

No. 25-1187

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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DARREN PATTERSON CHRISTIAN ACADEMY,  
*Plaintiff-Appellee,*  
v.  
LISA ROY, ET AL.,  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the District of Colorado  
Case No. 1:23-cv-01557  
Honorable Daniel D. Domenico

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**UNOPPOSED BRIEF OF *AMICI CURIAE* THE  
COLORADO ASSOCIATION OF PRIVATE SCHOOLS IN SUP-  
PORT OF PETITIONERS AND AFFIRMANCE**

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Andrew M. Nussbaum  
First and Fourteenth PLLC  
2 N. Cascade Ave., Suite 1430  
Colorado Springs, CO 80903  
(719) 428-4937  
andrew@first-fourteenth.com  
*Counsel for Amici*

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## INTRODUCTION<sup>1</sup>

The Colorado Universal Preschool Program was enacted to expand access to high-quality preschool for all of Colorado’s families. The Program’s design is a “mixed-delivery” system that creates a subsidy that follows a family to their chosen preschool, whether traditional public, charter, or private, including faith-based private schools. The virtue of a mixed-delivery system is that it expands educational access by giving Coloradoans a choice between as many high-quality preschool options as possible. Every family can find a preschool that serves their academic needs while respecting their culture, traditions, and faith.

Yet as implemented by Defendants, the Universal Preschool Program effectively undermines the purpose of a mixed-delivery system by prohibiting many religious schools and communities from participating. The Program does so by forbidding families to use their Program benefit at religious schools that make operational decisions on the basis of religion; requiring religious preschools to ascribe to an “Equal Opportunity

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<sup>1</sup> Conferral statement: All Parties have consented to the filing of this brief pursuant Fed. R. App. P. 29(A)(2).

Mandate,” parts of which violate the beliefs of many faiths; and creating a “congregation” exemption that favors certain denominations over others.

*Amicus* represents a mélange of religiously diverse school who together file this *amicus* brief to emphasize the import of religious diversity within the framework of a mixed-delivery system. Left uncorrected, Defendants’ policies implementing the Program amount to a religious penalty and tax on the large number of Coloradoans of faith who want to send their children to religious preschools.

### **STATEMENT OF INTERESTS OF AMICUS CURIAE<sup>2</sup>**

The Colorado Association of Private Schools is a statewide association serving Colorado private schools. On behalf of its member schools, CAPS supports the right of parents to educate their children in schools of their choice, promotes the vital role of private schools in American education, and educates others about these schools’ significant contributions to the common good. CAPS member schools espouse a variety of faiths,

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<sup>2</sup> No counsel for a party authored this brief in whole or in part; no one, other than Amicus and its counsel, made a monetary contribution for its preparation or submission; and all parties have consented to its filing.



doctrines, and educational models. All share the association's belief that all Colorado families should have access to private educational options in early childhood through 12th grade that align with their needs and values, and that all Colorado private schools should remain free, independent educational actors able to determine how best to provide educational excellence consistent with their beliefs in all aspects of their operations. Amicus has a strong interest in ensuring that its member schools, regardless of faith, are able to participate in Colorado's Universal Preschool Program and compete on a level playing field with other preschool providers.

## ARGUMENT

**I. The Colorado legislature chose a “mixed-delivery system” for its Universal Preschool Program. The religious diversity of Amicus’s members exemplifies the qualities of choice and pluralism such a system prizes.**

**A. Mixed-delivery systems emphasize choice so families can find a school that reflects their communities, traditions, and beliefs.**

The general assembly has numerous policy options when it devises a publicly funded educational program. It can directly fund and operate schools, as is the case for traditional district-run public schools. Colo. Const. Art. IX, sec. 2. It can use a charter model, in which public funds flow to non-district charter schools. *Bd. of Educ. of Sch. Dist. No. 1 in City*

*& Cnty. of Denver v. Booth*, 984 P.2d 639, 642 (Colo. 1999). It can empower local educational institutions to set up cooperative schools to provide educational services that individual member schools lack resources to provide alone. C.R.S. § 22-5-102. It can fund and operate purpose-built schools to serve the needs of a specific population—for example, the Colorado School for the Deaf and the Blind in Colorado Springs. C.R.S. § 22-80-102(1)(a). It can create hybridized online learning academies. C.R.S. § 22-5-119(4)(a). Or it can create a “mixed-delivery system” of education that creates a public benefit that follows families to private, charter, and public schools. *See* C.R.S. § 26.5-4-202(b).

