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Religious Schools Déjà Vu at the Supreme Court

Colorado makes families with traditional values choose: their beliefs or $6,300 per child?

By The Editorial Board
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The Colorado state flag THOMAS PEIPERT/ASSOCIATED PRESS

This is getting old. Three times in the past decade the Supreme Court has vindicated religious schools excluded from state programs. Colorado still needs a remedial lesson. The state's "universal" pre-K plan lets religious schools participate only if they agree to enroll families who oppose them on sex and gender. On Tuesday the Justices can reinforce religious liberty in *St. Mary Catholic Parish v. Roy*.

The Colorado program, launched in 2023, pays for 15 hours of preschool a week, about $6,300 a year. Providers are subject to what the state calls "equal-opportunity requirements," including enrollment without regard to religious affiliation, gender

identity or sexual orientation. Two Catholic parishes, two parents, and the Denver archdiocese argue they're being denied funds "solely on account of their religious exercise."

The Catholic schools ask new parents to sign a statement on "Community Beliefs and Commitments," as well as to refrain from publicly undermining the church. Colorado denied them an exemption from its enrollment rule. But does the First Amendment demand one? If that question prompts déjà vu, recall the High Court's 2022 ruling in *Carson v. Makin*, rebuking Maine for unconstitutionally barring religious options in a state tuition program.

Colorado insists this is different, because it doesn't target religion explicitly. Its program has included "more than forty faith-based providers," and schools "may continue to teach and shape their curricula according to their faith." The state says it has neutral nondiscrimination rules, while St. Mary wants tax dollars "without complying with those conditions—by, for example, excluding preschoolers based on their parents' sexual orientation."

Yet as St. Mary argues, the fact that Colorado gladly funds some faith-based schools, not others, makes things worse. Religious families get money for education—if their church agrees with the government on gay marriage and gender transitions. But if a pastor has theological objections? The choice is to bend or lose out, as the state offers parents $6,300 to go elsewhere.

This isn't First Amendment pluralism. The Catholic schools say applying *Carson*'s logic is enough. That's what the Tenth Circuit Court of Appeals didn't do. Instead it cited an older ruling, *Employment Division v. Smith* (1990), which said the Constitution doesn't require religious exemptions to neutral laws that generally apply to all. For the record, the Catholic schools also argue Colorado fails that test.

Who knows what five Justices might have an appetite to do with *Smith*, but these petitioners asked to argue for overturning it, and the Court declined that question. Meantime, the recent trio of school cases looms large. In 2017 the Justices said Missouri can't withhold playground money from a Lutheran preschool (*Trinity*

Lutheran). In 2020 they said Montana can't block tax-credit funding to religious schools (*Espinoza*). Then Maine lost *Carson*.

Notably, "the record" in Colorado "is devoid of a single instance of an LGBTQ family's seeking admission to any one of Petitioners' preschools," the archdiocese's brief says, and being upfront about the faith "helps avoid unnecessary conflicts." As far as it knows, no preschooler in its care has asserted a transgender identity. If that happens, it promises to proceed with discretion and prayer, while explaining to the family that it can't accommodate on pronouns, bathrooms or uniforms.

By the way, Maine has since passed nondiscrimination rules akin to Colorado's, meaning some religious schools are still excluded. The Justices have said three times lately that states can't deny religious families the benefits given to everyone else. Once more, with gusto.

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