No. 25-1187

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DARREN PATTERSON CHRISTIAN ACADEMY,

Plaintiff-Appellee,

v.

LISA ROY, *et al.*,

Defendants-Appellants.

On Appeal from the
United States District Court for the District of Colorado
Case No. 1:23-cv-1557, Hon. Daniel D. Domenico

BRIEF OF SUTHERLAND INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is a nonprofit, nonpartisan public policy organization with a substantial interest in the Constitution's guarantees of religious freedom and of parents' ability to direct the rearing of their children. The decision of the district court appropriately protects these principles and should be affirmed.

ARGUMENT

I. The Department's refusal to accommodate Darren Patterson Christian Academy also burdens the religious exercise of families and other schools.

Appellee has explained how the Colorado Department of Early Childhood burdens the constitutional rights of Darren Patterson Christian Academy by refusing to accommodate its 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 Academy. They are also experienced by other private schools who seek to operate consistently with a religious

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

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]

There are also many families that, because of their faith, share Darren Patterson's beliefs about gender and sexuality and who also 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 the respondents who are also parents of minor children have chosen "homeschooling or private religious schooling instead of public school."[4]

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[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").

[4] Gregory A. Smith, et al., *Decline of Christianity in the U.S. Has Slowed, May Have Leveled Off* Pew Research Center 151 (2025),

This statistic only captures a portion of the likely interest among parents since the choice of these schools 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 appellee notes, nearly "2,000 preschools signed up for the Program's inaugural year and even more joined for later years." Appellee Brief at 10.

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.

The U.S. Supreme Court has recognized this challenge. Last term, the Court 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

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https://www.pewresearch.org/religion/2025/02/26/religion-fertility-and-child-rearing/.

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

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*, the 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 "burdens not only religious schools but also the families whose children attend or hope to attend them" by barring "parents who wish to send their children to a religious school from [the scholarship] benefits . . . solely because of the religious character of the school." *Id.* at 486, 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. This was inconsistent with a "long recognized" right of parents to "direct 'the religious upbringing' of their children" which includes a Constitutionally protected decision to send their children to religious schools. The "no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one." *Id.* at 486.

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 thus be less likely to 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.

Supreme Court precedent, particularly the Court's decisions striking down restrictions on the use of public benefit programs to attend religious schools, should control the outcome of this case.

The 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] so 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 educational funding being used 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 broadly excluded all religious schools as religious schools while its application of the Equal Opportunity Provision to Darren Patterson did not prevent other religious schools willing to accept the Department's gender and sexuality conditions. Appellants' Brief at 59.

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 matters of gender and sexuality on which the Department has a different perspective.

Additionally, the Supreme 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

For these foregoing reasons, *amicus* respectfully urges this Court to affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATIONS

1. **Word Count.** This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Tenth Circuit R. 32(B), it contains 1,973 words.

2. **Typeface/Type-style.** This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Tenth Circuit R. 32, and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared using Microsoft Word in Century Schoolbook, a proportionally spaced font, in a size measuring 13 points or larger.

3. **Privacy Redactions.** All privacy redactions have been made in compliance with Tenth Cir. R. 25.5.

4. **Hard Copies.** This electronic filing is identical to the hard copies of the brief that will be submitted.

/s/ William C. Duncan
Date: November 17, 2025