

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*
CENTER FOR AMERICAN LIBERTY
IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*¹

The Center for American Liberty (CAL) is a 501(c)(3) non-profit law firm dedicated to protecting free speech and civil liberties. CAL has represented litigants across the country, including in this Court, in cases seeking to vindicate individuals’ religious freedom, free speech, and parental rights, among other things, against oppressive state action. *See, e.g., Regino v. Staley*, 133 F.4th 951 (9th Cir. 2025); *Antonucci v. Winters*, 767 F. Supp. 3d 122 (D. Vt. 2025), *opinion vacated, appeal dismissed*, No. 25-514, 2026 WL 623319 (2d Cir. Feb. 25, 2026); *Doe v. Weiser*, No. 1:24-CV-2185-CNS-SBP, 2025 WL 295015 (D. Colo. Jan. 24, 2025), *appeal docketed* No. 25-1037 (10th Cir. Jan. 31, 2025); *Ateba v. Leavitt*, 133 F.4th 114 (D.C. Cir. 2025), *cert. denied*, 146 S. Ct. 822 (2025). CAL has an interest in ensuring that courts apply the correct legal standard in cases involving these rights.

SUMMARY OF THE ARGUMENT

The promise of Colorado’s universal preschool program (the “Program”) was simple: give every family the freedom to choose the preschool setting best suited for their child. But in practice, that promise rings hollow. The Program conditions a universally available public benefit on faith-based schools’ willingness to abandon the religious commitments that define their

¹ In accordance with Supreme Court Rule 37, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made such a monetary contribution.

educational mission. In turn, the Program forces parents who want to choose those schools to surrender either their faith or the benefit. Colorado has thus turned a program meant to expand educational choice into one that shrinks it. Families of faith are denied full participation in a system they help fund, even as the Program tolerates a wide range of secular preferences, like income level, employer ties, language, and community focus. That asymmetry produces the very state-driven standardization this Court has rejected.

Those failures fall most directly on parents, whose constitutional right to direct the upbringing and education of their children has been repeatedly reaffirmed by this Court. This Court has long held that children are not “mere creature[s] of the State” and that parents have the “right, coupled with the high duty,” to direct their children’s upbringing and education. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925). When the government conditions public benefits on the abandonment of religious exercise, it not only violates the Free Exercise Clause but also undermines the parental autonomy that anchors a pluralistic society. As this Court recently reaffirmed, the State may not condition access to an important public educational benefit by forcing parents to choose between financial hardship and adherence to their religious convictions. *See Mahmoud v. Taylor*, 606 U.S. 522, 561–62 (2025). The Program imposes that same kind of unconstitutional choice, triggering strict scrutiny that Colorado cannot satisfy. For families like Daniel and Lisa Sheley, whose faith directs them toward a Catholic education for their children, that burden is not abstract but real.

The Program is unconstitutional. Colorado did not build a uniform, state-run preschool system. It built a parent-directed, mixed-delivery system that preserves secular provider diversity while treating religious diversity as disqualifying. That structure is not generally applicable vis-à-vis religion. Because excluding religious schools reduces provider diversity and family choice rather than advancing equal access—and because Colorado already ensures families are informed about providers’ admissions practices—the Program fails strict scrutiny.

CAL urges this Court to reverse the decision of the court of appeals. Doing so will protect both religious liberty and parents’ right to choose diverse educational paths for their children.

ARGUMENT

I. MAXIMIZING PARENTAL CHOICE IN A MIXED-DELIVERY SYSTEM BENEFITS ALL FAMILIES

Parents—not the state—are the primary decisionmakers over their children’s upbringing and education. This foundational principle underpins the Constitution’s protection of family autonomy and demands that government regimes like the Program expand, rather than restrict, families’ options. By rigidly enforcing the equal-opportunity requirement without providing exemptions for religious exercise, the Program undermines this principle, artificially limiting the “mixed delivery system” it promised and harming families in the process.

The Court should reverse the decision below to restore the Program’s intended breadth, aligning it with

longstanding constitutional commitments to parental choice, religious liberty, and educational pluralism.

