No. 24-1267

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ST. MARY CATHOLIC PARISH IN LITTLETON;
ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD;
DANIEL SHELEY; LISA SHELEY;
THE ARCHDIOCESE OF DENVER,

Plaintiffs-Appellants,

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood;
DAWN ODEAN, in her official capacity as Director of Colorado's Universal Preschool Program,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:23-cv-2079-JLK – Hon. John L. Kane

APPELLANTS' OPENING BRIEF

Eric C. Rassbach
Mark L. Rienzi
Joseph C. Davis
Nicholas R. Reaves
Jordan T. Varberg
Amanda G. Dixon
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave. N.W., Ste. 400
Washington, DC 20006
(202) 955-0095
nreaves@becketlaw.org

Counsel for Plaintiffs-Appellants

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

GLOSSARY

"Agreement"	The contract implementing the quality standards, including the Mandate, and other requirements that providers must sign to participate in UPK Colorado.
"Department," or "CDEC"	The Colorado Department of Early Childhood
"Mandate"	The UPK Colorado requirement (included in the Agreement and in the UPK statute) that "each preschool provider provide 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, as such characteristics and circumstances apply to the child or the child's family." Colo. Rev. Stat. § 26.5-4-205(2)(b).
"UPK Colorado"	Colorado's Universal Pre-Kindergarten program
"UPK statute"	Colo. Rev. Stat. § 26.5-4-201 *et seq.*

INTRODUCTION

This case is about whether Colorado can constitutionally exclude children from a "universal" preschool benefits program solely because they attend Catholic preschools. The answer to that question is no—denying kids who attend Catholic preschool this benefit violates the First Amendment.

In 2023, Colorado implemented a new universal preschool funding program called UPK Colorado. Colorado's Legislature intentionally created a "mixed delivery" system, meaning that participating preschools—public, private, religious, nonreligious—are reimbursed by the State for providing free preschool education to eligible children. In the program's first two years, however, Colorado has been unable to recruit enough participating preschools, meaning many children have missed out on this benefit.

The Catholic Church would normally be a great candidate to help fill this gap. The Archdiocese of Denver oversees thirty-six state-licensed Catholic preschools serving over 1,500 children. These Catholic preschools have operated for decades and routinely attain excellent quality ratings from the State. But Colorado has repeatedly told the Archdiocese that its preschools *can't* participate in UPK Colorado. Why? Because these preschools ask families (Catholic or not) who enroll in their programs to support the teachings of the Catholic faith in word and deed. This requirement is a sincere expression of the Archdiocese's religious

beliefs and ensures that Archdiocesan preschools can fulfill their religious mission by assisting parents in the education of their children and helping children learn the Catholic faith.

Colorado says Catholic preschools can participate only if they stop being Catholic. To justify this position, the State points to a UPK Colorado Mandate that requires "equal access" to preschools, claiming that following Catholic beliefs and practices constitutes discrimination based on religious affiliation, sexual orientation, and gender identity. As a result, not only did Colorado deny the Archdiocese's request for a religious accommodation, it went so far as to compare Catholic beliefs and practices to invidious race discrimination deserving to be stamped out.

But a trilogy of recent Supreme Court decisions—*Carson v. Makin*, *Fulton v. City of Philadelphia*, and *Tandon v. Newsom*—amply confirm that Colorado cannot create a "universal" preschool program and then bar the gate to religious preschools based on their religious exercise. In short, Colorado was not required to create a universal preschool program—but once it did, it cannot exclude just the religions it doesn't like.

Colorado defends its actions by claiming it lacks authority to grant *any* exceptions from the Mandate. This is simply false. Defendants—by their own admission—have allowed other preschools to deny "equal access" on account of disability, income, and religious affiliation. Similarly, Defendants admit that UPK Colorado preschools could limit enrollment to "gender-nonconforming children," "children of color from historically

underserved areas," and others. All these exceptions violate the Mandate. Defendants' only excuse is that these exceptions serve, or could serve, important interests. But religion is also important, and the Supreme Court has held time and again that value judgments favoring nonreligious over religious interests trigger strict scrutiny.

After reviewing these facts at a full trial on the merits, the district court got it half right. It agreed Defendants had created exceptions allowing providers to consider disability, income, and religious affiliation. It therefore granted Plaintiffs partial relief, enjoining the application of the "religious affiliation" "aspect" of the Mandate and allowing the Plaintiff preschools to prioritize Catholic families in the admission process consistent with the Archdiocese's religious instruction.

But the court bent over backwards—breaking with another Circuit's decision in the process—to conclude that Colorado could still enforce the Mandate's sexual-orientation and gender-identity "aspects." Therefore, Archdiocesan preschools remain unable to participate in UPK Colorado.

At bottom, Colorado says it is providing "universal" preschool funding—while excluding an entire category of schools solely because they are following their sincere religious beliefs. That violates the First Amendment. The Court should therefore direct the district court to enter an injunction that *fully* protects Plaintiffs' sincere religious exercise.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Final judgment was entered on June 5, 2024. 1.App.0016. Plaintiffs filed a timely notice of appeal on June 21, 2024. 2.App.0549. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether excluding religious organizations from a generally available government benefit on account of their sincere religious beliefs and exercise triggers strict scrutiny under the Free Exercise Clause.
2. Whether categorical exceptions from a government policy restricting religious exercise similarly trigger strict scrutiny.
3. Whether discretion to grant individualized exceptions from a government policy restricting religious exercise triggers strict scrutiny.
4. Whether government actions showing that religious exercise is not being treated neutrally trigger strict scrutiny.
5. Whether government actions requiring an expressive association to include those who reject the organization's message trigger strict scrutiny.
6. Whether Defendants' actions can withstand strict scrutiny.
7. Whether the Archdiocese of Denver has standing.

STATEMENT OF THE CASE

A. The Archdiocese of Denver and its Catholic preschools

The Archdiocese of Denver is the "geographic reality" of "the Catholic Church in northern Colorado." 3.App.0611.[1] Its purpose "is to establish ministries across northern Colorado in order to communicate the message of the gospel … of Jesus Christ." 3.App.0612.

Among the Archdiocese's ministries are preschools. In particular, the Archdiocese's Office of Catholic Schools oversees thirty-six Archdiocesan preschools, including St. Mary Catholic Preschool and Wellspring Catholic Academy of St. Bernadette. 2.App.0464-65; 3.App.0612-14.[2] The central mission of these schools is to partner with families in educating and forming students in the Catholic faith. 3.App.0617, 3.App.0623; 2.App.0465. The schools therefore seek to "support[] parents and empower[] families to lead their children to encounter and be rescued by

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[1] "N.App.NNNN" citations are to Appellants' Appendix and indicate first the volume and then the page number. "ECF" citations are to documents filed in the district court.

[2] Another Archdiocesan ministry, Catholic Charities, runs six Head Start programs that help those in need, including families experiencing homelessness, "by providing childcare services while parents work to get back on their feet." 1.App.0145-46. Because these programs do not seek to foster Catholic community or require program beneficiaries to support Catholic teaching, they are able to participate in UPK Colorado. These charitable ministries are not among the thirty-six Archdiocesan preschools discussed in this brief. *But see* 2.App.0465 (mistakenly including Head Start programs).

Jesus Christ and have abundant life, here on earth and in heaven, for the glory of the Father." 2.App.0381; 2.App.0465.

Plaintiffs Dan and Lisa Sheley are parishioners at St. Mary's Catholic Parish in Littleton. 3.App.0673; 2.App.0473. The Sheleys believe it is their "directive as Catholics" to provide a Catholic education for their children. 3.App.0673-76; 2.App.0473. They have a four-year-old who would have been eligible for UPK Colorado this past year, as well as a three-year-old and a one-year-old who will soon qualify. *See* 3.App.0674-75; 2.App.0473.

B. The Archdiocese's religious beliefs

Because Archdiocesan preschools seek to partner with parents and families to foster an intentional Catholic community, it's essential that parents not only understand and share the school's religious mission but also "desire to teach it within their family, to promote it, to defend it, and to have their children formed in a Catholic worldview." 2.App.0465 (cleaned up); 3.App.0627. Such alignment is also important because the schools seek to avoid causing conflict within a family and with what parents teach at home, lest it create confusion for the child and family. 2.App.0465; 3.App.0627; *see* 2.App.0386-87.

Accordingly, to enroll in an Archdiocesan preschool, parents must sign the Archdiocese's Statement of Community Beliefs, which makes it "clear" from the outset "what the Catholic school will teach and what the Catholic school community believes." 2.App.0465 (quoting 3.App.0620);

see 2.App.0386. As the Statement explains, "all Catholic school families must understand and display a positive and supportive attitude toward the Catholic Church[.]" 2.App.0465-66. And "families must refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the School, … or be considered a counter-witness to Catholic doctrine or morals." *Id.*

The Archdiocese promulgated this Statement and other similar policies and guidance pursuant to its role overseeing its schools' adherence to Catholic faith and morals. 3.App.0624-25; 2.App.0466; *see also* 2.App.0466-68 (discussing additional policies); 3.App.0624-27 (same); 5.App.1044 ("*Guidance for Issues Concerning the Human Person and Sexual Identity*"); 5.App.1067 ("*The Splendor of the Human Person*").

