic voice for freedom of thought, conscience, and religion. Most importantly for this case, the Wagner Center works to preserve religious freedom and the freedom to educate, holding a significant interest in the preservation of constitutional rights.

Education freedom requires education pluralism. It does parents little good to have a choice among multiple versions of the same educational content and environment for their children. As EdChoice's founder, Nobel laureate economist Milton Friedman, observed, the problem to be solved by education freedom is "an excess of conformity" and the solution "is to foster diversity" in education. Milton Friedman, *Capitalism and Freedom* 97 (1962).

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

Colorado's discrimination is unfortunately of a piece with historical treatment of Catholic schools. As the Court well knows, blatant religious bigotry during the 19th century sought to force Catholic families into Protestant public schools. *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 482 (2020) ("The Blaine

Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree.'" (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–829 (2000))).

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

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

SUMMARY OF THE ARGUMENT

In *Carson v. Makin*, 596 U.S. 767 (2022), and its predecessors, the Court held that religious institutions have the right to participate in private education choice programs. Yet some states repeatedly attempt to circumvent that rule through so-called "antidiscrimination" mandates that exclude religious

schools from private-choice programs based on their religious practices.

Colorado's Universal Preschool Program is one example. It purports to foster a "mixed delivery" system providing parents a diverse array of education options for their children. Yet it excludes religious providers through a confrontational "equal opportunity" mandate at odds with Catholic (and other religious) beliefs regarding human sexuality and gender.

The decision below says that *Carson* applies only to cases of explicit religious targeting. But the whole point of *Carson* was to apply the Free Exercise Clause to discrimination based on "religious use," 596 U.S. at 786–87, meaning the practice of one's religious creed in carrying out the educational mission. That includes St. Mary's religious exercise through its faith-based admissions policies. The Court should take this case to put states on notice that excluding disfavored religious practices from school choice programs will fail under the Free Exercise Clause just like excluding disfavored religious curriculum failed.

More broadly, this case is also worthy of certiorari as yet another in the growing number of cases presenting a conflict between religious beliefs about human sexuality and gender identity, on the one hand, and political views on LGBTQ rights, on the other. Each time the Court has faced this conflict, its resolution has turned on piecemeal, fact-sensitive analyses. In that vein, this case presents the next piece, *i.e.*, the next context requiring the Court to decide how to

resolve tension between competing world views on human sexuality and gender identity.

As in prior such cases, Colorado's program creates free exercise problems at least because it permits secular exceptions to its "equal opportunity" mandate—exceptions for schools favoring disadvantaged socioeconomic classes, individuals with disabilities, and even minority races—but not religious exercise. It thereby undermines any claim of being "generally applicable" and warrants strict scrutiny. The Tenth Circuit waved away those non-religious exceptions, contravening this Court's precedents.

Finally, the Court's intervention here would matter immensely. School choice programs are successful when parents have meaningful choices, not when states impose abstract "equal opportunity" or "anti-discrimination" mandates. Religious schools have been critical to the success of education freedom for decades. Excluding them based on their religious exercise not only offends the Constitution but also deprives the education marketplace of choices parents need for their children to succeed.

ARGUMENT

I. Certiorari is Warranted to Address the Use of Antidiscrimination Rules to Exclude Religious Schools from Private Choice Programs

Under *Carson v. Makin* and its predecessors, a state cannot exclude religious schools from a public benefit because of their religious exercise without

triggering strict scrutiny. 596 U.S. 767, 778–81 (2022). Notwithstanding *Carson*, Colorado and other states have taken yet another tack to exclude religious schools from choice programs: "antidiscrimination" mandates that conflict with religious practices based on disfavored beliefs about human sexuality and gender identity.

The Tenth Circuit below allowed Colorado to achieve its goal and circumvent *Carson*, asserting that although the state's "equal opportunity" mandate "infringes upon [Petitioners'] ability to exercise their religious beliefs," *Carson* does not apply because Colorado's restrictions "are not a targeted burden on religious use." App.21a–22a. That cannot be right.

States cannot put religious schools to the choice of participating in private choice programs or keeping their religious values without being "subjected to the 'most rigorous' scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). As the Court has explained, "[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Carson*, 596 U.S. at 787 (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020)). Religious schools, including the Petitioner Catholic schools and institutions here, have the right to participate in education choice programs while remaining firm in pursuit of their educational mission in accord with their

religious beliefs. The Court's intervention is needed to affirm their free exercise rights and allow families to enjoy the benefit of Catholic schools when using school choice programs like Colorado's Universal Preschool Program.