A. Parents Have the Fundamental Right to Direct the Upbringing and Education of Their Children

This Court has long recognized that parents hold the primary right to direct the upbringing and education of their children. In *Meyer v. Nebraska*, the Court held unconstitutional a prohibition on the teaching of foreign languages to children because it interfered with “the power of parents to control the education of their own.” 262 U.S. 390, 401 (1923). Two years later in *Pierce*, this Court struck down an Oregon statute requiring parents to send their children to public school, explaining that “[t]he child is not the mere creature of the State” and that parents have both the “right [and] the high duty” to guide their children’s education. 268 U.S. at 535.

This Court has reaffirmed these principles repeatedly. In *Wisconsin v. Yoder*, the Court held that Amish parents could not be forced to send their children to school beyond the eighth grade, noting that “the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” 406 U.S. 205, 232 (1972). In *Troxel v. Granville*, a plurality of the Court recognized the parental right as “perhaps the oldest of the fundamental liberty interests recognized by this Court.” 530 U.S. 57, 65 (2000) (plurality op.). Last year, in *Mahmoud*, this Court noted that “the rights of parents to direct ‘the religious upbringing’ of their children . . . extends to the choices that parents wish

to make for their children outside the home” and “follow[s] those children into the public school classroom.” 606 U.S. at 547 (citations omitted). And most recently, in *Mirabelli v. Bonta*, the Court reiterated that “parents—not the State—have primary authority with respect to the upbringing and education of children” and explained that this includes the right to be free from the “unconsented facilitation of a child’s gender transition” by school officials. 607 U.S. 492, 496–97 (2026) (citation omitted).

Together, these precedents establish that parental choice in education is not a matter of state grace or policy preference but a constitutional imperative. They reject the idea that the state may homogenize education by excluding disfavored viewpoints or institutions, as such “standardiz[ation]” of children threatens the diversity that fosters a free society. *Pierce*, 268 U.S. at 535; *see also Yoder*, 406 U.S. at 231–32 (emphasizing that parental rights protect “traditional concepts of parental control over the religious upbringing and education of their minor children”). By effectively excluding religious schools from the Program based on a so-called equal-opportunity requirement that still allows secular carve-outs—such as preferences for low-income families or employees’ children, *see* Colo. Rev. Stat. § 26.5-4-205(1)(b)(II), (2)—Colorado elevates uniformity over diversity, substituting bureaucratic judgment for parental discretion and eroding the constitutional commitment to family autonomy.

These precedents also reveal that this Court views some burdens of parental religious exercise as sufficient to trigger strict scrutiny. As *Mahmoud*

confirmed, when the State burdens the parental right to direct a child’s religious upbringing—including by conditioning a public benefit on its surrender—a court “need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny.” 606 U.S. at 564. That principle is decisive here. First, it confirms that the burden on the Sheleys’ ability to educate their children in the Catholic faith is constitutionally significant apart from Colorado’s secular exemptions. Second, the Program’s parent-choice design informs the general-applicability inquiry. Colorado’s asserted interest is equal access within a parent-directed preschool program; the question is therefore whether the secular preferences Colorado allows burden families’ access to chosen providers in the same way that excluding religious providers burdens religious families. They plainly do.

Respondents argue that Colorado’s equal-opportunity requirement advances child welfare and protects against emotional harms. *See* Appellees’ Br. at 45–49, *St. Mary Cath. Par. in Littleton v. Roy*, 154 F.4th 752 (10th Cir. 2025); Resp. Br. in Opp. at 5, 26–27, *St. Mary Cath. Par. in Littleton v. Roy*, No. 25-581 (U.S. Mar. 2, 2026). But this argument overlooks the fact that there is no evidence that granting religious exemptions from rules governing day-to-day operations causes such harms. Indeed, in a related case, Colorado was preliminarily enjoined from enforcing those rules against a private Christian academy for eight months, yet it was unable to muster a shred of evidence of resulting injury to anyone. *See* Appellee Br. at 52, *Darren Patterson Christian Acad. v. Roy*, No. 25-1187 (10th Cir. May 8, 2025).

Respondents' argument also ignores how parental rights precedents prioritize family choice over state-imposed norms. Indeed, *Yoder* teaches that even compelling state interests like the education of children must yield to parents' religious exercise unless the state's efforts to further those interests are narrowly tailored. And the State cannot satisfy that standard where, as here, secular exceptions abound. 406 U.S. at 214–25. Ensuring broad participation in the Program affirms this commitment to parental rights, allowing parents to select environments that nurture their children's holistic development, including spiritual growth.