For the Colorado Universal Preschool Program, the Colorado General Assembly chose to fund “a statewide mixed delivery system of preschool providers,” which it deemed the best structure “to make preschool programming universally available to children throughout Colorado.” C.R.S. § 26.5-4-202(1)(a)(VI). The Program creates a publicly funded subsidy that follows students to a qualified preschool program of their choice. C.R.S. § 26.5-4-208(5); *id.* § 26.5-4-202(1)(a)(V). The Program includes religious preschools, because for many of Colorado’s families a religious preschool is the best fit for their child. By statute, “preschool providers”

include public school districts, charter schools, head start programs, family childcare homes, and—as-relevant to Amicus—preschools “operated in conjunction with a public, private, or parochial college or a private or parochial school.” C.R.S. § 26.5-4-203(12); *id.* § 26.5-5-303(3). Choice of preschool type (public or private, secular or religious) and broad access to diverse preschool options (special needs, in-home preschool, Head Start, etc.) is a cornerstone of the Program.

This makes sense in light of the Program’s purpose. The Program heeds the voters’ “commitment to expanding access to quality preschool for children regardless of their economic circumstances” by subsidizing access to high-quality “preschool programming universally available to children throughout Colorado.” C.R.S. § 26.5-4-202(1)(a)(V)-(VI). In the General Assembly’s judgment, expanding preschool enrollment is not simply a matter of providing funds to parents or otherwise funding public preschools. Rather, universal preschool access requires that parents be allowed “to select preschool providers for their children *from as broad a range as possible* within their respective communities.” C.R.S. § 26.5-4-204(2) (emphasis added). This entails two components: first, choice (preschool options from “as broad a range as possible”); and second, *pluralism*

(preschools that reflect values “within [parents’] respective communities”). *Id.*

The Director of Colorado’s Universal Preschool Program, Defendant Dawn Odean, emphasized in a deposition that these two components of the Program’s structure, that, for a universal preschool program to function properly, families of all economic backgrounds must be able to choose the preschool that reflects their needs and beliefs. The Program is structured “to support [a] family’s choice of the just-right provider.” 3.App.801. Executive Director Roy also testified that the Department considers “access” and “affordability” and that it’s important to “ensure that there’s family choice and different types of providers.” 4.App.936. Ms. Odean’s testimony that universal access to preschool is best accomplished by ensuring parents have access to diverse preschool options is bolstered by a wealth of data that “mixed delivery gives access to all families to meet their cultural and specific needs.”<sup>3</sup>

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<sup>3</sup> Marie Huey, *How Mixed Delivery Builds Equity and Inclusion for Families*, Think Small: Leaders in Early Learning, available at <https://bit.ly/4hUtU5t>; see also Lucy Danley, *Mixed Delivery Systems Encourage Parent Choice and Strengthen Child Care Programs* (June 24, 2021) (“As policymakers seek to reform and invest in America’s child care and early learning system, a crucial component must be ensuring

**B. The diversity of Amicus’s members underscores the need for a mixed-delivery system.**

The diverse communities Amicus represents exemplify why the General Assembly chose a mixed-delivery system that on its face prizes religious diversity. Among other things, religious schools often provide the best academic experience for students as recent evidence shows.<sup>4</sup> But they also cater to the unique needs of religious families. Consider a few examples of how religious preschools in particular serve unique needs within the broader population.

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families are able to choose care options that work best for them.”), <https://bit.ly/3Rx0fn6>; Suzanne Morris & Linda Smith, *Examples of Mixed-Delivery Early Care and Education Systems*, Bipartisan Policy Center (June 17, 2021) (“For families, a mixed delivery system allows parents to choose among different program types and select one that best meets their needs, and children can participate in a program that meets their development and learning style.”), <https://bit.ly/4a2rJZ4>.