A. States that disfavor Petitioners' religious beliefs about human sexuality and gender identity are using "antidiscrimination" mandates to circumvent *Carson*.

While after *Carson* and *Espinoza* Blaine Amendments no longer help states discriminate against religion, *see Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 482–87 (2020), Colorado—and other states—advance the same philosophy to ensure that children adhere to the state's preferred values. Instead of targeting religions by name, these states target religious ideas contrary to the state's views on sexuality and gender identity.

This case is a prime example. Colorado established a Universal Preschool Program, which serves "[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," App.195a, and does so by covering the cost of fifteen hours per week of preschool services for all Colorado children. App.188a. It purports to be a "[m]ixed delivery system," App.193a, but as a condition of participating in the program, all providers must sign a Program Service Agreement, under which they must agree to adhere to all "quality standards," including a requirement to "provide eligible children

an equal opportunity to enroll and receive preschool services regardless of … sexual orientation [or] gender identity, … as such characteristics and circumstances apply to the child or the child's family." App.6a–7a (quoting Colo. Rev. Stat. § 26.5-4-205(2)(b)).

Petitioners sought a religious accommodation from the program's "equal opportunity" mandate regarding their admissions policies, which follow their sincere religious beliefs about human sexuality and gender identity. App.11a–13a. Colorado refused to provide an accommodation that would allow Petitioners to participate in the program without violating their religious practices. *Id.*; App.289a–290a.

Colorado isn't the only state to do this. Maine—the source of the *Carson* case—also has imposed its own "antidiscrimination" mandate for schools participating in its town-tuitioning program. Under a Maine law enacted in 2021 while *Carson* was being decided, the state does not permit schools to receive public funding if they "discriminat[e]" based on "sexual orientation or gender identity." *St. Dominic Academy v. Makin*, 744 F. Supp. 3d 43, 53 (D. Me. 2024); *see* 5 M.R.S. § 4602 (Maine law defining "unlawful educational discrimination … on the basis of … sexual orientation or gender identity"). When Catholic and other religious schools sought religious accommodations because their policies and practices, rooted in their religious beliefs about human sexuality and gender, conflicted with the mandate, Maine refused. *See St. Dominic*, 744 F. Supp. at 53–58; *see also*

Crosspoint Church v. Makin, 719 F. Supp. 3d 99, 103–11 (D. Me. 2024).

The district court allowed the exclusion, even as it acknowledged the "fundamental tension that arises when the Maine Legislature's view of the categories of people meriting protected status conflicts with the sincerely held beliefs of religious communities"—a "tension [that] has kept [religious practitioners in Maine] from realizing the practical benefits of a landmark decision," *i.e.*, *Carson. St. Dominic*, 744 F. Supp. 3d at 84; *Crosspoint*, 719 F. Supp. 3d at 126.

Maryland, too, has taken this approach. Its school choice program—called the BOOST Program—provides scholarships for students from low-income households to attend nonpublic schools. H.B. 200 § R00A03.05 (Md. 2023). But for nonpublic schools to participate, they must comply with a statutory mandate to "not discriminate in student admissions, retention, or expulsion or otherwise discriminate against any student on the basis of … sexual orientation, or gender identity or expression." *Id.*; *see* 2019 Md. Laws ch. 565 at 151 (adding "gender identity or expression" to the mandate).

Maryland has put this requirement to work, investigating and excluding private religious schools for purported violations of the antidiscrimination mandate's sexual orientation and gender identity provisions. *See Bethel Ministries, Inc. v. Salmon,* 2022 WL 111164, at *3 (D. Md. Jan. 12, 2022). When one religious school brought First Amendment claims against the state for excluding it based on its speech

conveying its religious beliefs about sexuality and gender in its parent/student handbook, the district court ruled narrowly, holding only that Maryland's "application of the nondiscrimination provision to exclude Bethel from" the BOOST Program "violated Bethel's First Amendment rights" because the state's "enforcement of [the nondiscrimination provision] was focused entirely on the content and viewpoint of Bethel's speech." *Id.* at *7–*8, *12. The court did not "address[] the constitutionality of the BOOST program or its nondiscrimination provision," and it declined to order "any prospective injunctive relief relating to Bethel's future BOOST eligibility or the [state's] future enforcement of the current nondiscrimination provision," concluding that such relief would "be improper." *Id.* at *12.