B. The Constitution Favors Expanding, Not Narrowing, Educational Options

The Constitution not only protects parental rights but also requires that government programs that broaden educational choices through inclusion of private schools must be open to religious options, thereby honoring schools' free exercise rights and empowering families.

In *Zelman v. Simmons-Harris*, this Court upheld Ohio's school voucher program, which included religious schools, because it provided "genuine choice among options public and private, secular and religious[.]" leaving decisions to parents rather than the state. 536 U.S. 639, 662 (2002). The Court emphasized that such neutral, parent-directed programs reinforce liberty and promote equality by expanding access for low-income students while avoiding Establishment Clause concerns because funds flow to religious schools only through families' independent choices.

Id. at 652–53, 662–63. *See also id.* at 681 (Thomas, J., concurring) (noting that the “inclusion of religious schools” aids in “expanding the reach of the scholarship program” and “increasing educational performance and opportunities”). *Zelman* built on precedents like *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), which permitted state aid to religious institutions when distributed through private choices, underscoring that inclusion of faith-based options enhances, rather than undermines, constitutional values. 536 U.S. at 650–52.

Espinoza v. Montana Department of Revenue went further. In *Espinoza*, Montana created a scholarship program funded by tax credits but barred parents from using those funds at religious schools. 591 U.S. 464, 468–70 (2020). This Court struck down that prohibition, holding that once the state chooses to fund private education, “it cannot disqualify . . . private schools solely because they are religious.” *Id.* at 487. As this Court explained, it has “long recognized the rights of parents to direct ‘the religious upbringing’ of their children . . . by sending their children to religious schools.” *Id.* at 486 (quoting *Yoder*, 406 U.S. at 213–214). And the no-aid provision cut against that right by “penaliz[ing]” parents’ constitutionally protected choice to send their children to religious schools “by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one.” *Id.* Thus, this Court held, “[a] provision [that] puts families to a choice between sending their children to a religious school or receiving such

benefits [from the state]” violates the Free Exercise Clause. *Id.* at 480.

More recently, *Carson v. Makin* went further still. In *Carson*, Maine provided tuition assistance for students in rural areas without public high schools but barred funds from being used at “sectarian” schools that integrated faith into their curriculum. 596 U.S. 767, 773–74 (2022). This Court held that the prohibition was unconstitutional because it discriminated against schools based on the religious use of funds, not just their religious status. *Id.* at 784–87. *Carson* thus made clear that the Free Exercise Clause forbids states from requiring religious schools to secularize their policies or programs as a condition of participating in a neutral public benefit. *Id.*

Yet that is exactly what Colorado demands: religious schools must strip away their faith commitments to receive Program funds. But those commitments are not incidental features a school can shed on command. As this Court has recognized, “[t]he religious education and formation of students is the very reason for the existence of most private religious schools.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738 (2020). To condition funding on religious schools’ abandonment of their faith commitments does not just regulate them—it asks them to stop being religious schools. That kind of forced secularization is indistinguishable from outright exclusion. *See Carson*, 596 U.S. at 787–88.

Respondents resist that conclusion, insisting that the Program “welcomes” faith-based providers and does not formally exclude religious schools. J.A.113.

But the constitutional inquiry cannot turn on whether the State expressly excludes religious schools or instead conditions participation on their willingness to abandon religious exercise. A State may not accomplish indirectly through eligibility conditions what it could not do directly through an express exclusion. If a State creates a public-benefits program that includes private educational providers, it cannot require religious schools to surrender the religious beliefs and practices that define their educational mission as the price of equal participation.

That is especially true where, as here, the Program is parent-directed. The funds reach providers because parents choose them. *See* Pet.App.193a, Pet.App.59a–60a. Colorado therefore does not merely burden religious institutions in the abstract; it burdens the families who seek those institutions precisely because of their religious character. A program designed to maximize family choice cannot treat religious choices as available only when religious schools cease to operate consistently with their faith. Such a rule leaves families with religious labels but not religious options.