<sup>4</sup> William H. Jeynes, A Meta-Analysis on the Effects and Contributions of Public, Public Charter, and Religious Schools on Student Outcomes, 87 *Peabody J. of Educ.* 305 (2012) (finding that students in religious schools show greater effects in both academic and behavioral outcomes than students in traditional public schools); *see also* Kathleen Porter-Magee, Amid the Pandemic, Progress in Catholic Schools, *Wall Street Journal* (Oct. 27, 2022) (“Today, the divergence between Catholic schools and public ones is so great that if all U.S. Catholic schools were a state, their 1.6 million students would rank first in the nation across the NAEP reading and math tests for fourth and eighth graders.”).

*School calendars and religious holidays.* Religious preschools offer school calendars that reflect the needs of Colorado’s diverse religious communities. Jewish preschools, for example, adopt school calendars that allow students and families to observe Jewish holidays and leave early on Fridays to prepare for the Sabbath.<sup>5</sup> Catholic members of the Colorado Association of Private Schools provide students with daily or weekly mass.<sup>6</sup> And Christian members of Colorado Association of Private Schools observe Good Friday and similar holidays.<sup>7</sup> For religious families, the observance of religious holidays is not simply the analogue of observing Memorial Day or Thanksgiving. For example, holy days of obligation for Catholics, or Rosh Hashanah or Yom Kippur for Jewish

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<sup>5</sup> See, e.g., 2024-25 Calendar, Denver Academy of Torah (listing holidays), <https://bit.ly/4pbb10B>.

<sup>6</sup> See, e.g., Why BSCS, Blessed Sacrament Catholic School (listing “Weekly Mass,” “Reconciliation,” and “Adoration of the Blessed Sacrament”), <https://www.bscc-denver.net/faith>; Preschool, Christ the King Catholic School (“We learn and say daily prayers, read Bible stories and learn about the lives of the Saints. We teach the golden rule, ‘In everything, do to others as you would have them do to you...’ Matthew (7:12).”), <https://www.ckrcs.org/preschool>.

<sup>7</sup> E.g., 2024-25 Calendar: April 2025, Dayspring Christian Academy (listing good Friday holiday and Easter break), <https://day-co.client.renweb.com/renweb/parentsweb/Calendar-public.cfm?District=DAY-CO&Month=4&Year=2025&School=>.

families are obligatory days of prayer and celebration, essential to their faith and lives. A religious preschool's calendar thus allows a family to practice their faith fully, without compromise.

*Unique services.* Religious preschools provide services unique to the needs of specific religious preschools. Jewish schools, for example, provide students with kosher meals.<sup>8</sup> Jewish schools also have heightened security measures to guard against the all-too-real threats faced by the Jewish community.<sup>9</sup> Catholic schools provide mass, reconciliation, and

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<sup>8</sup> *E.g.*, Lunch, Denver Jewish Day School (“The Denver Jewish Day School lunch program is a delicious, nutritious, convenient, and kosher hot lunch program every day of the week.”), <https://www.denverjds.org/academics/upper-division-high-school/lunch>.

<sup>9</sup> *E.g.* Joseph De Avila, *Antisemitic Incidents Rise to New High, Report Says*, Wall Street Journal (Mar. 23, 2023) (“There were 3,697 antisemitic incidents in the U.S. last year, the most since the Anti-Defamation League started keeping records in 1979.”) *available at* <https://bit.ly/3LIa3dz>; Ella Bilu, *Jewish communities embrace security staff in face of rising antisemitism*, Jewish Telegraphic Agency (Feb. 6, 2023) (“In a 17-day span in October and November, at least 14 United States Jewish day schools reported receiving suspicious phone calls or bomb threats, according to the Anti-Defamation League.”), *available at* <https://bit.ly/49ft80v>.

adoration of the Blessed Sacrament.<sup>10</sup> Christian schools provide daily chapel.