By imposing these sexual orientation and gender identity mandates, states that wish to target religious schools for exclusion from their programs are finding *Carson*—and the First Amendment—to be no barrier at all.

B. The Court should intervene to protect religious schools from "antidiscrimination" policies that exclude their religious practices from education choice programs.

Forcing religious schools to agree to broad "antidiscrimination" mandates as a condition of participating in school choice programs puts those schools to the same choice as the church daycare in *Trinity Lutheran*—participate in a government program *or* pursue religious inculcation through education, not both.

582 U.S. at 462. And *Carson* was unequivocal that a state's administration of a school-choice benefit that "offer[s] tuition assistance that parents may direct to the public or private schools of *their* choice … is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient's religious exercise." 596 U.S. at 785 (emphasis in original).

Furthermore, as in *Espinoza*, Colorado's refusal to afford Petitioners an accommodation also affects the religious practices and education of *families* who must choose between education integral to their religious exercise and participation in a government benefits program. In *Espinoza,* the Court was particularly concerned that the revenue rule enforcing the Blaine Amendment "also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school." 591 U.S. at 476.

The impact on families is especially important because families—not churches and certainly not the state—have the *a priori* duty and right to educate their children. *See id.* at 486 ("Drawing on 'enduring American tradition,' we have long recognized the rights of parents to direct 'the religious upbringing' of their children." (citation omitted)). Naturally, "[m]any parents exercise that right by sending their children to religious schools, a choice protected by the Constitution." *Id.* Religious schools are especially important when public schools "inculcate a worldview that is antithetical to what [parents] teach at home." *Id.* at 508 (Alito, J., concurring). In such cases, government-

supported choice programs "provide[] necessary aid for parents who pay taxes to support the public schools but who disagree with the teaching there." *Id.*

The Tenth Circuit below, and other lower courts, are not adhering to the directives of these precedents. The Tenth Circuit attempted to distinguish *Carson*, *Espinoza*, and *Trinity Lutheran* on the theory that Colorado "did not exclude faith-based preschools" because it "welcomed" the ones whose beliefs were consistent with the "equal opportunity" mandate. App.21a. In the Tenth Circuit's estimation, Colorado "has not been 'intolerant' of religious beliefs" because "[m]any faith-based preschools—including Catholic preschools under the Catholic Charities of the Archdiocese of Denver—currently participate in UPK." App.28a. But under the Court's precedents, such "denominational favoritism" itself is a violation of Petitioners' free exercise rights. *Carson*, 596 U.S. at 787; *see also Catholic Charities Bur., Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 248–49 (2025).

The Tenth Circuit further distinguished *Carson* and its predecessors because, in its view, those cases apply only where laws "target[] 'religious status' and 'religious use' on the explicit basis that they [a]re religious and not secular." App. 21a (citation omitted). It therefore turned instead to *Employment Division v. Smith* to resolve the free exercise issue. App.22a. Other courts have done the same. *See, e.g.*, *Kim v. Bd. of Educ. of Howard Cnty.*, 93 F.4th 733, 748 (4th Cir. 2024) (distinguishing *Carson* and its predecessors because "[t]he programs in those cases explicitly barred

public funds from going to religious actors 'solely because of their religious character'"); *Youth 71Five Ministries v. Williams*, 2025 WL 3438455, at *6 (9th Cir. Nov. 26, 2025) (amended opinion) (distinguishing *Carson* because "the Rule does not deny funding based on a practice exclusive to religious organizations" where it "merely disqualifies a class of potential grantees—those who discriminate based on religion—that includes both secular and religious organizations").

That distinction is unfounded. Under *Carson*, a state's exclusion of a school "on the basis of [its] religious exercise" requires strict scrutiny. 596 U.S. at 789. In this case, the only basis for Colorado's exclusion of Petitioners from its program is Petitioners' religious exercise—specifically, their faith-based admissions policy rooted in their religious beliefs about human sexuality and gender. *See* App.10a–13a. There is no material distinction between this exclusion of religious schools based on their enforcement of religious policies and the exclusion in *Carson*, where the state excluded religious schools "'based on the religious use that they would make of [state funding] in instructing children.'" 596 U.S. at 787 (citation omitted).

