

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 WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF OF *AMICUS CURIAE*
SUTHERLAND INSTITUTE IN
SUPPORT OF PETITIONERS**

William C. Duncan
Sutherland Institute
420 E South Temple, Suite 510
Salt Lake City, UT 84111
(801) 355-1272
bill@sifreedom.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS*¹

Amicus Sutherland Institute is a Utah nonprofit, nonpartisan public policy organization with a mission to promote the constitutional values of faith, family, and freedom. Sutherland promotes the constitutional right to the free exercise of religion and works to explain the individual and societal benefits of the involvement of people of faith and religious organizations in our communities.

This case provides this Court with a significant opportunity to make clear that States cannot avoid the Constitutional protection of religious exercise by imposing regulations on public spending programs that burden parents as they seek to exercise their responsibility to direct the education of their children.

SUMMARY OF THE ARGUMENT

Through targeted regulations on religious schools, Colorado not only burdens the free exercise of petitioners. The majority of private schools in the State are religious, and those who choose to operate consistent with the teachings of their faith about marriage and sexuality are also burdened by the State's policy. This is because the policy enforces a preference for secular private schools and schools

¹ In accordance with Supreme Court Rule 37, this brief was not authored by counsel for any party in this action. No party or person not related to *amicus* made any kind of monetary contribution to the preparation or submission of this brief. All funding for this brief came from the amicus.

whose missions and practices align with the State's preferred beliefs about gender and sexuality. Significantly, the policy also interferes with the ability of parents and families to exercise their responsibility, motivated by their faith, to direct their children's education by removing from them an opportunity to receive otherwise publicly available financial assistance necessary for many to access private schooling consistent with their religious beliefs about gender and sexuality.

It is no answer to assert that the policy here is different from other similar exclusions invalidated by this Court because it does not impose a blanket exclusion on all religious schools. Governments cannot foreclose educational choices of parents for religious reasons. This Court has addressed a similar program that allowed some, but not all, religious schools to participate. What a State cannot do directly, as through a blanket exclusion, it cannot do indirectly, as by attaching strings to eligibility that exclude religious schools with religious missions at variance with the State's preferred positions on sensitive moral issues.

ARGUMENT

I. The Department's refusal to accommodate the petitioners imposes burdens on families and other schools because of their faith.

Petitioners have demonstrated how the Colorado Department of Early Childhood burdens their constitutional rights by refusing to accommodate their religious exercise while allowing exemptions for other providers.

The burdens imposed by the Department's targeted denial of an exemption are not felt only by the Petitioners. They are also experienced by other private schools that seek to operate consistently with a religious mission. There are 382 private schools in Colorado, making up about 16% of the State's schools. Of these, 58% are religious.² The Department's policy will implicate the religious exercise of any of these schools that offer preschool and share the widely held religious convictions about sexuality at issue here.³

² *Distribution of Public and Private Schools: Colorado*, Learning Policy Institute at 3 (March 2025), https://learningpolicyinstitute.org/sites/default/files/2025-03/pub_private_Colorado_MAP.pdf.

³ See Michael Lipka & Patricia Tevington, *Attitudes About Transgender Issues Vary Widely among Christians, Religious 'Nones' in U.S.*, Pew Research Center (July 7, 2022), <https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s/> (reporting strong support among people of different faiths for the belief that "gender is determined by sex at birth").

There are also many families that, because of their faith, share petitioners' beliefs about gender and sexuality and desire a religiously-influenced education for their children. Some indication of this is the finding of a Pew Research Center survey involving a large nationally representative sample of Americans that reported 17% of respondents who are parents of minor children have chosen "homeschooling or private religious schooling instead of public school."⁴ This statistic only captures a portion of the likely interest among parents since the choice of these educational opportunities can require significant outlays of time and money. The average annual tuition at private elementary schools in Colorado is estimated to be \$12,017.⁵ Indeed, as petitioners note, almost 2,000 preschools were involved in the Program initially. Petition at 42a.

These costs are an important reason Colorado adopted a program of financial assistance that allows families to choose options for preschool education that might otherwise be out of reach for financial reasons. The reality, however, is that the value of this welcome public benefit is not available for families that would utilize it to ensure a preschool education that respects their religious beliefs about gender and sexuality.

⁴ Gregory A. Smith, et al., *Decline of Christianity in the U.S. Has Slowed, May Have Leveled Off* Pew Research Center 151 (2025), <https://www.pewresearch.org/religion/2025/02/26/religion-fertility-and-child-rearing/>.

⁵ Melanie Hanson, *Average Cost of Private School Education Data Initiative* (Aug. 29, 2024), <https://educationdata.org/average-cost-of-private-school#colorado>.

This Court has recognized this challenge. The Court recently noted that “financial and other constraints” may deprive some parents of educational options other than public school. *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2351 (2025). Ironically, the Universal Preschool Program could ameliorate this challenge in Colorado by making a wide range of options available without cost. This would allow the State, in the context of early childhood education, to avoid the problem addressed in *Mahmoud* where parents had only an “empty promise” of being able to exercise their right “to direct the religious upbringing of their’ children.” *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213-214 (1972)). Unfortunately, the Department here threatens to withdraw that promise for a set of parents who desire an educational setting that is consistent with their religious convictions about gender and sexuality.