The Archdiocese provides this instruction to its schools on matters of sexuality and gender identity in accord with its sincere religious beliefs and rooted in Christian anthropology—specifically, in the belief that "[s]exual identity, [and in particular] embodiment as either a man or a woman is a gift that is given to us from the moment of creation." 2.App.0466. And since "the body is ordered towards unity with one another and the procreation of children," the Church likewise "has a particular understanding of marriage as being between a man and a woman." 3.App.0624.

Accordingly, the Archdiocese instructs that "school policies should reinforce Christian anthropology, including the reality of sexual difference

and its relevance in certain spheres." 5.App.1046. To that end, Archdiocesan preschools use pronouns corresponding with biological sex, enforce the dress code corresponding with biological sex, and make changing and bathroom facilities available according to a child's biological sex. 5.App.1045, 5.App.1052-55; 2.App.0467; 2.App.0383-84. Additionally, the Archdiocese teaches that enrolling a child of a same-sex couple "may cause confusion for the child" because it "would be difficult for the child to hear" one message from the school when "that's not what they hear from their parents." 3.App.0626-27. The Archdiocese therefore advises that such an enrollment "is likely to lead to intractable conflicts." 5.App.1045, 5.App.1052-55, 5.App.1058, 5.App.1059; 2.App.0467; 3.App.0627 (enrollment "not []possible"). All Archdiocesan preschools must follow this guidance. 3.App.0630; *see* 2.App.0466.

Similarly, Catholic preschools must provide the opportunity to obtain a Catholic education first to Catholic families. *See* 2.App.0468. Archdiocesan preschools therefore prioritize Catholic families in their admissions process. *Id.*

The district court found that Plaintiffs' beliefs are sincerely held. 2.App.0487 n.19. And, although many of the Archdiocese's preschools have been licensed for decades, both sides agree that none of these preschools "has any history of a complaint from an LGBTQ family or other person alleging LGBTQ-based discrimination." 1.App.0081-82 (Declaration of Dawn Odean); 3.App.0656, 3.App.0691; ECF.109 at 32, 33.

C. UPK Colorado

In 2022, the Colorado General Assembly created by statute a system of state funding for "universal" preschool. Colo. Rev. Stat. §§ 26.5-4-201 *et seq*. ("UPK statute"). The program, which is administered by the newly created Department of Early Childhood, provides fifteen hours of "preschool services" free for all Colorado children "regardless of their economic circumstances." *Id.* §§ 26.5-4-202(1)(a)(V), 26.5-4-204(1)(a).

As a "mixed delivery" system, all licensed childcare providers—private and public—can sign up to participate in UPK Colorado. 2.App.0453; 3.App.0719; 8.App.1830-31. Families with eligible preschool-aged children can enroll in UPK Colorado via the Department's online portal. 2.App.0457. Families then rank up to five participating preschools before being "matched" with a preschool by a Department-created algorithm. 1.App.0059; ECF.109 at 20; 7.App.1527, 7.App.1531.

The Department requires preschools to admit families matched with them *unless* they receive a Department-approved exception from this matching process. 2.App.0457-61. The Department, however, has granted 1,091 preschools—over half of all the participating providers—various exceptions from the matching requirement. 2.App.0460. In addition to the matching process, families can enroll in UPK Colorado directly at a preschool through a "walk in" process. 7.App.1535-38, 7.App.1542. If a participating preschool has an open seat, it similarly must enroll a

walk-in family unless the Department grants an exception. 2.App.0539; *see also* 7.App.1541-42.

In each of its two years, UPK Colorado has suffered from a shortage of licensed preschool providers, meaning the Department could not match every interested family with an available preschool seat. *E.g.*, Lindsey Jensen, *Not enough UPK childcare providers for families applying again this year*, KOAA News5 (Aug. 1, 2024), https://perma.cc/T8YJ-UL28 ("We had about 8,000 applicants in year one for UPK and we had less than 6,000 [families] match and be able to utilize the match.").

The UPK statute also requires the Department to adopt "quality standards." Colo. Rev. Stat. § 26.5-4-205(1)(a), (2); 2.App.0450. These include a requirement (the "Mandate") that "each preschool provider provide 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." Colo. Rev. Stat. § 26.5-4-205(2)(b). Identical language is included in the Department's regulations and in the Program Service Agreement providers must sign. *See* 8 Colo. Code Regs. § 1404-1-4.109; 2.App.0451 n.4, 2.App.0455; 5.App.1167.

D. The Department grants categorical and discretionary exceptions from the Mandate

The Department both permits categorical exceptions from the Mandate and retains discretion to grant case-by-case exceptions from the Mandate.

1. Categorical exceptions

Colorado has created via regulation ten distinct categories of exceptions from the matching process, several of which also allow providers to consider characteristics covered by the Mandate. *See* 8 Colo. Code Regs. § 1404-1-4.110 (listing "programmatic preferences" providers "may utilize" to depart from mandatory matching process); *see also* 4.App.0793-0802.

First, Colorado allows some providers to deny families an equal opportunity to enroll and receive services based on *disability* and *income level*. As the district court explained, the Mandate has "exceptions for children in low-income families … as well as those with disabilities." 2.App.0510. These two exceptions are included in the Department's regulations, which allow UPK providers to reserve seats for children with individualized education plans and allow some providers (Head Start programs) to consider a family's income when determining eligibility for enrollment. 8 Colo. Code Regs. § 1404-1-4.110(A)(4)-(5). And the operation of these exceptions was confirmed by Defendants both at trial and in their briefing. 4.App.0856 (acknowledging the Department has "preferences

allowing providers to prioritize low-income children or children with disabilities."); ECF.109 at 44 ("preferences permit providers to prioritize low-income children and children with disabilities"); *see also* 4.App.0795:16-17, 4.App.0796:22-25 (confirming regulations allow providers to reject families based on "disability" and "income").

Second, Colorado, through its "congregation preference," allows providers to deny families an equal opportunity to enroll and receive services on account of *religious affiliation*. 2.App.0458, 2.App.0461, 2.App.0514 (district court: "congregation preference permitted by Defendants is a clear exception" from the Mandate). This is also confirmed in the Department's regulations. 8 Colo. Code Regs. § 1404-1-4.110(A)(1) ("Faith-based providers granting preference to members of their congregation."). Under this exception, Defendant Odean testified, a Lutheran provider "wouldn't have to provide an opportunity to enroll" to Catholics. 4.App.0815-16.

Third, on the second day of trial, 4.App.0817, Colorado announced a new categorical exception which allows providers to "grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity." 8.App.1833-34; 8 Colo. Code Regs. § 1404-1-4.110(A)(10). Odean testified that this broadly worded preference would, among other things, allow providers to serve only "gender-nonconforming

children" and "children of color from historically underserved areas," and to prioritize serving "the LGBTQ community." 4.App.0820-22.

2. Discretionary exceptions

In addition to categorical exceptions, the Department has discretion to grant case-by-case exceptions from the Mandate in two ways.

First, the Department has an online form, 7.App.1701, by which providers can request an exception from the mandatory matching requirement even if the requested exception conflicts with the Mandate and even if the exception is not among those categories of exceptions included in the Department's regulations. 4.App.0832; *see also* 2.App.0463-64. The form itself offers examples of exceptions providers might request (regarding disability, for example). 7.App.1701; *see* 2.App.0503; ECF.109 at 25.

Second, the UPK statute includes an express grant of discretion: "the department may allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II); *see id.* § 26.5-4-205(2). The statute, however, does not permit exceptions from "quality standards relating to health and safety." *Id.* § 26.5-4-205(1)(b)(II).

E. Defendants deny Plaintiffs a religious accommodation

When UPK Colorado was first announced, Archdiocesan preschools planned to participate. 3.App.0632, 3.App.0665, 3.App.0696. As more details emerged, however, the Archdiocese learned that compliance with

the Mandate, as the Department understood it, would conflict with the Archdiocese's long-held religious beliefs and exercise. 2.App.0469.

Specifically, the Mandate's requirement of equal access regardless of "religious affiliation" conflicted with the Archdiocese's religious belief that its schools must first be available to Catholic families. Moreover, while the Archdiocese's religious exercise does not discriminate against anyone because of status (*e.g.*, as a person who experiences attraction to persons of the same sex), *see, e.g.*, 5.App.1046, 5.App.1048-50, 5.App.1057-59, the Archdiocese feared that Colorado would interpret the Mandate to forbid its preschools' practices regarding sexuality and gender identity, *supra* pp. 6-8. That fear would prove well-founded, as the Department later told the district court that abiding by Plaintiffs' religious beliefs constituted "discriminat[ion] against LGBTQ families and children." 1.App.0055.