*Religious instruction.* Religious preschools provide instruction in religious faith and traditions. Jewish preschools, for example, teach their students Jewish songs and prayers, learn Jewish values, and dedicate a portion of the week to the Torah and Purim.<sup>11</sup> Evangelical Christian preschools require teachers and families to sign a statement of faith; instruct their students in the Bible; and observe Christian holidays. Catholic members of the Colorado Association of Private Schools provide students instruction in the sacraments and fulfill Catholic families' general religious obligation to send their children to Catholic schools. And Missouri Synod preschools teach students Lutheran hymnody and celebrate events unique to the Lutheran tradition like Reformation Day.

The upshot of the uniqueness of religious preschools is that they provide preschool environments that serve the specific needs of their

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<sup>10</sup> See, e.g., Why BSCS, Blessed Sacrament Catholic School (listing “Weekly Mass,” “Reconciliation,” and “Adoration of the Blessed Sacrament”), <https://www.bsccs-denver.net/why-bsccs>.

<sup>11</sup> See *Early Learning Center*, Hillel Academy of Denver, <https://bit.ly/4oIYJg8> (last visited November 11, 2025).



respective communities, including spiritual and cultural development not provided by other preschools. Constitutionally construed, the Program should foster, not hinder, this kind of religious diversity and choice.

Indeed, the Supreme Court has underscored the importance of religious education for America's diverse population. For Judaism, "religious instruction is an obligation of the highest order, entrusted only to a schoolteacher possessing 'fear of Heaven.'" *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2065 (2020). Similarly in Islam, "the acquisition of at least rudimentary knowledge of religion and its duties is mandatory for the Muslim individual." *Id.* (cleaned up). "In the Catholic tradition, religious education is intimately bound up with the whole of the Church's life." *Id.* (cleaned up). And "[m]any [protestant] schools expressly set themselves apart from public schools that they believe do not reflect their values." *Id.* Colorado, like all of America, has a "rich diversity of religious education," *id.* at 2066, that a properly administered mixed-delivery system would allow to flourish.

## **II. The Department's policies violate the First Amendment.**

Notwithstanding the General Assembly's laudable commitment to a mixed-delivery system that on its face includes faith-based preschools, Defendants' policies implementing the Universal Preschool Program effectively undermine that commitment, excising certain families and

religious preschools from participating in the Program in violation of the Free Exercise Clause. On the one hand, Defendants’ policies purport to impose categorical non-discrimination requirements, some of which conflict with the mission and teaching of religious schools. *See* C.R.S. § 26.5-4-205(2)(b) (“[E]ach preschool provider provides eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child’s family.”). Yet on the other hand, Defendants’ implementing policies make numerous exceptions that, among other things, allow certain faith-based providers to give preference to families who attend their “congregation,” co-op programs to “require family participation,” dual language providers to screen applicants, Head Start providers to impose additional criteria on enrollment, and preschools to exclude or preference students based on disability.

4.App.908–09 (congregation); 3.App.800–01 (co-op programs); 3.App.807–08 (dual language); 3.App.802–03 (Head Start providers); 3.App.810–11 (disability).

Appellee’s answer brief amply explains the myriad violations of the First Amendment attendant to Defendants’ discriminatory policies, as does the opinions of the court below. As Judge Domenico reasoned, the Free Exercise issues with the Program are readily resolved under the *Carson-Espinoza-Trinity Lutheran* line of cases: “the Supreme Court has thrice held that a state may not exclude religious observers from receiving otherwise available educational funding because of a school’s religious status or practice.” *Id.* at 1185. Here, Colorado has made available a benefit to *all* licensed preschools, except for certain religious ones like Plaintiffs.

Amicus will not retread the ground covered by Plaintiffs or Judge Domenico. Amicus instead highlight two First Amendment problems posed by Defendants’ program that undermine Amici’s interest in ensuring all families have access to preschool options, including religious preschools.

**A. The Program’s prohibition against religious discrimination.**

As implemented, the Program forbids a preschool from “discriminat[ing] against any person on the basis of . . . religion.” Colo. Rev. Stat. § 26.5-4-205(2)(b). This prohibition on religious discrimination is broad, covering enrollment and operational decisions made by preschool

providers. Colo. Rev. Stat. § 26.5-4-205(2)(b). Unless a preschool provider agrees to forego religious considerations in operational decisions for the school, it cannot participate in the Program. 3.App.767–77.