The Court's intervention is needed to address the lower courts' application of its precedents and affirm the rights of Catholic schools, and other schools sharing Petitioners' religious beliefs, to participate in school choice programs.

II. This Case Presents Another Episode Requiring the Court's Intervention in the Recurring Conflict of Worldviews Concerning Human Sexuality and Gender Identity

With predictable frequency, the Court continues to confront—and then sidestep—recurring conflicts between LGBTQ antidiscrimination statutes and constitutional free-exercise rights of persons holding traditional religious beliefs about human sexuality and gender identity. Members of the Court have repeatedly acknowledged this conflict since the Court embraced a fundamental right to same-sex marriage. *See Obergefell v. Hodges*, 576 U.S. 644, 711–12 (2015) (Roberts, C.J., dissenting) (describing the "[h]ard questions [that] arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage" and that "[t]here is little doubt that these and similar questions will soon be before this Court"); *id.* at 733–34 (Thomas, J., dissenting) (likewise describing the "all but inevitable … conflict"); *see also id.* at 741–42 (Alito, J., dissenting) (warning that the decision will be "used to vilify Americans who are unwilling to assent to the new orthodoxy").

Despite the Court's assurance that the "First Amendment ensures" that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned," *Obergefell*, 576 U.S. at 679–80, religious believers continue to be put to the choice of following their

sincere beliefs or participating in society—by benefitting from government programs or just running their businesses.

The Court has already seen this phenomenon play out in numerous contexts, but each such case has yielded a decision that turned on specific facts and circumstances rather than broad legal principles. To be sure, that mode of decision-making advances the cause of judicial humility and respect for Article III case-or-controversy principles. But it leaves lower courts without much direction for confronting similar issues in new contexts—with the result that they may often decide those new cases incorrectly. Accordingly, when the Court cannot issue broad legal rules capable of resolving large categories of cases, it should be prepared to accept more cases presenting new fact patterns so that, over time, multiple decisions will, via the common law method, provide a roadmap to lower courts.

This case presents a new context needing the Court's attention. *Carson* would seem to be the most directly relevant precedent, but Colorado's LGBTQ antidiscrimination statute and exceptions also call to mind the standard employed by the Court in *Fulton*, where the Free Exercise Clause required religious accommodations from a similar statute considering non-religious statutory exceptions. The Tenth Circuit's decision, which sidestepped strict scrutiny despite that parallel with *Fulton*, demonstrates the need for further development of the doctrine by the Court.

A. This case is cert worthy as the next chapter in the Court's piecemeal resolution of conflicts between traditional religious practices and statutory LGBTQ protections.

In recent years, the Court has taken up several cases presenting conflicts between traditional religious beliefs and practices concerning human sexuality and gender identity and LGBTQ antidiscrimination laws—but there is no end in sight. This fundamental conflict arises in a nearly infinite variety of human interactions, so, absent a broad ruling applicable across wide swaths of cases, the Court's somewhat frequent intervention will be necessary to maintain order and preserve constitutional rights in lower courts.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, for example, the Court ruled that a baker could not be forced to produce a bespoke wedding cake for a same-sex couple, but only because the record showed case-specific targeting by government officials. 584 U.S. 617, 625 (2018). The Court put off "the delicate question of when the free exercise of [one's] religion must yield to an otherwise valid exercise of state power." *Id.*

The same thing happened in *Fulton v. City of Philadelphia*. 593 U.S. 522 (2021), where the Court ruled that Catholic Social Services was entitled to a religious accommodation from a rule requiring it to certify same-sex couples as foster parents, but only

because other non-religious exemptions were available. "On the facts of this case," the government's interest "in the equal treatment of prospective foster parents and foster children" "cannot justify denying CSS an exception for its religious exercise" because the government had "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." *Id.* at 542.