Given these concerns, on January 14, 2023, the Archdiocese instructed its preschools not to participate in UPK Colorado for the time being because portions of the Mandate "clearly run counter to Church teaching and the guidance we have provided to Catholic schools … with respect to sexual and gender identity," and because "the statutes do not provide any type of exemption … for religiously held beliefs." 5.App.1161.

Then, on February 17, 2023, the Archdiocese, along with a coalition of other religious organizations, sent a letter to the State requesting a religious accommodation from the Mandate so its preschools could

participate in UPK Colorado. 5.App.1162. The Department responded that no religious accommodation would be provided because it lacked "authority" to grant one. 5.App.1164-65.

Soon after, another religious preschool sought an accommodation, similarly identifying a conflict between the Mandate and its religious "policies on bathroom and locker room usage, pronoun usage, and dress codes." *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163, 1172 (D. Colo. 2023). In response, the Department again explained that the Mandate was "mandated in state statute," and the Department lacked authority to create exceptions. *Id.*

Because the Department denied the Archdiocese an accommodation, none of the Archdiocese's preschools are able to participate in UPK Colorado. 3.App.0635-36.

F. Procedural background

Plaintiffs filed suit on August 18, 2023, 1.App.0005, and filed their amended complaint on September 13, 2023. 1.App.0008. Although another case, *Darren Patterson*, 699 F. Supp. 3d 1163, already involved a challenge to the Mandate by a religious preschool on similar grounds, the district court here declined to treat the cases as "sufficiently related to warrant special assignment or transfer." ECF.28.

On September 13, 2023, Plaintiffs asked for a preliminary injunction to participate in UPK Colorado for the 2023-24 school year. 1.App.0008. The court instead set a discovery and briefing schedule to resolve the

entire case on the merits "by the first of the year." 2.App.0560. On October 20, 2023, the *Darren Patterson* court granted a preliminary injunction to Darren Patterson Christian Academy, allowing it to participate in UPK Colorado consistent with its religious exercise. 699 F. Supp. 3d at 1189. Defendants did not appeal that ruling.

Meanwhile, the parties here engaged in extensive discovery and briefing on Plaintiffs' motion for summary judgment and Defendants' motion to dismiss. In resolving these motions, the court held that the Plaintiff preschools and parents had standing and that the case was ripe. 2.App.0320-29 (amended order). But it dismissed the Archdiocese for lack of standing and denied summary judgment. 2.App.0329-32. It also set the case for a bench trial starting January 2, 2024. 1.App.0171-72.

Following a three-day trial with ten witnesses, the parties submitted simultaneous proposed findings of fact and conclusions of law. 1.App.0015-16. On June 4, 2024, the district court issued its opinion. Citing *Employment Division v. Smith*, the district court declined to apply strict scrutiny to what it called the "sexual-orientation and gender-identity aspects of the equal-opportunity requirement," holding they were "neutral and generally applicable." 2.App.0486-514. But it applied strict scrutiny to "the religious affiliation aspect" and concluded that the Department's actions failed this heightened scrutiny. 2.App.0514-17, 2.App.0527-28. The court therefore entered an injunction forbidding Defendants "from requiring, as a condition for participation in" UPK, that

the Plaintiff preschools "agree to provide or provide … an equal opportunity to enroll and receive preschool services regardless of religious affiliation," but entering judgment for Defendants "[o]n all other issues and claims." 2.App.0544-45.

In light of Defendants' position that Plaintiffs' religious exercise constitutes sexual-orientation and gender-identity discrimination, Plaintiffs timely appealed. 2.App.0549.

SUMMARY OF ARGUMENT

The Free Exercise Clause protects the right of religious organizations to participate in public-benefits programs without abandoning their faith. Here, Colorado has burdened Plaintiffs' religious exercise by conditioning participation in UPK Colorado on their agreeing to forgo it—effectively imposing a special tax on Catholic preschools and penalizing families who would benefit from UPK Colorado but for their religious beliefs and exercise.

Colorado's actions violate the Free Exercise Clause in five independent ways. *First*, the Department has created a generally available funding program that excludes Plaintiffs' preschools because of their religious exercise. This, as *Carson* makes clear, triggers strict scrutiny.

Second, the Department allows for—as the district court found—at least *three* categorical exceptions from the Mandate: for religious affiliation, disability, and income. These acknowledged exceptions (and several others apparent from the trial evidence) trigger strict scrutiny.

Third, the Department has two mechanisms for considering, on a case-by-case basis, whether the Mandate should be enforced against a particular provider's conduct. This similarly triggers strict scrutiny.

Fourth, the Department's actions—including thrice amending the definition of "congregation" to try and evade Plaintiffs' claims—show that the Department did not treat Plaintiffs' request for a religious accommodation neutrally. This triggers strict scrutiny.

Fifth, Plaintiffs are, as the district court recognized, an expressive association. And trial testimony confirmed that forcing Plaintiffs' preschools to accept and affirm those who espouse views in conflict with what the schools teach would significantly interfere with Plaintiffs' message. This also triggers strict scrutiny.

Defendants do not come close to satisfying strict scrutiny. For starters, their alleged government interests—equal access and removing discriminatory barriers—are neither measurable nor genuine. Worse, keeping Plaintiffs' preschools out of the program doesn't advance these interests. As the Court reasoned in *Fulton*—a case in which Philadelphia asserted an *identical* interest in an effort to exclude another Catholic service provider—having more providers will create more opportunities for families to find the best fit for them. Defendants' interests are also not compelling because they have not identified an actual problem in need of solving and admit that any future harm is speculative. And there are numerous ways to help LGBTQ families find affirming UPK providers—like through the

Department's own matching process—that are less restrictive than categorically excluding Plaintiffs.

The district court further erred when it concluded that the Archdiocese lacked standing. St. Mary's and Wellspring, as the court found, have standing. What's more, there is no question that protecting its preschools' ability to participate in UPK Colorado is germane to the Archdiocese's purposes, or that participation of each individual preschool is not necessary to resolve the primarily legal issues involved in this case.

STANDARD OF REVIEW

While this Court typically reviews factual findings for clear error, "[i]n a First Amendment case … we review the district court's findings of fact and its conclusions of law de novo." *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007) ("We conduct our review 'without deference to the trial court.'") (citation omitted); *Roberts v. Winder*, 16 F.4th 1367, 1374 (10th Cir. 2021) ("Where activity is arguably protected by the First Amendment, the court has 'an obligation to make an independent examination of the whole record'" (citation omitted)).

ARGUMENT

Plaintiffs appeal both the district court's (1) denial of a permanent injunction with respect to the sexual orientation and gender identity "aspects" of the Mandate; and (2) dismissal of the Archdiocese for lack of standing. Defendants did not cross-appeal the district court's injunction

protecting the ability of Plaintiff preschools to consider religious affiliation in their admissions and operations, so that issue is not before this Court. *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1107 (10th Cir. 2020).

I. Colorado's Mandate violates the Free Exercise Clause.

By excluding Archdiocesan preschools from UPK Colorado based on their sincere religious beliefs and exercise, Defendants have burdened Plaintiffs' religious exercise. This is not in dispute. Indeed, the existence of this burden was a prerequisite for granting Plaintiffs the permanent injunction that Defendants have not appealed. 2.App.0544-45; *see also* 2.App.0447 & n.2 (noting the narrow issue before the court). This burden on Plaintiffs' religious exercise, in turn, triggers strict scrutiny under the First Amendment in five separate ways—and fails that stringent test.

A. Colorado's Mandate violates the rule of *Carson v. Makin*.

If a government chooses to create a generally available benefit program, it cannot exclude religious organizations on account of their religious beliefs or exercise. Supreme Court precedent makes that abundantly clear—including in the specific context of school-funding programs like UPK Colorado.

Thrice in the last seven years, the Court has considered Free Exercise Clause challenges to government-funding programs that excluded religious schools. *Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464 (2020); *Trinity Lutheran Church of Columbia,*

Inc. v. Comer, 582 U.S. 449 (2017). In all three cases, the Court ruled for the challengers. In *Espinoza* and *Trinity Lutheran*, the Court held that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character'"—*i.e.*, because they *are religious*—"imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'" *Espinoza*, 591 U.S. at 475 (quoting *Trinity Lutheran*, 582 U.S. at 462). And in *Carson*, the Court confirmed that "denying the benefit based on a recipient's religious *exercise*"—*i.e.*, because of the religiously motivated *things they do*—triggers the same strict scrutiny. 596 U.S. at 785 (emphasis added).

Carson didn't break new ground, but rather reaffirmed a longstanding rule: conditioning "a benefit or privilege" on a person's "willingness to violate" her faith triggers strict scrutiny. *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963); *see Carson*, 596 U.S. at 778 (citing *Sherbert*; *Thomas v. Review Bd.*, 450 U.S. 707 (1981); and *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947)). And this rule makes good sense—"[a]fter all," the Free Exercise Clause "guarantees the free *exercise* of religion, not just the right to inward belief (or status)." *Trinity Lutheran*, 582 U.S. at 469 (Gorsuch, J., concurring in part).