At the outset, it is important to remember that a *religious* school making *religious* decisions regarding its operations is not the kind of invidious discrimination the general assembly was targeting here. Religious decision making is instead a necessary aspect of what it means to be a religious school. As explained in this section, the Constitution not only protects a religious school’s religious decisions, it says that the flourishing of religious associations is essential to the functioning of our society: “Throughout our Nation’s history, religious bodies have been the preeminent example of private associations that have acted as critical buffers between the individual and the power of the State.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 199 (2012) (cleaned up) (Alito J. and Kagan J., concurring).

Prohibiting a religious preschool from making employment, enrollment, and operational decisions for religious reasons runs afoul of at least three overlapping Constitutional rights: the ministerial exception, the broader religious autonomy doctrine, and the right of expressive

association. The ministerial exception protects a religious organization's hiring decisions from state interference for "ministerial" employees who "play certain key roles" in the organization, especially teachers. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. This is because teachers in religious schools are responsible for "educating young people in [a denomination's] faith, inculcating its teachings, and training them to live their faith." *Id.* at 2064. More broadly, the First Amendment shields from state interference *any* decision of a religious organization "based on religious doctrine," including regarding non-ministerial employees. *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 660 (10th Cir. 2002). This is because "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 114 (1952). The Program's prohibition on religious discrimination also implicates the right of expressive association as "[r]eligious groups are the archetype of associations formed for expressive purposes." *Hosanna-Tabor*, 565 U.S. at 200 (2012) (Alito J. and Kagan J, concurring). An expressive religious association cannot be forced to "accept certain

members [that would] impair its ability to express those views, and only those views, that it intends to express.” *Id.* at 200 (cleaned up).

The Program’s prohibition on religious discrimination violates these overlapping rights, as religious decision-making touches all facets of a religious preschool’s operations. As explained above, a virtue of including religious preschools in a mixed-delivery system is that they provide instruction and environments that serve the unique needs of Colorado’s diverse population. In addition to those examples cited above, consider a few more local examples in the areas of enrollment, hiring, and curriculum design.

As part of its admissions process, the Hillel Academy of Denver assesses a “[s]tudent’s secular *and Judaic* knowledge” before making an enrollment decision for its preschool.<sup>12</sup> That is, the Academy selects for those students who, among other things, have knowledge of Judaism. Assessing for religious fit in this way is common among religious preschools in Colorado.<sup>13</sup> Southeast Christian School in Parker similarly “seek[s] to

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<sup>12</sup> *Applications*, Hillel Academy of Denver, <https://bit.ly/4oBelSN> (last visited on Nov. 11, 2025) (emphasis added).

<sup>13</sup> *E.g.*, Application for Admission, Front Range Christian School (asking parents to explain, (“Why are you seeking a Christian education for

partner only with Christian families who are aligned with the mission and vision” of the school.<sup>14</sup> These kinds of tests make sense given that a religious preschool’s purpose is to cultivate faith. Yet this kind of preference for students who share a religious preschool’s faith, would usually not be allowed under the Program.

Next consider a common practice among religious schools: requiring teachers and other employees to adhere to a statement of faith. For example, Colorado Association of Private Schools member Dayspring Academy requires its teacher applicants to affirm commitment to its Statement of Faith.”<sup>15</sup> This, too, is common practice for Colorado’s religious

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your student(s)?”), *available at* <https://bit.ly/4qVHDgl> (last visited on Nov. 11, 2025).

<sup>14</sup> *About our School*, Southeast Christian School, <https://sechristianschool.org/about/our-school/>.

<sup>15</sup> Instructional Staff and Substitute Application (Pre-K thru 12), Dayspring Christian Academy at p. 9, *available at* <https://bit.ly/3JG4KLd> (last visited Nov. 11, 2025).