Together, *Zelman*, *Espinoza*, and *Carson* confirm that programs that maximize options based on parental choice bolster parental liberty while avoiding governmental coercion and establishmentarianism. These cases mark the two halves of a single principle. Under the Establishment Clause, a State may include religious options in a parent-directed program, because aid that reaches religious schools through families' independent choices raises no establishment concern. And under the Free Exercise Clause, once a State chooses to fund private education, it may not

exclude otherwise eligible schools because of their religious exercise. A program that maximizes parental choice may therefore welcome private providers but, having done so, it may not shut the door on religious ones.

Here, the Program was enacted to provide “universal” access to preschool through a “mixed delivery system” that includes both public and private schools. Colo. Rev. Stat. § 26.5-4-205(1)(b); Pet.App.193a. Yet by excluding religious schools that cannot comply with the equal-opportunity requirement in connection with their day-to-day operations without violating their faith, Colorado narrows participation in the Program, reducing parental choice and contradicting the principles set forth in *Zelman*, *Espinoza*, and *Carson*. Instead of accommodating religious schools, Colorado has chosen to weaponize its equal-opportunity requirement to condition funding on the surrender of religious identity. That is irreconcilable with the Constitution’s promise that parents remain free to direct their children’s education, including through faith-based schools, on equal terms with their secular peers.

Colorado contends that the Program’s requirements are neutral and generally applicable, thereby preserving the Program’s integrity without favoring or disfavoring religion. *See* Appellees’ Br. at 18–38, *St. Mary*, 154 F.4th at 752; Resp. Br. in Opp. at 32, *St. Mary Cath. Par. in Littleton v. Roy*, No. 25-581 (U.S. Mar. 2, 2026). But even putting *Mahmoud*’s impact on the triggering conditions for strict scrutiny to the side, this contention ignores how the Program’s categorical preferences tolerate secular departures from equal

access while refusing comparable accommodation for religious exercise. True general applicability expands choices, rather than constricting them, ensuring parents—not state officials—select what best suits their children. Allowing secular carve-outs while simultaneously effectively closing the Program’s doors for faith-based schools undermines the very equality the Program purports to offer, particularly for underserved families reliant on local faith-based schools.

C. Excluding Religious Schools Harms All Families, Not Just Religious Ones

Effectively excluding religious preschools from the Program does not protect vulnerable families and children; instead, it harms them by shrinking the overall pool of options in a program meant to be inclusive. Families with LGBTQ children, for instance, already enjoy abundant affirming preschool choices across Colorado, from public district programs with explicit inclusivity policies to secular private schools and nonprofits dedicated to diversity.

The Denver Preschool Program—which partners with over 270 preschools—works with organizations like Denver Pride to highlight LGBTQ-friendly environments and resources. *See Promoting Access and Opportunity Through DPP’s Partnership with Denver Pride*, Denver Preschool Program, (May 15, 2025), available at <https://perma.cc/WQN4-YZBX>. Districts like Cherry Creek provide support for LGBTQ youth, ensuring access without reliance on religious schools. *LGBTQ+ Resources*, Cherry Creek Schools, <https://perma.cc/3BD9-GJ2V>. By contrast, only 40 of the over 2,000 preschools participating in the

Program statewide are religious. Pet.App.107a, 303a; J.A.516; J.A.524. This is an exceedingly small number of religious options for the 41,000 children in the Program. *See* Schimke, Ann, *Inside Colorado’s high-stakes preschool lawsuit pitting religious liberty against LGBTQ rights*, Chalkbeat Colorado (Sept. 19, 2024), available at <https://perma.cc/VN8W-VT7V>.

Allowing faith-based schools to participate in the Program fully would not diminish choices for parents in any way; rather, it would expand the system for everyone. Excluding faith-based schools, by contrast, reduces the pool of available options. The impact of this reduction is not simply about the availability of options, because a school’s religious character is not incidental but, for religious parents, the very reason for the choice. For these parents, forming their children in the faith is not a preference but a religious obligation. For example, Catholic teaching makes parents the first educators of their children, *see* Catechism of the Catholic Church § 2223, and directs them to “entrust their children to those schools which provide a Catholic education,” Code of Canon Law c. 798. These duties are rooted in the scriptural command that parents “bring [their children] up in the training and instruction of the Lord.” Ephesians 6:4. This Court has recognized that the obligation to raise one’s children in the faith is shared across religious traditions. *Our Lady*, 591 U.S. at 754 (“Religious education is vital to many faiths practiced in the United States.”). *See also* Pet.App.285a–286a (letter from the coalition of providers who sought a religious exemption from the Department, which included Catholic, Lutheran, and Jewish preschools). Religious schools exist to help parents—especially working parents—

fulfill that obligation. Excluding those schools therefore burdens not a lifestyle choice but the exercise of religion itself.