Other cases have resolved—or will resolve—this fundamental conflict in other narrow contexts. *See, e.g.*, *Mahmoud v. Taylor*, 606 U.S. 522, 530, 550 (2025) (holding that "the Board's introduction of the 'LGBTQ+-inclusive' storybooks—combined with its decision to withhold notice to parents and to forbid opt outs—substantially interferes with the religious development of their children and imposes" an "unacceptable" "burden on religious exercise" and that "a government cannot condition the benefit of free public education on parents' acceptance of such instruction"); *303 Creative LLC v. Elenis*, 600 U.S. 570, 578–79 (2023) (holding that Colorado cannot use its anti-discrimination law "to compel an individual to create speech she does not believe"); *Chiles v. Salazar*, No. 24-539 (U.S.) (cert granted to consider whether state law censoring conversations between counselors and their clients based on viewpoint, namely the petitioner's religious beliefs about sexuality and gender, violates the First Amendment).

As this litany of cases demonstrates, the Court's decision to rule on narrow grounds has consequences for litigants and lower courts who confront the same

fundamental conflict in new contexts. They must do their best to discern whether the Court's precedents are sufficiently analogous to decide new cases, or barring that, do their best to resolve the competing worldviews by their own lights. That may be a better way to work out recurring conflicts in this area of law, but it surely demands the Court's renewed attention to multiple cases, lest any path toward consistent, orderly protection of constitutional rights be forsaken.

This case presents the next piece for the Court to determine applications of its Free Exercise doctrine to LGBTQ protections that conflict with religious practices. The tension between *Carson* and *Fulton* has become more pronounced as the lower courts try to discern which precedent applies to this category of cases. Although *Carson*'s prohibition on the exclusion of religious schools based on their religious exercise appears to be directly relevant, *see supra* Section I, courts instead have been applying a version of *Fulton* and considering statutory non-religious exceptions. *See id.* The Tenth Circuit's decision, which declined to review Colorado's program with strict scrutiny under its application of *Fulton*, provides an opportunity for the Court to guide the lower courts in navigating an issue that is cropping up across the country. *See, e.g.*, *St. Dominic Academy v. Makin*, No. 24-1739 (1st Cir.) (pending decision on appeal).

B. Colorado's antidiscrimination law is not generally applicable and must be subjected to strict scrutiny.

In *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), where the Court awarded Catholic Social Services accommodation from a rule requiring foster-placement agencies to accept same-sex couples as prospective foster parents, the Court held that a system of exceptions from a no-discrimination rule makes it *not* generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). When officials decide "which reasons for not complying with the policy are worthy of solicitude," those exceptions trigger strict scrutiny. *Fulton*, 593 U.S. at 533, 537.

That is exactly the case here. Colorado has created numerous exceptions to its "equal opportunity" mandate that put officials in the position of deciding which reasons are "worthy of solicitude." While the "equal opportunity" mandate forbids discrimination because of "race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability," the Department's practices and policies afford exceptions it deems worthy.

For example, Colorado allows Head Start providers to prefer applicants based on their family's income level. App.35a–36a. And it also welcomes programs devoted only to children who have a disability. *Id.* Petitioners' requests for accommodation so that they may teach only those who accept their sincere

religious beliefs on sexual orientation and gender identity are materially indistinguishable. Each of these types of schools seemingly runs afoul of the equal opportunity mandate. Yet some programs—*i.e.*, those preferred by Colorado—can expect accommodation, while Petitioners cannot. Thus, Colorado picks which "discriminatory factors" warrant exception and the whole scheme thereby fails the test for general applicability.

The Tenth Circuit, however, decided otherwise—mainly by taking liberties with *Fulton*'s statement that "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534; App.35a. According to the Tenth Circuit, an exception that *prefers* certain characteristics does not count in the general-applicability analysis. App.36a–37a. As the court reasoned, the disability and income-level provisions "are not exceptions to the nondiscrimination requirement" because they "do not speak in general terms about ignoring disability status or income level" but rather "specifically concern children who *have* a disability or *are* low-income" in order "to help preschools comply with federal laws that specifically protect disabled and low-income children." App.37a–38a.

In other words, according to the Tenth Circuit, benign discrimination—or discrimination that favors people that the government prefers—is not discrimination at all. This holding is mere wordplay, as

discrimination necessarily favors some groups and disfavors others. The Tenth Circuit apparently believed that discrimination is neutral so long as it only describes the first category. There is no basis for that reasoning in *Fulton*.