Preschools.<sup>16</sup> Yet the Program’s prohibition on religious discrimination could forbid a religious preschool from hiring co-religionists.<sup>17</sup>

Finally, consider curriculum design. The lesson plans of Gan Chaya Esther Preschool in Denver “integrat[e] tradition and Jewish pride.”<sup>18</sup> Corpus Christi Catholic preschool in Colorado Springs “provide[s] a faith-based curriculum: Twenty-six letters to Heaven, Classical Catholic Curriculum, Writing without Tears, and Brigrance Assessment.”<sup>19</sup> And at Resurrection Christian School in Loveland, its preschool provides “[d]aily opportunities for spiritual growth through prayer, Bible stories, scripture verses, and chapels, so they grow into strong Christians with unwavering

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<sup>16</sup> *E.g.*, Current Career Opportunities, Southeast Christian School (“Southeast Christian School only employs Christians who agree to and abide by our Statement of Faith.”) *available at* <https://sechristianschool.org/careers/>; Parent Handbook, Southeast Christian School at p. 5 (“The following statements of faith and practice are believed in and lived out by every Southeast Christian School employee and by which every school family agrees to support and abide.”), *available at* <https://bit.ly/3JQErSn>.

<sup>17</sup> *Amici* understand that Appellees have apparently disclaimed the prohibition on religious discrimination to the extent that a faith-based preschool hires a co-religionist. 1.App.0067. Yet they have limited this disclaimer to ministerial employees and not other aspects of a faith-based school’s operations.

<sup>18</sup> Curriculum, *Gan Chaya Esther Preschool*, <https://bit.ly/47WaoB3>.

<sup>19</sup> *Preschool*, Corpus Christi Catholic Academy, <https://bit.ly/47HiYTO>.



faith.”<sup>20</sup> Such faith-based curricular decisions would not be allowed under the Program as currently implemented by Defendants. Faith-based curricula are indeed the reasons these schools exist and why families choose them. Cutting them out of the Program removes this important segment of preschools that fulfil the needs of certain religious families.

The constitutional protections that allow a religious school to hire and fire, enroll, and design curricula according to their faith are not simply reflective of our country’s commitment to religious freedom. They also are supported by a deep body of psychological research known under the heading “Social Influence Theory”:

[Social Influence Theory] strongly supports the notion that religious enterprises that wish to protect their mission should secure their employees’ personal witness to that mission in public word and deed, whether they speaking to colleagues or clients or students or patients. Beliefs and norms are more successfully maintained and transmitted in group settings in the presence of a majority—or at least some critical, influential mass—of knowledgeable, confident, expert, relatable individuals who speak in favor of, and role-model, the desired beliefs and norms. If, on the other hand, organizations employ public dissenters . . . the institution’s beliefs and norms, and thus its mission, are significantly undermined.

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<sup>20</sup> RCS Preschool, <https://bit.ly/4nTGPpn>.

Helen M. Alvaré, *Religious Freedom After the Sexual Revolution* at 89 (2022). The expressive association doctrine reflects this social reality: “Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion’s message depend vitally on the character and conduct of its teachers.” *Hosanna-Tabor*, 565 U.S. at 201 (Alito and Kagan J. concurring).

**B. The Program’s “congregational” preference.**

Notwithstanding the Program’s prohibition on religious discrimination, Defendants have crafted a “congregation” exception that allows faith-based providers to give preference to families who are part of their congregation. 3.App.615. Yet the congregation exception only benefits those religions that define themselves as 1) have “congregations” and 2) run preschools on a congregation basis. *See* 8 Colo. Code Regs. § 1404-1-4.103. The congregation exception is thus unconstitutional inter- and intra-religious discrimination, as the court below ruled.

In *Colorado Christian University*, this Court held that Colorado’s exclusion of “pervasively sectarian” universities and colleges from its higher-education scholarship program violated the First Amendment’s Free Exercise and Establishment clauses, as well as the Fourteenth

Amendment's Equal Protection Clause. *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257-66 (10th Cir. 2008) (“CCU”). Colorado’s scheme was unconstitutional for two reasons. First, it required Colorado to discriminate between religions, permitting public funds to be used at some religious schools (Jesuit Regis University and Methodist Denver University) but not religious schools that “proselytized” their students (Evangelical Colorado Christian University and Buddhist Naropa University). *Id.* at 1257–60. Second, Colorado’s scheme required an entangling inquiry by state officials to determine what kinds of curricula “tend to indoctrinate or proselytize.” *Id.* at 1251, 1261.