The broader harm from this decrease in opportunities is evident in similar programs nationwide, where nondiscrimination mandates have discouraged religious participation, limiting options for low-income families and exacerbating disparities. In states like Michigan and New Jersey, requirements to secularize curricula or prohibit religious activities during funded hours force schools to choose between identity and funding, leading to pervasive non-participation where less than 31% and 29% of 4-year-olds in each state, respectively, are being served. Garver, Karin, et al., *State Preschool in a Mixed Delivery System Lessons From Five States*, Learning Policy Institute (Mar. 15, 2023) at 3–4, available at <https://perma.cc/U284-GAGX>. In contrast, states like West Virginia, which permit faith-based schools and instruction, participation rates are significantly higher (56% in 2023). *Id.* In short, policies that force religious schools to abandon their faith can cut religious school involvement by significant margins, which necessarily affects thousands of preschool-aged children and their families throughout the income spectrum. This not only limits parental choice but perpetuates inequality, as low-income and rural families lose affordable, community-rooted options.²

² A December 2020 national survey “found that 31% of households with a single parent or two working parents used center-based care, and over half (53%) of these families used one that was affiliated with a faith organization.” Morris, Suzann, Smith, Linda, *Examining the Role of Faith-Based Child Care*,

Pet.App.91a; J.A.1043. In those areas, exclusion leaves parents—religious and non-religious alike—with no realistic alternatives.

Colorado’s focus on uniform protections for LGBTQ children overlooks this reality, assuming, without evidence, that inclusion of religious schools inherently harms LGBTQ children. That assumption defies logic. After all, even if religious schools with traditional religious commitments are included in the Program, families with LGBTQ children can continue to choose schools with “LGBTQ-friendly” policies if that is what they want.

This Court’s decision in *Fulton v. City of Philadelphia* underscores why Colorado’s exclusionary approach is not necessary to protect LGBTQ families. There, even though Catholic Social Services (CSS) could not certify same-sex foster parents for religious reasons, “no same-sex couple has ever sought certification from CSS” and there were multiple other agencies in the City that stood ready to serve all families. 593 U.S. 522, 529–30 (2021). On that record, the Court rejected Philadelphia’s insistence that excluding CSS was necessary to safeguard access, emphasizing that CSS sought only “an accommodation that will allow it to continue serving the children of Philadelphia,” not the ability to interfere with anyone else’s eligibility. *Id.* at 541. The same logic applies here: Colorado already offers thousands of preschool options that will provide LGBTQ families environments they want, and allowing a small number of faith-based preschools to participate does not limit any family’s

Bipartisan Policy Center (May 2021) at p. 5, available at <http://bit.ly/46Sa7OT>.

ability to choose a different environment. Exclusion does not accomplish protection but contraction, reducing the overall number of seats available to *all* families in a program that purports to be “universal.”

Respecting parental rights by expanding the choice of preschools enhances child welfare because families, not states, are best positioned to choose “safe and welcoming” environments for their children, and diverse options foster empathy and long-term benefits like higher graduation rates and reduced inequality. Pet.App.187a. Colorado’s own experience—with over 2,000 schools serving diverse needs—confirms that inclusion need not conflict with access. Excluding schools like St. Mary’s and St. Bernadette’s only contracts the system, contravening the Program’s goals and constitutional principles.

* * *

In sum, the Constitution does not permit the state to shrink family options and impose homogeneity based on religion. By effectively driving out religious schools, Colorado narrows the range of choices available to parents and substitutes families’ judgment with that of the state. Reversing the court of appeals’ ruling will ensure the Program fulfills its purpose: to expand opportunities for all families by affirming parental autonomy and honoring educational diversity.