Nor does *Employment Division v. Smith* provide an excuse to ignore this precedent. *Cf.* 2.App.0490. *Smith*, of course, has been vigorously criticized by five sitting Justices. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring); *id.* at 545 (Alito, J., concurring

in judgment). More importantly, of the recent trilogy of Supreme Court cases arising in a factual context analogous to this one, neither *Carson* nor *Espinoza* invokes *Smith*'s rule, and *Trinity Lutheran* cites *Smith* only to distinguish it—relying instead on *Sherbert* when analyzing the plaintiff's claim. *See Trinity Lutheran*, 582 U.S. at 463-65; *cf. Employment Division v. Smith*, 494 U.S. 872, 884 (1990) (addressing an "across-the-board criminal prohibition" unlike anything at issue in this case).

Carson governs here. The district court correctly recognized that UPK Colorado is a government-benefit program just like the school funding programs in *Espinoza* and *Carson*. 2.App.0489. And there's no dispute either that Plaintiffs' admissions and operations policies are sincerely religious, 2.App.0487 n.19, or that the Department is excluding Plaintiffs' preschools because of them, 2.App.0468-70, 2.App.0492. Because Plaintiffs are excluded from UPK Colorado based on their sincere religious exercise, strict scrutiny is triggered under *Carson*, *Espinoza*, and *Trinity Lutheran*. *Darren Patterson*, 699 F. Supp. 3d at 1185 (same).

The district court purported to distinguish this precedent, saying that "each" of Plaintiffs' cases "involved a program that 'specifically carved out' religious organizations from those eligible to receive funding." 2.App.0491. Not so. The Supreme Court has repeatedly held that even laws facially neutral to religion can trigger heightened scrutiny when, as here, they impose a burden "based on a recipient's religious exercise." *Carson*, 596 U.S. at 785.

In *Thomas*, for example, the law did not specifically carve out religious entities but rather was a facially neutral requirement that claimants for unemployment benefits have "good cause" for leaving work. 450 U.S. at 712-13. But when Indiana denied benefits to a claimant who left work for religious reasons, the Court applied strict scrutiny. *Id.* at 716-18. "[A] person may not be compelled to choose between [religious] exercise" and "participation in an otherwise available public program," the Court explained—*even if* the relevant "regulation" is "neutral on its face." *Id.*; *accord Sherbert*, 374 U.S. at 404 (similar).

Likewise, in *Carson* itself, Maine insisted that while its law as written excluded "sectarian" schools, it actually applied only to those schools that failed to provide the "rough equivalent of [a] public school education" because they "present[ed] academic material through the lens of" a particular faith. 596 U.S. at 775, 777, 787-89. But the Court rejected this "distinction" as immaterial. *Id.* at 786-87. As the Court put it, "our holding in *Espinoza* turned on the substance of free exercise protections, not on the presence or absence of magic words." *Id.* at 785. So even if the denial of benefits were indeed "based on a recipient's religious exercise," and not the recipient's religious *status*, it wouldn't matter—the First Amendment "prohibit[s] … denying the benefit" on that basis, too. *Id.*

Unsurprisingly, the district court's focus on facial neutrality also papers over reality: Defendant Odean has acknowledged that *all* the preschools barred from UPK Colorado by the Mandate are religiously

affiliated. Ex. 21 to Pls.' Mot. Summ. J. at 77:5-19, *Darren Patterson Christian Acad. v. Roy*, No. 1:23-cv-1557 (D. Colo. June 21, 2024), ECF No. 78-21.[3] But the First Amendment isn't so easily fooled. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("the effect of a law in its real operation is strong evidence of its object"); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Because the Archdiocese's preschools are excluded from UPK Colorado solely because of their religious exercise, *Carson* requires strict scrutiny.

B. Colorado's Mandate violates the Free Exercise Clause because it lacks general applicability and neutrality.

Carson aside, Colorado's actions also trigger strict scrutiny under *Smith*. Under *Smith*, strict scrutiny applies when the government "burden[s] [the plaintiff's] sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022).[4] The Mandate fails this requirement in three distinct ways: it lacks general applicability because it has categorical exceptions, it lacks general applicability because it has individualized

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[3] This Court can take notice of Defendant Odean's sworn testimony in a parallel proceeding. *See, e.g.*, *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1219 n.2 (10th Cir. 2011); *see also* Defs.' Mot. for Partial Summ. J. at 4, *Darren Patterson*, No. 1:23-cv-01557 (D. Colo. June 21, 2024), ECF No. 77 (citing trial evidence from this case).

[4] Plaintiffs, for purposes of Supreme Court review, preserve the argument that *Smith* was wrongly decided.

exceptions, and it lacks neutrality because it reflects hostility to religious beliefs.

1. Colorado permits categorical exceptions from the Mandate.

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. This rule is strict: A law isn't generally applicable if it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). And the comparability of "two activities" is "judged against" the "government interest that justifies the regulation at issue." *Id.* at 62. Once a plaintiff shows that any comparable secular conduct is treated more favorably, strict scrutiny is triggered. *Does 1-11 v. Bd. of Regents of Univ. of Colo.*, 100 F.4th 1251, 1277 (10th Cir. 2024) (having "lower bar" for secular over religious exceptions triggers strict scrutiny by making a "value judgment in favor of secular motivations").

Here, the Mandate's purpose (and thus the government's interest in enforcing it), is plain from the UPK statute's text: to "provide eligible children an equal opportunity to enroll and receive preschool services regardless" of the characteristics enumerated in the Mandate. Colo. Rev. Stat. § 26.5-4-205(2)(b); 2.App.0446 n.1. Colorado, however, has granted numerous categorical exceptions from the Mandate that undermine this

interest "in a similar way" to the religious accommodation Plaintiffs requested. *Fulton*, 593 U.S. at 534.

Disability and Income Level. First, it's undisputed that Colorado allows some UPK providers to deny families an equal opportunity to enroll and receive services based on disability and income level—even though these characteristics are covered by the Mandate. *Supra* pp. 11-12; *see also* 2.App.0446-47, 2.App.0510 (finding "exceptions" from Mandate for "low-income families … as well as those with disabilities."); ECF.109 at 44; 8 Colo. Code Regs. § 1404-1-4.110(A) (confirmed in regulations).

Religious Affiliation. Second, there's also no dispute that Colorado, through its "congregation preference," allows providers to deny families an equal opportunity to enroll on account of their religious affiliation—even though this characteristic, too, is covered by the Mandate. *Supra* p. 12; *see also* 2.App.0458, 2.App.0461, 2.App.0514-15 (finding that congregation preference violates the Mandate). As Odean testified, under this preference, a Lutheran provider "wouldn't have to provide an opportunity to enroll" to Catholics. 4.App.0815-16. *See also Darren Patterson*, 699 F. Supp. 3d at 1185 (same).

Sexual Orientation, Gender Identity, and Race. Third, Defendants admitted that the categorical preference allowing providers to prioritize serving a "specific community" would allow preschools that serve only "gender-nonconforming children," "children of color from historically

underserved areas," or that prioritize "the LGBTQ community" to participate in UPK Colorado. 4.App.0820-22; *supra* pp. 12-13. Yet sexual orientation, gender identity, and race are all likewise covered by the Mandate. And while Defendant Odean later testified that these providers "would be accepted" only "[a]s long as there wasn't discrimination that was aligned to the antidiscrimination provision," *id.*, her unequivocal testimony was that the Department views some preferences based on sexual orientation, race, and gender identity (like preferences for those who have historically faced discrimination) to be consistent with their application of the Mandate. 4.App.0854-56.

In other words, Defendants' position is that policies like these are permissible because they don't "discriminate[] against" children "who historically have been" discriminated against. 4.App.0821-22; *accord* 3.App.0600; ECF.109 at 24-25. But the text of the Mandate does not distinguish between types of discrimination the Department does and doesn't like.

Under *Tandon*, *Fulton*, and *Kennedy*, each of these categorical exceptions—for disability, income, religious affiliation, sexual orientation, race, and gender identity—is "comparable" to the religious exception sought by Plaintiffs because each undermines the government's interest in enforcing the Mandate "in a similar way." *Fulton*, 593 U.S. at 534. By permitting providers to exclude families based on a status covered by the Mandate, each exception "pose[s] an identical risk to the [Department's]

stated interest," "render[ing] its decision" to exclude Plaintiff preschools "subject to strict scrutiny." *Fellowship of Christian Athletes v. San Diego Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 689-90 (9th Cir. 2024) (en banc) ("*FCA*").