Similarly, in *Espinoza v. Montana Department of Revenue*, this Court struck down a Montana exclusion on private religious schools from participating in a “program to provide tuition assistance to parents who send their children to private schools.” 591 U.S. 464 (2020). The Court noted that the limitation did not only affect the excluded schools but “also bars parents who wish to send their children to a religious school from those same benefits . . . solely because of the religious character of the school.” *Id.* at 476. Later, the Court reiterated that the no-aid “provision puts families to a choice between sending their children to a religious school or receiving [government] benefits.” *Id.* at 480.

The baneful effects of the State's position here go beyond even those experienced by schools and families whose educational options are limited based on their beliefs. The government's preference for secular private schools (and schools whose missions and practices align with the State's preferred beliefs about gender and sexuality) creates a competitive imbalance in the private school sector. If Colorado solely subsidizes private schools that are secular or whose philosophies about sexuality coincide with the State's, only parents who can choose private schooling without financial assistance will be able to enroll their children in schools that have religious missions and practices that align with their faith. This will result not only in decreased options for families but also in decreased enrollments and potential closures of schools with different faith commitments.

This, in turn, will further limit options for families over the long term. The demand for educational options that align with families' religious beliefs about gender and sexuality will likely not be met well into the future.

II. Colorado's differential treatment of religious schools and families is no less problematic because it uses regulations to exclude otherwise eligible education providers from a public benefit rather than simply excluding all religious schools.

This Court's precedent, particularly its decisions striking down restrictions on the use of public benefit

programs to attend religious schools, should control the outcome of this case.

This Court long ago established as a constitutional baseline that governments cannot foreclose educational choices by prohibiting alternatives to public schooling. *Meyer v. Nebraska*, 262 US 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These cases also establish that the right of parents to direct their children's upbringing includes the ability to select teachers and schools they believe will assist them in that responsibility. *Meyer*, 262 U.S. at 400 (referring to a "right of parents to engage [a teacher] to instruct their children"); *Pierce*, 268 U.S. at 535 (holding that choosing a nonpublic school is part of a parent's right and duty to "prepare [their child] for additional obligations" through education).

In *Mahmoud*, the Court made this abundantly clear:

The practice of educating one's children in one's religious beliefs, like all religious acts and practices, receives a generous measure of protection from our Constitution. . . . And this is not merely a right to teach religion in the confines of one's own home. Rather, it extends to the choices that parents wish to make for their children outside the home. It protects, for example, a parent's decision to send his or her child to a private religious school instead of a public

school. *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2351 (2025) (citing *Pierce*, 268 U.S. at 532-535).

More directly relevant to this case are the Court’s decisions related to state laws that prohibited the use of educational funding in private religious schools.

Thus, in *Carson v. Makin*, 596 U.S. 767 (2022), the Court explained “that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” *Id.* at 778. The Court said that while a state “may provide a strictly secular education in its public schools,” the Maine policy challenged in that case involved a decision, “not to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of their choice.” That meant that its policy was “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.” *Id.* at 785.

In *Espinoza*, religious schools were barred “from public benefits solely because of the religious character of the schools.” 591 U.S. 464, 476 (2020). Surely, “religious character” is more than just affiliation, but also includes the teaching and operational decisions of the school prompted by its religious mission and beliefs. Consistent with this, the Court explained that one result of the policy is that schools were being put to “a choice between *being* religious or receiving government benefits.” *Id.* at 480

(emphasis added).

Here, the Department argues that these cases are distinguishable because the challenged State actions in those cases broadly excluded all religious schools as religious schools, while its application of the policy to petitioners did not preclude the involvement in the program by other religious schools willing to accept the Department's gender and sexuality conditions.

That argument is mistaken. First, in *Carson*, Maine allowed some but not all religious schools to participate in the State program. Religious schools could be included as long as they did not present academic material "through the lens of [the religious school's] faith." *Carson*, 596 U.S. at 786-787. This is precisely what the Department is doing here, excluding some religious schools because they operate in ways consistent with their faith on matters of gender and sexuality, on which the Department has a different perspective.

Additionally, this Court has long recognized "a general rule, that what cannot be done directly from defect of power, cannot be done indirectly." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 50 (1825). The precedent described above establishes that a State cannot exclude an otherwise eligible religious observer from a generally available public benefit. Since the State lacks the power to do that directly, it cannot do it indirectly by imposing that exclusion through a regulation targeted at specific religious beliefs and practices or by tying participation in a public benefit to nondiscrimination strings that apply

only to some recipients.

As with the law invalidated in *Carson*, “Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.” *Carson*, 596 U.S. 789.

One final lesson from these cases is also relevant. In *Pierce*, the Court identified a corollary to the principle that the State must provide parents latitude to carry out their right and duty to direct their children’s education—that the State does not have authority to attempt to “standardize” children. *Pierce*, 268 U.S. at 535. Here, too, Colorado should not be able to impose ideological conformity regarding questions of gender and sexuality on parents who may not be able to afford educational opportunities without generally available public support. While the State may not have a mandate to fund private educational opportunities, having determined it will do so, it cannot limit the free exercise of beneficiaries by insisting that they endorse a belief preferred by the State when doing so cuts against their religious principles.

CONCLUSION

Amicus respectfully urges this Court to reverse the decision of the court below.

Respectfully submitted,

William C. Duncan
Sutherland Institute
420 E South Temple, Suite 510
Salt Lake City, UT 84111
(801) 355-1272
bill@sifreedom.org
Counsel for Amicus Curiae

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