II. THE EQUAL-OPPORTUNITY REQUIREMENT LACKS GENERAL APPLICABILITY, UNDERMINING PARENTAL RIGHTS TO EDUCATIONAL CHOICE

Colorado defends the equal-opportunity requirement as a uniform rule that universal access demands. But the Program that Colorado actually built is not uniform. It is a mixed-delivery system designed around provider diversity and parental choice, in which the State lets more than 2,000 preschools serve the communities and missions that make them distinctive. Pet.App.69a. Colorado thus already tolerates a broad range of secular departures from equal access; it only forbids the religious ones. Because the Free Exercise Clause does not permit a State to treat comparable secular conduct more favorably than religious exercise, that asymmetry defeats general applicability and triggers strict scrutiny. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam); *Fulton*, 593 U.S. at 533–534. The Constitution does not require religious exclusion. That is a choice Colorado has made.

The “principle underlying the general applicability requirement” is that the government may not create a regulatory regime that allows it to “impose burdens only on conduct motivated by religious belief.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). Laws can violate this principle in two ways. First, “[a] law is not generally applicable if it invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” *Fulton*, 593 U.S. at 533 (cleaned up). Second, “[a] law . . . lacks general applicability if it prohibits religious conduct while

permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534.

The Program fails the second principle. By statute and regulation, the Program authorizes preschools to grant enrollment preferences based on income level, employer ties, language ability, and neighborhood or community affiliation, among other secular criteria. Colo. Rev. Stat. § 26.5-4-205(1)(b)(II), (2); Pet.App.8a, 9a, 35a–37a, 347a. These preferences are the norm, not the exception: of the roughly 2,000 preschools participating in the Program, more than half impose at least one enrollment preference. Pet.App.69a. Colorado tolerates each of these departures from equal access because it has judged the secular interest behind the departure worth accommodating. Yet it refuses that same accommodation when a preschool's enrollment practices reflect a family's religious commitment. That is precisely the asymmetry *Fulton* and *Tandon* forbid: a law "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; *see also Tandon*, 593 U.S. at 62 (concluding that regulations are not generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise" (emphasis in original)).

Comparability is measured against Colorado's asserted interest, not the State's label for the conduct in question. And that interest cannot be understood apart from whose choice it exists to protect. The Program lets parents, not the State, choose the preschool that fits their family. Colorado has defined that

interest as equal opportunity to enroll in the preschool that best meets a child's needs. A religious preschool that asks families to support its religious mission does not burden that interest any more than a secular preschool that turns away a child because her family earns too much, lacks an employer tie, or falls outside the community the provider was designed to serve. The burden on the stated interest is identical either way: some families cannot use that specific provider.

Colorado resists this conclusion by insisting that the equal-opportunity requirement itself is non-waivable and that it has no discretion to except any provider from it. *See* Appellees' Br. at 25–30, *St. Mary*, 154 F.4th at 752. That framing is too narrow. The Free Exercise Clause does not turn on whether Colorado has attached the word “exception” to a particular line of its statute. Instead, the right question is whether the Program, in operation, permits secular interests to justify departures from equal access while treating religious exercise as uniquely beyond accommodation. *Tandon*, 593 U.S. at 62. The Program does exactly that: it gives providers discretion to depart from equal access for secular reasons and withholds that same discretion when the reason is religious. That asymmetry produces underinclusiveness fatal to general applicability. Colorado has “fail[ed] to prohibit nonreligious conduct that endangers [the state's] interests in a similar or greater degree than [the religious conduct] does.” *Lukumi*, 508 U.S. at 543.

These preferences exist only because Colorado recognizes that a parent-choice program works best when providers may serve the communities and missions for which families seek them out. A preschool

built around language immersion, disability services, an employer, or a neighborhood, to give a few examples, offers something distinctive that parents may reasonably value. Religious schools should be treated no differently. A Muslim preschool that partners with parents to educate their children in the faith is as much a distinctive educational community as any secular provider organized around a specialized mission. Colorado's interest in equal access would not be burdened by accommodating those parents any more than the secular preferences the State permits. Nor would granting that accommodation deny any family the ability to educate their child. What Colorado refuses to tolerate, then, is not provider diversity but *religious* provider diversity. This singling out of religious exercise for uniquely unfavorable treatment defeats general applicability.