The en banc Ninth Circuit in *FCA* reached the same result on analogous facts. There, school-district policies forbade "discrimination on the basis of race, sex, sexual orientation, religion, and other criteria." *Id.* at 687.[5] Citing these policies, the district excluded a religious student group that limited its leadership to students sharing its traditional beliefs on sexuality. *Id.* at 671. The district's actions violated the Free Exercise Clause because other groups "were allowed to discriminate expressly—even on otherwise protected grounds." *Id.* at 689-90.

Notably, the comparator student groups in *FCA* were allowed to discriminate based on *different* protected characteristics ("race and gender") than the ones relevant for the plaintiff student group (sexual orientation and religion). *Id.* at 689. Nevertheless, these secular exceptions triggered strict scrutiny: "there is no meaningful constitutionally acceptable distinction between the types of exclusions at play here. Whether they are based on gender, race, or faith, each group's exclusionary membership requirements pose an identical risk to the District's stated interest in

[5] The district court misread *FCA*, mistakenly stating that the policies there "did not specify the characteristics that could be or were prohibited from being considered." 2.App.0510.

ensuring equal access for all student to all programs." *Id.*; *see also Darren Patterson*, 699 F. Supp. 3d at 1186 (categorical exception for religious affiliation triggered strict scrutiny of entire Mandate); *Youth 71Five Ministries v. Williams*, No. 24-4101, 2024 WL 3749842, at *4 (9th Cir. Aug. 8, 2024) (secular exceptions for race and gender triggered strict scrutiny of entire non-discrimination policy).

By contrast, the district court here thought that only exceptions from the *same* protected characteristic (religious affiliation, sexual orientation, etc.) triggered strict scrutiny. 2.App.0508, 2.App.0514. But Free Exercise analysis turns on whether secular and religious exceptions similarly undermine the *government's interest*, *Fulton*, 593 U.S. at 534—not whether they involve *conduct* that is inherently similar. In *Tandon*, for example, the question wasn't whether going to the hair salon is similar to "at-home religious exercise"; what mattered was that the same government interest (public health during COVID) was implicated for each. *Tandon*, 593 U.S. at 62-63. So too here: it does not matter whether the secular exceptions involve disability, income, or sexual orientation; the government's interest in equal access is, by definition, undermined by *un*equal access based on any of the seven characteristics covered by the Mandate.

Instead of following this straightforward analysis, the court essentially treated the Mandate's seven protected categories as seven separate laws, each justified by a distinct government interest. 2.App.508.

Nothing in the Mandate supports that kind of dissection. *Supra* p. 10. And Defendants offered no evidence that some categories are more protected than others. Rather, Odean testified to the opposite in parallel litigation: "Q. Does the Department view some [of] those characteristics [in the Mandate] as being more important than others? A. No. … Q. Is the [Department's] interest the same? A. It is the same." Ex. 21 to Pls.' Mot. Summ. J. at 15:10-16:16, *Darren Patterson*, ECF No. 78-21. If the interest is "the same," the result follows ineluctably: denying equal access based on *any* characteristic protected by the Mandate undermines the Department's interest in the same (or, at a minimum, a "similar") way and thus triggers strict scrutiny. *Fulton*, 593 U.S. at 534.

The district court and Defendants also suggest that *some* differential treatment shouldn't trigger strict scrutiny because it advances important government interests, like helping children with disabilities and low-income families. 2.App.0511-12 ("These, and other laws, reflect the nuanced realities of education, permitting special programming in specific cases for specific children."). But the comparability analysis is not concerned with the *justification for* or the *importance of* the secular exceptions; that is a question for strict scrutiny. *Tandon*, 593 U.S. at 63; *see also Fulton*, 593 U.S. at 542. All that matters for the strict-scrutiny *trigger* is whether the government has favored other interests over religious interests, thus "devalu[ing] religious reasons … by judging them to be of lesser import than nonreligious reasons." *Does 1-11*, 100 F.4th at 1277. If

the government makes such a "value judgment," strict scrutiny applies. *Id.* at 1277-78.

Pivoting, Defendants next claim that on a creative reading of the UPK statute, their secular exceptions are actually consistent with the Mandate after all. *See* ECF.109 at 24-25 (Department "understands the statute to mean" that prioritizing low-income families is permitted by the UPK statute). But this is a red herring. Whether framed as an exception from the Mandate or an exclusion from its coverage, the bottom line is the same: the Department invokes the Mandate to prohibit Plaintiffs' religious conduct while allowing secular conduct implicating the same interests in equal treatment based on protected characteristics. As another Circuit has persuasively explained, it doesn't matter if the government *claims* there are "no exceptions" from a policy because it interprets its policy to hive off from coverage the secular conduct it favors. "[T]hat is word play." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020). What matters is the real operation of the law. *Id.*

Here too, *FCA* is instructive. The school district there sought to "justify" the exceptions it granted for groups like the Senior Women Club "by asserting that they benefit 'individuals who need specific support from the school system' and align with the District's 'equity policy.'" 82 F.4th at 688. But this didn't change the result. "While inclusiveness is a worthy pursuit," the court held, "the District's alleged good intentions do not change the fact that it is treating comparable secular activity more

favorably than religious exercise." *Id.* at 687-88; *see also id.* at 693 (no exceptions "for 'benign' discriminatory membership rules."); *see also Fellowship of Christian Athletes v. District of Columbia*, No. 1:24-cv-1332, 2024 WL 3400104, at *13 (D.D.C. July 11, 2024) (same). So too here.

In short, Defendants would not and have not completely excluded from UPK Colorado preschools that prioritize (1) low-income families, (2) children with disabilities, (3) Lutherans, (4) LGBTQ children and families, or (5) Black children and families—but they have barred Plaintiffs' preschools from UPK Colorado based on their religious exercise. This triggers strict scrutiny.

2. Colorado permits individualized exceptions from the Mandate.

As both this Court and the Supreme Court have explained, governmental discretion to consider individualized exceptions means a law is not "generally applicable," triggering strict scrutiny. *Does 1-11*, 100 F.4th at 1272; *Fulton*, 593 U.S. at 533-34. Here, Defendants have two separate forms of discretion to consider case-by-case exceptions from the Mandate—so their exclusion of Catholic preschools triggers strict scrutiny.

The individualized-exception form. First, the Department has an explicit mechanism for requesting an individualized exception. 4.App.0819-20. To use it, preschools fill out an online form identifying their "Exception Requested." 7.App.1702. Defendants then consider these requests on a "case-by-case" basis. 4.App.0833. And they have granted

several—including requests to serve only "fully Vaccinated Children," "church members," and "Fort Lewis College student families and staff/faculty." 7.App.1729-30; *see also, e.g.*, 7.App.1582, 7.App.1583-84, 7.App.1587 (describing process); ECF.109 at 25.

Moreover, the individualized-exemption process allows the Department to consider requests that would implicate characteristics covered by the Mandate. Indeed, the form itself includes an example of a potential request—"My location only serves children with specific disabilities"—that conflict with the Mandate. 4.App.1702; *see also* 2.App.0503.

In response, Defendants argue that the Department doesn't have this discretion because certain regulations forbid granting exceptions that violate other statutory or regulatory requirements. ECF.109 at 42-44. But that didn't stop them from issuing the "congregation" preference, which the district court agreed allows UPK providers to consider "religious affiliation." *Compare id.* at 46 *with* 2.App.0514-16.

More importantly, the vague regulatory language Defendants cite states only that providers can't use an exception if it would "conflict with any other provision" of the UPK statute. 8 Colo. Code Regs. § 1404-1-4.110(A)(10)(b); *see also id.* § 1404-1-4.110(B) ("must still comply with" other regulatory provisions). Such broadly worded, don't-break-the-law statements can't insulate Defendants from the plain import of the exceptions they've offered, "lest" those exceptions be rendered "a nullity." *Fulton*, 593 U.S. at 537. What would it even mean to tell a provider *both* that

it can serve "only" "children with specific disabilities" *and* that it can use this exception only if it provides an equal opportunity to enroll regardless of "disability"?

In any event, if this regulatory language means Defendants don't have to worry about consistency with the Mandate when granting exceptions, there's no reason they couldn't have granted an exception to Plaintiffs, too. Yet they refused—determining that Plaintiffs' religious reasons for seeking an exception (unlike others') were not "worthy of solicitude." *Id.* at 537. That requires strict scrutiny.

Statutory discretion. The UPK statute also expressly grants discretion, stating "the department may allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II). These "quality standards" include the Mandate. *Id.* § 26.5-4-205(2). The statute also explains that the Department cannot grant exceptions from the "quality standards relating to health and safety." *Id.* § 26.5-4-205(1)(b)(II).

This discretion similarly triggers strict scrutiny. Having retained the ability to grant exceptions from the Mandate, the State "may not refuse to extend that system to cases of religious hardship without a compelling reason." *Fulton*, 593 U.S. at 523. This remains true even though the Department's discretion is time-limited: even temporary exceptions require

a "compelling reason." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297-99 (10th Cir. 2004) (one-day exception could trigger strict scrutiny).