The Tenth Circuit also narrowed the comparability scope such that, in its view, only exceptions to the sexual orientation and gender identity portions of the mandate would suffice to find it not generally applicable. App.42a. In its estimation, "'all discrimination is not the same,'" and "[a]llowing some schools to ignore the nondiscrimination requirement with respect to sexual orientation and gender identity would undermine the government's interest in erasing barriers to equal access caused by social stigma in a way that the IEP and Head Start preferences simply do not." App.39a (citation omitted).

That distinction ignores Colorado's entire rationale for the equal opportunity mandate. Because Colorado "believes the statutory equal-opportunity requirement implicates the health and safety of preschool children," App.61a, its exceptions for admissions policies focused on wealth and disability equally implicate the "health and safety" standard it uses to justify refusing Petitioners' requested accommodation regarding sexual orientation and gender identity. The "general applicability" of the whole mandate, therefore, rises or falls as a unit. In other words, either those equal-treatment demands are necessary for advancing health and safety or they are not. *Fulton* does not permit courts to justify nonreligious exemptions

short of strict scrutiny by reference to their justifications. Rather, it is those very justifications that must pass strict scrutiny when the exemptions exclude religious practice.

Finally, the court ignored the Department's discretion to provide additional exceptions. Under the catchall exemption, the Department's representative stated it could allow schools to restrict their admission based on gender identity, sexual orientation, and even race. *See* App.353a–355a. And the statute permits exemptions 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." App.33a (quoting Colo. Rev. Stat. § 26.5-4-205(1)(b)(II)).

The Tenth Circuit got this case wrong, which, given the Court's case-by-case approach to such issues, should be enough to justify review. But as the Petition points out, other lower courts have splintered in applying *Fulton*. Pet.15–21. While some courts recognize that "the mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable," *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 687–88 (9th Cir. 2023) (en banc); *see also* Pet.15–19, others consider only exemptions that involve unfettered discretion or are identical to the challenged conduct to find a lack of general applicability, *see, e.g.*, *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 111 (2d Cir. 2024); Pet.19–21.

No matter how one frames the issue, the Court's guidance is once again needed to decide whether state antidiscrimination laws can override religious exercise that intersects with LGBTQ interests.

III. Concrete Religious Pluralism Produces Successful School Choice Programs.

The Court's intervention in this case would matter a great deal to the success of school choice programs, which are successful when parents have meaningful choices, not when states impose abstract nondiscrimination mandates. Colorado chose to enact its Universal Preschool Program because when parents have the resources to choose the best education providers for their kids, education outcomes improve. Studies of choice programs throughout the country overwhelmingly reflect a common conclusion: Choice leads to measurable educational benefits for many students, is neutral for others, and harms none. The 2024 edition of EdChoice's research compendium reports that "[t]he number of studies that find null or positive effects from school choice significantly outweigh that of studies that find negative effects." EdChoice, *The 123s of School Choice*, 5 (2024).

Those results presuppose meaningful choices, *i.e.*, choices among providers of educational content not available in traditional public schools—especially Catholic schools. For starters, Catholic schools have for decades pursued a social-justice mission to educate disadvantaged urban students, regardless of whether they are Catholic. To that end, "many

Catholic schools have been eager participants in targeted school voucher programs when they have been launched." Julie Trivitt & Patrick Wolf, *School Choice and the Branding of Catholic Schools,* Education Finance and Policy (2011) 6(2) at 207.

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

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

Critically, religious private schools were particularly more likely to be associated with better civic

outcomes. *See id.* at 23. And some studies included in the meta-analysis even showed a "Catholic school civic advantage." *Id.* at 33 (citing Coleman, J. S., & Hoffer, T.*, Public and Private High Schools: The Impact of Communities* (1987); Macedo, S., *Diversity and Distrust: Civic Education in a Multicultural Democracy* (2000); and Prud'homme, J., *The Potential of Catholic Schools: Public Virtues Through Private Voucher,* Journal of Catholic Education, 25(1), 109–132 (2022)).

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

CONCLUSION

This Court should grant the Petition and reverse the Tenth Circuit.

Respectfully submitted,

Thomas M. Fisher
Counsel of Record
Bryan G. Cleveland
Melinda R. Hudson
EDCHOICE LEGAL ADVOCATES
111 Monument Circle, Suite 2650
Indianapolis, IN 46204
(317) 978-9472
tfisher@edchoice.org

Counsel for Amici Curiae

December 17, 2025