Colorado answers that the identified exceptions are not exceptions at all because a legislature may protect low-income families from income discrimination and children with disabilities from disability discrimination without also protecting religion. But that response misframes the inquiry. Whether the income and disability preferences are called "exceptions" or, alternatively, built into the statute's structure, the Free Exercise Clause asks the same question: does the secular conduct Colorado permits burden its asserted interest in a way comparable to the religious exercise it forbids? *Tandon*, 593 U.S. at 62; *Fulton*, 593 U.S. at 534. And comparability is "judged against the asserted government interest that justifies the regulation." *Tandon*, 593 U.S. at 62. Colorado has defined that interest as equal access to the preschool each family chooses. A religious provider does not harm

that interest any more than a secular provider that turns a four-year-old away because her family earns too much or because she lacks a qualifying disability. The labels differ; the burden on the stated interest does not. That a State may, in other settings, enact protections that run in only one direction does not entitle it to deem secular departures from equal access tolerable while treating religious ones as categorically forbidden.

Colorado has also tried to avoid its underinclusiveness problem by insisting the Program can be carved into components so that access-oriented preferences live on one side of the statute while nondiscrimination rules live on the other. But whether exceptions appear in a different subsection of a statute is not dispositive. This Court's cases look to how the law operates, not merely how the State organizes its code. *See Lukumi*, 508 U.S. at 535 (explaining that "the effect of a law in its real operation is strong evidence of its object"). If Colorado can tolerate comparable burdens on its stated interest for secular reasons anywhere in the Program, it must extend the same regard to religious exercise.

Bates v. Pakseresht is instructive. There, the Ninth Circuit reversed the denial of an Oregon policy under which individuals could not be certified to adopt foster children unless they agreed to "not discriminate" against transgender identifying foster children by affirming children's gender identity and facilitating their "gender-affirming" medical treatment. 146 F.4th 772, 777 (9th Cir. 2025). The Ninth Circuit concluded that the policy was not generally applicable because, just as in the Program here, there was no "formal set

of criteria” by which Oregon would assess what practices did and did not comport with its antidiscrimination provision. *Id.* at 797. Just as Colorado does, Oregon argued that other provisions in the statute did not operate as exemptions and were not relevant to the antidiscrimination statute’s general applicability analysis. *See* Appellees’ Br. at 18–21, *Bates*, 146 F.4th at 772. The Ninth Circuit disagreed, concluding that these sorts of non-exemptions served to “incorporate[] ad hoc decision making based on non-objective criteria.” *Bates*, 146 F.4th at 797. That regime “pos[es] an undue risk of case-by-case discrimination on the basis of religion.” *Id.* Applying that reasoning here, because the exemptions both within and surrounding the equal-opportunity requirement give context to “[Colorado’s] conception” of what constitutes discrimination, they grant “ample discretion” to Colorado, thereby rendering the equal-opportunity requirement not generally applicable. *Id.*

In short, the Program (1) tolerates categorical secular carve-outs that burden equal access, (2) builds in discretion to relax its requirements for secular ends, and (3) tries to avoid scrutiny by compartmentalizing the scheme into different, unrelated components. Under this Court’s precedent, that does not make the Program generally applicable.

III. THE PROGRAM FAILS STRICT SCRUTINY

The State may not compel families to abandon the religious upbringing of their children merely because it holds a different vision of education. *Yoder*, 406 U.S. at 214–15. Nor, having chosen to fund private education, may it penalize parents who select religious

instruction “because of their religious exercise.” *Carson*, 596 U.S. at 781. Because strict scrutiny applies, Colorado must show that excluding Petitioners’ preschools “serve[s] a compelling interest and [is] narrowly tailored to that end.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 532 (2022). It cannot do either.

A. Colorado Lacks a Compelling Interest in Denying Petitioners an Accommodation

The relevant question is not whether Colorado has a compelling interest in enforcing the equal-opportunity requirement in the abstract. Rather, it is whether Colorado has a compelling interest in denying *Petitioners* an accommodation from it. *Fulton*, 593 U.S. at 541. It does not. Indeed, Colorado has not treated its asserted interest as compelling. It grants categorical preferences based on income, employer ties, language, and community affiliation—and it retains discretion to grant still more through the catchall provision—all without any showing that these secular departures produce the harm the equal-opportunity requirement supposedly guards against. *See supra* Section II. The “creation of a system of exceptions . . . undermines [the government’s] contention that its non-discrimination policies can brook no departures.” *Fulton*, 593 U.S. at 542. Indeed, when Colorado was preliminarily enjoined for eight months from enforcing these same rules against a different Christian preschool, it could not identify a single instance of resulting harm to any family. *See supra* Section I.A (discussing *Darren Patterson Christian Academy*). That failure is decisive because “speculation is insufficient to satisfy strict scrutiny.” *Fulton*, 593 U.S. at 542.