Here, like the scholarship program in *CCU*, Defendants’ “congregation” exception requires inter-religious discrimination. On one hand, religions that have congregations with preschools may favor co-religionists in the operation of their preschools. On the other hand, religions that either do not have traditional congregations or congregations that don’t have preschools cannot discriminate on the basis of religion in their operations. The religions represented by Amicus’s show why. For example, preschools affiliated with the Rocky Mountain District of the Lutheran Church Missouri Synod usually fit squarely within the structure of the

congregational exception. Missouri Synod Lutheran churches have “congregations” and most of their preschools are associated with a specific congregation, primarily attended by congregation families.<sup>21</sup> By contrast, Jewish preschools in Colorado are often not associated with any synagogue or other “congregation.”<sup>22</sup> Similarly, although Catholic preschools are often associated with a specific parish, they exist to serve Catholic families from other parishes, too. And non-denominational Christian schools are often not affiliated with any congregation.<sup>23</sup> In practice, only certain denominations are able to take advantage of the congregation exception. Privileging some religious groups over others “raise[s] serious concerns about state entanglement with religion and denominational

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<sup>21</sup> See, e.g., LCMS School Ministry (“Congregations and Christian day schools of The Lutheran Church-Missouri Synod operate more than 1,600 early childhood centers and preschools, and they serve more than 100,000 children ranging from infants and toddlers to 5-year-olds.”), <https://bit.ly/4qSMr5Z> (last visited Nov. 11, 2025).

<sup>22</sup> E.g., *BMH-BJ Preschool* Denver, <https://www.bmhbjpreschool.org/about/>; *JCC Early Learning School*, Staenberg-Loup Jewish Community Center, <https://www.jccdenver.org/preschool/>; *Pre-K Overview*, Denver Jewish Day School, <https://www.denverjds.org/admission/pre-k>; About, Denver Academy of Torah (Initially housed by a synagogue but moved out and is independent), [datcampus.org](http://datcampus.org).

<sup>23</sup> E.g., *Our Mission*, Resurrection Christian School, <https://rcschool.org/our-mission-and-core-values/>.

favoritism” in violation of the First Amendment. *Carson v. Makin*, 596 U.S. 767, 787 (2022).

These problems are present even under the broader definition of “congregation” now being used by Defendants. *See* 3.App.610. That new definition still coerces denominations to internally define their “congregations” in a way that meets the state-approved understanding of religious communities entitled to protection. For example, the new definition would coerce Colorado’s Catholic dioceses to define “congregation” in a manner at odds with a Catholic understanding of parish membership. The problem remains that Defendants are drawing ecclesiastical lines that, under the First Amendment, they are not empowered to.

The congregation exception also swallows whole Defendants’ arguments as to compelling interest and least-restrictive means. If *some* denominations are entitled to make administrative and operational decisions based on religion (favoring congregants), then there is no reason why *all* denominations should not be allowed to do so. In this way, the congregation exception is both under-inclusive and discriminatory. It also conflicts with the Program’s prohibition on religious discrimination. On the one hand, non-congregational religious preschools cannot

currently make religious operational decisions under the Program. On the other hand, congregational religious preschools can.

### **III. Excising religious preschools from UPK Colorado needlessly penalizes religious communities.**

The General Assembly made two key findings about the need for the Program. First, high-quality preschool is immensely important in improving student outcomes: “State and national research demonstrate the positive long- and short-term impacts of high-quality preschool, including improved early literacy, reduced grade retention, decreased probability of developing a significant reading deficiency, improved performance on statewide standards-based assessments, and increased rate of high school graduation.” C.R.S. § 26.5-4-202(1)(a)(V). Second, increased access to high-quality preschool helps lower-income families the most: “Creating a statewide mixed delivery system of preschool providers to make preschool programming universally available to children throughout Colorado compounds the benefits for children who are in low-income families and increases the ultimate social and economic benefits of high-quality preschool programming for the state as a whole.” C.R.S. § 26.5-4-202(1)(a)(VI).