In response, the district court and Defendants suggest the Mandate is a non-waivable "health and safety" provision. 2.App.0501-02; ECF.109 at 40-41. But Defendants never understood the Mandate to be a "health and safety" provision until this litigation and haven't even come up with a clear standard to determine whether any other quality standards also qualify. *See* 4.App.0823-25 (interpretation new at trial). And for good reason: the suggestion that a provision primarily regulating *admissions to* a preschool is a "health and safety" regulation strains credulity well past the breaking point.

This also explains why the Department's own Agreement lists the Mandate *separate* from the "[q]uality standards relating to health and safety" in a list of "Program Requirements." 5.App.1166-67. And other uses of "health and safety" in the same bill that created UPK Colorado confirm that the Legislature intended the term to describe the physical health and safety of students *in the classroom environment*. *See* 2022 Colo. Legis. Serv. Ch. 123 (H.B. 22-1295) (using "health and safety" in regulating "care setting" and "preschool classrooms").

If anything, the Department's last-minute scramble toward this "health and safety" explanation is a tell: it underscores the lack of general applicability of its actions. Like the policies adopted during litigation in *FCA*, this "appears to be the type of post hoc justification" for excluding

religious exercise "that is incompatible with the protections of the First Amendment." 82 F.4th at 693.

3. Colorado's application of the Mandate is not neutral.

Separate from general applicability, Defendants' exclusion of Plaintiffs from UPK Colorado also "transgressed th[e] neutrality standard." *Fulton*, 593 U.S. at 533. This neutrality requirement bars government actions that, in their effects, evidence religious hostility. *See Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 639 (2018); *Lukumi*, 508 U.S. at 535 ("religious gerrymander"). As the Sixth Circuit has explained, "various irregularities in [the government's] investigation and adjudication processes also permit an inference of non-neutrality." *Meriwether v. Hartop*, 992 F.3d 492, 514 (6th Cir. 2021). For example, "repeated changes in position" can show that the government was "using an evolving policy as pretext for targeting" a plaintiff's beliefs. *Id.* at 515.

Here, there is evidence of both religious hostility and manipulation of the Department's policies to exclude religious providers. As for overt hostility, Defendants have compared Plaintiffs' preschools to 1970s segregation academies in the South and characterized Plaintiffs' millennia-old religious beliefs as stigmatization and bullying. ECF.77 at 23-26, 29-31; 4.App.0836-39. *But see Obergefell v. Hodges*, 576 U.S. 644, 671-72, 679-80 (2015) ("emphasiz[ing]" religious organizations must be "given proper protection as they seek to teach" their "decent and honorable" traditional views on marriage).

And as for manipulation, Defendants have repeatedly recalibrated their policies in a manifest attempt to gerrymander around Plaintiffs' claims—not only expanding the definition of "health and safety" (as explained above), but also repeatedly tweaking the scope of the congregation preference in response to Plaintiffs' legal arguments made during this litigation. ECF.110 ¶3 (revised congregation preference); 1.App.0187 (describing the prior proposed regulatory definition); 1.App.0117-18 (describing the Department's pre-regulation understanding of "congregation").

These targeted actions confirm that far from neutrally applying the law, Defendants have instead created a "moving target" to avoid accountability while reaching a foregone conclusion. *Meriwether*, 992 F.3d at 515.

C. Colorado cannot withstand strict scrutiny.

With strict scrutiny triggered, Defendants must prove that excluding Plaintiffs' preschools "serve[s] a compelling interest and [is] narrowly tailored to that end." *Kennedy*, 597 U.S. at 532. "That is a demanding standard." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Strict scrutiny for free-exercise claims "is not watered down; it really means what it says." *Tandon*, 593 U.S. at 65 (internal quotation marks omitted). And in applying it, the Supreme Court has repeatedly ruled in favor of First Amendment claimants in cases like this one. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 602 (2023) (website designer couldn't be forced to design for same-sex weddings); *Fulton*, 593 U.S. at 533 (Catholic foster-

care agency couldn't be forced to certify same-sex couples); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 578-79 (1995) (parade couldn't be forced to include LGBT pride group). Defendants fare no better.

1. Colorado's interests are not compelling.

Under strict scrutiny, "[o]nly the gravest abuses, endangering paramount interest," can "give occasion for [a] permissible limitation" on free exercise. *Sherbert*, 374 U.S. at 406. And whether an interest is compelling must be judged by scrutinizing "the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 593 U.S. at 541. "The question, then, is not whether [Colorado] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [the Archdiocese]." *Id.*

Here, the district court and Defendants describe the government's interest as two-fold: "(1) ensuring eligible children and their families do not face discriminatory barriers to publicly funded preschool and (2) protecting children from discrimination." 2.App.0476, 2.App.0452; ECF.109 at 52. These interests fail to satisfy strict scrutiny for numerous reasons.

Not meaningfully reviewable. First, "amorphous" goals don't count as compelling government interests, because they "cannot be subjected to meaningful judicial review." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023) ("*SFFA*"). As *SFFA* explained, goals like "achiev[ing] the educational benefits of

diversity" may be "commendable," but "they are not sufficiently coherent for purposes of strict scrutiny" because it's "unclear how courts are supposed to measure" them or reliably determine "when they have been reached." *Id.* at 214, 215-16. So too here, where Defendants' position plainly "is not one of *no*" discrimination but one "of degree." *Id.* at 215-16 (emphasis in original); *see also Fellowship of Christian Athletes v. District of Columbia,* 2024 WL 3400104, at *8 (applying *SFFA* in free-exercise case; finding government's "claimed interest in maintaining an 'equitable environment free of discrimination'" insufficient for strict scrutiny).

***Raised* post hoc.** Second, these alleged interests were not raised until litigation. Such belated justifications are not compelling as a matter of law. *Kennedy*, 597 U.S. at 543 n.8 ("Government 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'" (alteration in original)); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008) ("*CCU*") ("governmental interest found nowhere but in the defendants' litigating papers" not compelling).

Before this case was filed, the Department claimed Plaintiffs could not receive an exception because the UPK statute didn't allow for exceptions. 5.App.1164 ("I do not have the authority to create an exemption."). This, as Defendants admitted at trial, was the reason they denied Plaintiffs an accommodation. 3.App.0735-36, 3.App.0749. No other reason was proffered or considered at the time. *Id.* It was only once Defendants were

forced to confront in court the many secular exceptions they had already granted from the Mandate that their story changed from "no exceptions" to "only those exceptions that 'align' with our goals." This *post hoc* attempt to rationalize a naked policy preference is—as a matter of law—not compelling.

Excluding Plaintiffs doesn't advance claimed interest. Third, even if Defendants' interests were compelling in the abstract, Defendants' actions here wouldn't advance them. Indeed, excluding Plaintiffs' preschools from UPK Colorado doesn't remove any "discriminatory barriers" to preschool access. Nearly 2,000 UPK providers have agreed to the Mandate and participate in UPK Colorado today. 4.App.0805. Allowing Plaintiffs' preschools to participate would not take away a *single one* of those nearly 2,000 options from LGBTQ families. *See* 4.App.0813 (new providers "participate alongside" current providers). Rather, it would *add* to the list of UPK providers—permitting Catholic families who feel obliged to send their kids to Catholic schools to participate too and *increasing* overall UPK program capacity so more families can participate. 3.App.0675-77; *see Fulton*, 593 U.S. at 541-42 ("Maximizing the number of foster families" is an "important goal[ ]," but "[i]f anything, including" a Catholic foster agency "seems likely to increase, not reduce, the number of available foster parents"). Put simply, if the goal is to—in Defendants' words—prevent "children and families" from "hav[ing] fewer options available to them because of who they are," ECF.77 at 22-23, Defendants

have "fail[ed] to show that granting [Plaintiff preschools] an exception will put th[at] goal[] at risk," *Fulton*, 593 U.S. at 541-42.

Even the district court agreed: "Plaintiffs are correct that none of the expert testimony presented by Defendants spoke directly to whether Plaintiff Preschools' participation in the UPK Program *would increase or decrease the ability of LGBTQ+ families to access preschool services* in Denver and the surrounding area." 2.App.0481 (emphasis added). Without being able to show *any effect* on the ability of LGBTQ families to access preschool services, Colorado's interest cannot possibly be compelling. This alone is dispositive.

No evidence of "actual problem." Fourth, for an interest to be compelling, Defendants must identify an "'actual problem' in need of solving," *Brown*, 564 U.S. at 799, and an actual harm that would be caused by granting Plaintiffs an accommodation. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006) (Courts must "look[] beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."); *see Ramirez v. Collier*, 595 U.S. 411, 427 (2022) (same). Mere "speculation is insufficient." *Fulton*, 593 U.S. at 542; *see also Peck v. McCann*, 43 F.4th 1116, 1136 (10th Cir. 2022) (same).