The burden the Program imposes on families sharpens that conclusion. This is not a case where the State conditions a benefit on the surrender of some minor preference. Rather, families must abandon “the religious upbringing” of a four-year-old child. *Mahmoud*, 606 U.S. at 547. For families like Daniel and Lisa Sheley, whose faith requires them to provide a Catholic education to their children, that is a significant burden on their religion. Only “the gravest abuses, endangering paramount interests,” can justify a burden of that character. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). And “[t]o condition the availability of benefits upon a recipient’s willingness to . . . surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017) (cleaned up). A generalized interest in administrative uniformity is not the kind of paramount interest that can justify imposing that choice on parents exercising a fundamental right, particularly where, as here, accommodation would help rather than hurt the interest Colorado invokes. As in *Fulton*, “maximizing” the number of available preschool options is an “important goal,” but “if anything, including” Petitioners’ preschools “seem[s] likely to increase, not reduce,” the choices available to families. *Fulton*, 593 U.S. at 541–42.

B. Colorado Has Not Used the Least Restrictive Means Available

Even if Colorado could identify a compelling interest, it has not shown that excluding Petitioners is necessary to serve it. Under strict scrutiny, the government must show that its actions were narrowly

tailored and the least restrictive means available. *Holt v. Hobbs*, 574 U.S. 352, 365 (2015). Colorado has not carried that burden.

Colorado's asserted interest must be judged against the Program it actually created. Colorado did not build a uniform, state-run preschool system. It built a mixed-delivery system that relies on public, private, secular, and religious providers, one that already tolerates categorical enrollment preferences for more than half of its roughly 2,000 participating preschools. *See supra* Section II. That existing accommodation of secular interests is strong evidence of a less restrictive alternative. If the Program's equal-access goals can coexist with preferences based on income, employer ties, and community affiliation, Colorado cannot show that an equivalent religious accommodation would be any less compatible with those goals.

The Program's own architecture confirms the point. Families first sign up to receive UPK benefits through an online portal. Pet.App.64a. The UPK portal already discloses each preschool's admissions preferences directly to families, "so that families understand" and can "make an informed choice about the provider[s]" they select. J.A.335; J.A.247-248. Parents relying on that portal already self-select into or out of preschools with income limits, employer ties, language requirements, and community affiliations. Colorado does not need to bar a provider from the Program to protect a family that would rather choose differently. A religious preference is no different. A family uninterested in a Catholic preschool's mission will not select it, and a family that wants that mission should not need the State's permission to choose it.

Because the Program already relies on parents, not Colorado, to sort themselves, excluding religious preschools is not the least restrictive path.

A regime that shrinks religious options in a program built to expand parental choice is not narrowly tailored. It is the opposite. It reduces access by driving out the very providers whose distinct character is why families choose them, while leaving Colorado's preferred secular carve-outs untouched.

The stakes of this case extend beyond this Program. If a State may define its preferred ideological commitments as baseline "quality" standards, declare them nonwaivable, and then treat every religious accommodation as special treatment while granting secular ones freely, the Free Exercise Clause offers little protection to families of faith. "Universal" cannot mean "universal except for families of faith." This Court has long held that the State may not use its regulatory power to "standardize its children" by compelling families and schools to embrace the government's preferred orthodoxy. *Pierce*, 268 U.S. at 535. The Program violates that rule, conditioning a universally available benefit on families' willingness to set aside their faith.

The Constitution requires more than nominal access for religious schools and families. It requires that States not structure public-benefits programs to sideline religious education or penalize parents who want to choose it. Colorado's rule narrows parental choice, reduces provider diversity, burdens religious exercise, and converts a universal preschool benefit into a mechanism for enforcing state-approved views.

Because that rule is incompatible with the Free Exercise Clause and the constitutional protection of parental authority, the judgment below should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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