Yet by cutting out a large swath of religious schools from the Program, Defendants have effectively penalized the State’s religious families—with the greatest effect on religious families at lower-income levels. In *Amici*’s communities, the cost of education has skyrocketed. In the Orthodox Jewish community, for example, the high cost of religious tuition has long been seen as a crisis that forces many parents to choose between their faith and financial security.<sup>24</sup> This is also true in Denver metro Jewish schools. Preschool tuition alone for the 2025-26 school year at the Denver Jewish Day School, Ramaz, SAR Academy, and Scheck Hillel

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<sup>24</sup> School Choice Policy Impact on the Jewish Community, Jewish Policy Center (Winter 2015) (“As tuition prices for Jewish day schools rise, parents are often forced to choose between providing their children with a Jewish education or keeping their families financially stable. This financial crush has many names within the Jewish community: ‘tuition crisis,’ ‘tuition crunch,’ and “pricing out parents’ are just a few.”), <https://bit.ly/4p0iCPb>; *Shira Hirschman Weiss*, Jewish School Tuition Crisis: Parents Feeling ‘Priced Out’ of Their Religion, HuffPost (May 25, 2011) (“Rabbi Saul Zucker of the Orthodox Union explains that ‘the average price of Jewish day school tuition for grades K-12 is \$15,000 per year (as compared to the average Catholic school tuition of \$3,383, according to NCEA). For four children that would mean \$60,000 per year post taxes, which indicates that one would have to earn approximately \$200,000 per year (the top 3 percent of earners in this country) *just* to support their children’s education.”), <https://bit.ly/4nRWDZZ>).

Community School are \$20,800,<sup>25</sup> \$29,900,<sup>26</sup> \$22,430,<sup>27</sup> and \$20,700,<sup>28</sup> respectively. The Program's benefit would fundamentally change the lives of Jewish and other religious families in Colorado by lessening the stark choice they currently face between faith and finances. The Program as implemented currently incentivizes a religious family to forego the unique curriculum, calendar, and other benefits of a religious preschool in favor of a non-religious preschool to ensure financial health. A mixed-delivery system should encourage, not hinder, Colorado's religiously diverse population to be able to choose a preschool that is "just-right" for their family.

## CONCLUSION

The premise of Colorado's Universal Preschool Program is that preschool access and enrollment will increase only if families can choose a preschool reflecting their culture and needs. This goal is important to the

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<sup>25</sup> Affording Denver JDS, Denver Jewish Day School, <https://www.denverjds.org/admission/affording-denver-jds> .

<sup>26</sup> Affording a Ramaz Education, Ramaz, <https://www.ramaz.org/admissions/tuition-financial-aid>.

<sup>27</sup> Tuition and Financial Aid, SAR Academy, <https://saracademy.org/admission-aid/tuition-financial-aid/>.

<sup>28</sup> Tuition, Scheck Community School, <https://www.ehillel.org/tuition>.



religious communities represented by *Amici* as their families want to choose preschools that provide their children with the unique benefits of a religious preschool. Yet Defendants' policies implementing the program effectively excise most religious preschools to the harm of families and the goal of universal access, and in violation of the First Amendment. The Court should grant Plaintiff's motion for summary judgment and permit religious preschools to freely participate in the Program.

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Respectfully submitted,

/s/ Andrew Nussbaum

Andrew Nussbaum  
First and Fourteenth PLLC  
2 N. Cascade Ave., Suite 1430  
Colorado Springs, C.O. 80903  
(719) 428-4937  
andrew@first-fourteenth.com

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the word-count limitation of Fed. R. App. P. 29(a)(5) because, according to the word-count feature of the program used to prepare it and excluding the items listed in Fed. R. App. P. 32(f), it contains 5,037 words and does not exceed 6,500 words – one half the limit of 13,000 words for a party’s principal brief.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Andrew Nussbaum  
Andrew Nussbaum  
*Counsel for Amici*

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 17, 2025, I electronically filed the foregoing brief with the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. I certify that counsel for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Andrew Nussbaum  
Andrew M. Nussbaum  
*Counsel for Amici*