Here, Defendants assert an interest in protecting children from discrimination, but Defendants can't point to any evidence of actual harms that have occurred or would occur to justify this exclusion. Defendants

acknowledge that they have not received a single complaint regarding LGBTQ discrimination against any Archdiocesan preschool. 4.App.0840-41; 8.App.1811-12. And Defendants concede that future harm to LGBTQ families is speculative. *See* 1.App.0065.

In addition, Plaintiffs' preschools already take steps to mitigate the speculative harm Defendants float. As Plaintiffs have said from the start, they too want to avoid creating conflicts for families who might have beliefs or views on sexuality that diverge from what their schools teach. *E.g.*, 1.App.039. And they share the Department's goal of helping families find the preschool that is the best fit for them. That is why Plaintiffs have the enrollment policies they do. *Cf.* 3.App.0690 (declining to enroll fifth-grade child of same-sex parents to avoid "caus[ing] great conflict within their own family"); *see also* 3.App.0626-30.

Given the Archdiocese's enrollment policies, Defendants are forced to concede that their concerns about "discrimination" would arise at Plaintiffs' preschools only *if* a child doesn't "identify as gender diverse until after enrollment." ECF.109 at 53. But despite having the burdens of proof and persuasion on their strict-scrutiny affirmative defense, Defendants put on no evidence suggesting there are a significant number of four-year-olds deciding to socially transition *during the nine months of UPK-funded preschool*. There is thus simply no record evidence that Defendants' exclusion of Plaintiffs is addressing an "'actual problem' in need of solving," *Brown*, 564 U.S. at 799.

Experts confirm interest is speculative. Fifth, Defendants' experts undermine Defendants' claimed interest. The testimony of Defendants' two experts—Drs. Goldberg and Tishelman—conclusively established that there is *no* research demonstrating that excluding licensed preschools (much less excluding Catholic preschools specifically) from universal preschool programs would advance the Department's alleged interest in removing discriminatory barriers to preschool access. *E.g.*, 4.App.0876 (no evidence regarding the effect of enrollment policies on LGBTQ families), 4.App.0878 (similar), 4.App.0881 (agreeing there is no "evidence showing that LGBTQ families in Denver are unable to access cost-effective early childhood education through the UPK program"); 5.App.0953-54 (not "aware of studies specific to preschool on LGBTQ bullying").

Moreover, neither expert could explain how LGBTQ families would benefit from the exclusion of Catholic preschools from UPK Colorado. 5.App.0972 ("I don't know that I can answer that question"); *see also* 4.App.0880-81 (unable to opine on UPK Colorado accessibility). And even more fundamentally, neither expert could point to studies attesting to the alleged critical importance of affirming a child's sex-diverging gender identity at the *preschool* level in particular—all the studies cited involved preteens and teens. *E.g.*, 5.App.0953-54.

Defendants haven't treated these interests as compelling. Sixth, "a law cannot be regarded as protecting an interest of the highest order

when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi,* 508 U.S. at 547 (cleaned up); *accord*, *e.g.*, *O Centro*, 546 U.S. at 433. As *Fulton* explained, an interest in "equal treatment" may be "weighty," but "[t]he creation of a system of exceptions … undermines" the claim that the government's interest in equal access "can brook no departures." 593 U.S. at 542.

Here, Defendants have granted (and have the discretion to grant) countless exceptions from the Mandate, for all sorts of secular reasons. *Supra* pp. 25-34. As in *Fulton*, this confirms that the government's interest in denying an exception to Plaintiffs, "while making them available to others," is not compelling. 593 U.S. at 542.

Moreover, Defendants' own evidence shows there are still other ways they are not treating these government interests as compelling. For example, according to Defendants' experts, an "affirming" preschool curriculum is critical to LGBTQ student and family wellbeing, and failure to have such a curriculum can cause harm. 4.App.0872, 4.App.0889; 8.App.1820-21. Yet Defendants have *disclaimed* any intention to regulate religious preschool curricula. ECF.109 at 56; 4.App.0808-09. This "underinclusiveness undermines" any effort to satisfy strict scrutiny. *CCU*, 534 F.3d at 1268.

The district court's invented interest. Perhaps recognizing the weaknesses in Defendants' interests, the district court fashioned one of its own: ensuring that LGBTQ families have access to preschool

programs "of their choosing" that are the "best fit their family's needs." 2.App.0523. According to the district court, this means that families who reject Plaintiffs' beliefs must be able to enroll not just in *a* UPK participating preschool, but in *Plaintiffs'* Catholic preschools—an interest it deemed "even more significant" because these schools might "provide the best academic experience." 2.App.0523-33.

But again, compelling interests can't be "invented *post hoc*" even by defendants, *Kennedy*, 597 U.S. at 543 n.8—much less by the court. And this interest isn't just different from Defendants' arguments, it's at odds with them—for example, Defendants' (erroneous) claim that Plaintiffs' preschools could be harmful to LGBTQ children. ECF.109 at 51. The Department can't have an interest in ensuring children can attend preschools it believes are harmful to them.

Nor could one square the circle by saying UPK funding should induce Catholic preschools to *change* their religious practices to suit secular mores—that simply rejects the Free Exercise Clause altogether. And indeed, in the speech context, *303 Creative* rejected an argument precisely analogous to the district court's—that because a website designer's services were "'unique,'" she could be forced to design wedding websites for same-sex couples. 600 U.S. at 592. As in *303 Creative*, the fact that Plaintiffs' schools are high-quality "hardly means a State may coopt [them] for its own purposes." *Id.* "That would not respect the First Amendment; more nearly, it would spell its demise." *Id.*

2. Excluding Plaintiffs' preschools is not the least restrictive way of advancing Colorado's interests.

Defendants not only have failed to assert a compelling interest—they also haven't shown that their means of advancing these alleged interests are "narrowly tailored." *Kennedy*, 597 U.S. at 525. Strict scrutiny requires that "[i]f a less restrictive alternative would serve the Government's purpose, [it] must use that alternative." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000). And there must be a close "fit" between the "means" Defendants have chosen and the "ends" they seek to accomplish. *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1226 (10th Cir. 2021); *see also Awad v. Ziriax*, 670 F.3d 1111, 1130-31 (10th Cir. 2012). Defendants fail narrow tailoring in at least two ways.

Less restrictive alternatives. First, Defendants have failed to use less restrictive alternatives to advance their interests. The Department has an online portal that provides families with detailed information about potential matches. This portal already includes disclaimers for numerous secular providers, including bolded statements like: "This is a Head Start grantee and families may need to meet additional factors to enroll"; and "This provider may require families to be a part of their congregation." 6.App.1442-46. *See* 4.App.0839 (information provided "[s]o that families understand and are making an informed choice about the provider that they've listed"). Moreover, the Department can (and has)

asked families questions through the portal to determine whether they meet a provider's enrollment requirements. 3.App.0743-44.

During the matching process, then, the Department could use a family's profile, the disclaimers, and targeted questions to ensure that LGBTQ families are matched with a preschool that best meets their needs. 2.App.0457. The Department could also—as the federal government does for families in foster care, 45 CFR § 1355.22(b)(2)—alert families to the existence of preschools that affirm and support LGBTQ families and youth, ensuring that they know they do *not* face a barrier to access.

Rather than embrace these alternatives, Defendants have categorically barred Plaintiffs' preschools. Worse, Defendants have offered *no evidence* as to why these less restrictive alternatives wouldn't similarly advance their interests. This evidentiary failure alone confirms the Department can't satisfy strict scrutiny. *Yellowbear v. Lampert*, 741 F.3d 48, 63 (10th Cir. 2014) ("[T]he government's burden here isn't to *mull* the claimant's proposed alternatives, it is to *demonstrate* the claimant's alternatives are ineffective.").

Means-ends analysis. Second, Defendants also fail narrow tailoring because the "means" they have chosen does not "fit" their asserted interests. Defendants seek to increase access to UPK Colorado for LGBTQ families, but, as explained above, barring Plaintiffs' preschools emphatically fails to advance that interest. *Supra* pp. 40-41. This mismatch

between Defendants' means and asserted ends also defeats narrow tailoring. *Awad*, 670 F.3d at 1131 ("[T]he amendment's complete ban … is hardly an exercise of narrow tailoring.").

II. Colorado's Mandate violates Plaintiffs' freedom of expressive association.

"[T]he First Amendment protects acts of expressive association." *303 Creative*, 600 U.S. at 586. That includes the decision "not to associate" with others if the forced association would "affect[] in a significant way the group's ability to advocate" its "viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Applying this doctrine, the Supreme Court has held that notwithstanding state antidiscrimination laws, the Boy Scouts could dismiss an assistant scoutmaster whose beliefs and actions failed to reflect their opposition to homosexual conduct, *id.* at 647-48, and veterans groups could exclude an LGBT group from a St. Patrick's Day parade, *Hurley*, 515 U.S. at 572-73. That doctrine applies here, protecting the Archdiocese's preschools from being forced to enroll families who reject the beliefs they seek to pass on to the next generation.

As the district court found, there is no question Plaintiffs engage in expressive activity. 2.App.0530. Nor is there any question that requiring Plaintiffs' preschools to include those who oppose their sincere religious beliefs in their faith community and to affirm in word and deed a message contrary to their faith would interfere with the schools' religious message. *Supra* pp. 6-8. Indeed, Defendants' expert *agreed* that the Plaintiffs'

religiously informed policies send a "consequential" message. 4.App.0886-87. Under *Dale*, this is more than enough to show a violation of the right to expressive association. Yet, despite conceding that "Plaintiff Preschools engage in substantially the same activity as in *Dale*," 2.App.0531, the district court attempted to distinguish *Dale* in four ways; none are persuasive.

First, the district court noted that *Dale* dealt with the direct application of a public accommodations law rather than, as here, a condition on state funding. But both direct regulations and "a funding condition can result in an unconstitutional burden on First Amendment rights." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). Indeed, the Supreme Court has made clear that a condition on funding is unconstitutional if the government could not directly impose that condition without violating constitutional rights. *Fulton*, 593 U.S. at 536 ("We have never suggested that the government may discriminate against religion when acting in its managerial role."); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("[t]he government 'may not deny a benefit … on a basis that infringes [plaintiff's] constitutionally protected [interests]' … even if he has no entitlement to that benefit.").[6]

[6] The district court's analysis confuses things further by relying on cases in which private parties are paid to engage in *government speech*. 2.App.0537. But Defendants have never suggested that UPK Colorado converts private preschools into government speakers, and their decision

Second, the court suggested that *Dale* was distinguishable because membership in the Boy Scouts "is entirely elective"—but the district court then admitted that preschool is voluntary. 2.App.0531-32, 2.App.0532 n.47.

Third, the court suggested that "associating with LGBTQ+ children and the children of LGBTQ+ parents is not likely to send the same message as 'an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform' in *Dale*." 2.App.0534; *see also* 2.App.0535 (similar). And it claimed Plaintiffs are mistaken about what would "contravene the[ir] preferred messages." *See* 2.App.0535. But *Dale* rejected this argument: the Court held it could not second guess whether a gay scoutmaster would impair the Boy Scouts' message; instead, it gave "deference" to the Boy Scouts' account of "what would impair its expression." 530 U.S. at 653. That is because "a [s]tate, or a court, may not constitutionally substitute its own judgment for that of" the expressive association. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 123-24 (1981); *see also Hurley*, 515 U.S. at 575 (same).

Fourth, the district court minimized *Dale* because of greater "social acceptance for LGBTQ+ rights" today. 2.App.0533 & n.49. But *Dale* itself recognized that the growing "societal acceptance" of LGBTQ rights was "all the more reason to protect the First Amendment rights of those who

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to disclaim control over religious schools' curricula confirms it has done nothing of the sort.

wish to voice a different view." *Dale*, 530 U.S. at 660. Regardless, Supreme Court decisions don't have expiration dates. *United States v. Guillen*, 995 F.3d 1095, 1114 (10th Cir. 2021); *see 303 Creative*, 600 U.S. at 584-87, 589-90, 592 (applying *Dale* in 2023).

Both the district court and Defendants also attempt to conjure a slippery slope if *Dale* is applied here. ECF.109 at 58 ("no limiting principle"). But the facts of this case—as the district court recognized, 2.App.0531 n.46—so closely align with existing precedent (like *Dale* and *Hurley*) that slippery slope arguments have little purchase. And the context in which *this case* arises further confirms such fears are unfounded—it is hard to imagine an environment *more sensitive* to the witness of those in the community than early-childhood education. *See generally Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 756 (2020).

III. The Archdiocese has standing.

Despite finding standing for the Plaintiff preschools and parents, the court dismissed the Archdiocese for lack of standing. 2.App.0313. But the Archdiocese has standing both to represent its preschools and in its own right.

A. The Archdiocese has associational standing.

Associational standing permits an organization to sue on behalf of its members whenever (1) "at least one of" the organization's "members would otherwise have standing," (2) "the interests" it "seeks to protect are germane to the organization's purpose," and (3) "neither the claim

asserted nor the relief requested requires the participation of individual members in the lawsuit." *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 759 (10th Cir. 2023) (cleaned up); *SFFA*, 600 U.S. at 199. All three requirements are met here.

First, as the district court held, at least two of the Archdiocese's members have standing in their own right—St. Mary's and St. Bernadette's. 2.App.0324-28, 2.App.0540, 2.App.0544. These preschools, like the other thirty-four overseen by the Archdiocese's Office of Catholic Schools, are "part of" the Archdiocese, 5.App.0989; *see* ECF.32-1 at 2-3; they exercise the Archbishop's delegated teaching authority, 2.App.0381; and the Archdiocese speaks for and advances their interests in public affairs. *See*, *e.g.*, 5.App.1160-61 (Archdiocese's instruction to preschools not to participate in UPK Colorado); 5.App.1162-63 (Archdiocese's request for accommodation). And they have suffered justiciable harm: their "inability to participate in and benefit from" UPK Colorado. 3.App.0324 & n.5; *see also*, *e.g.*, *Trinity Lutheran*, 582 U.S. at 463 (justiciable injury where religious school was denied "right to participate in a government benefit program without having to disavow its religious character"); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("[t]he 'injury in fact' ... is the denial of equal treatment resulting from the imposition of the barrier"). That harm is caused by Defendants' challenged policies and would be redressed by a ruling in Plaintiffs' favor. 2.App.0325-27 (district court so concluding).

Second, the interest the Archdiocese seeks to protect—its preschools' ability to participate in UPK consistent with their Catholic convictions—is germane to its purpose. "Education is critically important to the mission of the Archdiocese." 3.App.0612; *see also* 5.App.0999. And pursuing that mission involves ensuring parents have the financial ability to choose Catholic schools for their families. 3.App.0636; *see also, e.g.*, Pope Benedict XVI, *Meeting with Catholic Educators* (Apr. 17, 2008), https://perma.cc/W8TR-P6RV ("[E]verything possible must be done, in cooperation with the wider community, to ensure that [Catholic schools] are accessible to people of all social and economic strata."). Moreover, for the Archdiocese to provide that Catholic education, its schools "need to implement policies that are consonant with Christian anthropology's view of the person." 5.App.1047; *see also* 2.App.0465; 5.App.1073. That is what this case is about—Defendants' effort to force the Archdiocese's preschools to abandon those policies to participate in an otherwise available funding program. Protecting its schools from that unconstitutional choice could hardly be more germane to the Archdiocese's mission.

Third, neither the claim asserted nor the relief requested requires the participation of the other thirty-four preschools. As for relief, "a declaration, injunction, or some other form of prospective relief" are classic forms of relief that can be sought by organizations without the need for participation by individual members. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also* 33 Wright & Miller, *Federal*

Practice and Procedure § 8345 (2d ed.) ("Generally speaking, the third [prong] is satisfied where an association seeks just injunctive or declaratory relief[.]"). That is the relief the Archdiocese seeks here. 1.App.0052-53.

And as for the claim asserted, the Archdiocese raises an essentially legal question: whether the First Amendment permits the Department to condition UPK participation on its preschools' abandoning the Archdiocese's religious policies governing enrollment and operations. This "question of law" does not require individual participation. *Int'l Union v. Brock*, 477 U.S. 274, 287 (1986). The UPK conditions, of course, do not vary by preschool. And the Archdiocese's admissions and enrollment policies likewise apply to all thirty-six preschools. *See* 2.App.0382; 2.App.0469; ECF.109 at 34.

Yet it was here the district court went astray. The court declined to address the first two elements of associational standing. *Cf.* 2.App.0330-31. On the third, however, it reasoned that the participation of the non-Plaintiff preschools was "indispensable" because they are separate legal entities that the Archdiocese, in response to Defendants' efforts to seek wide-ranging discovery from each of them, had asserted were beyond its "legal 'control.'" 2.App.0331-32.[7]

[7] Defendants, among other things, sought to depose representatives of all thirty-four non-Plaintiff preschools, 1.App.0156-57.

That reasoning is mistaken. Members in associational-standing cases are frequently separate entities over which the organization exercises no legal control. *See, e.g., SFFA*, 600 U.S. at 201 (organization representing individual students); *Hunt*, 432 U.S. at 344-45 (government agency representing private apple growers and apple dealers). And an association doesn't have to offer up each of its members to intrusive discovery as the price for obtaining associational standing. Indeed, this Court has held that an organization does not even need to *give the real name* of its affected members. *Speech First, Inc. v. Shrum*, 92 F.4th 947, 949-52 (10th Cir. 2024). And one of the seminal associational-standing cases was precisely about an association asserting its members' interest in *resisting discovery*. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 458-59 (1958).

Of course, the result might be different had Defendants raised legitimate "questions about the existence or bona fides of the" non-Plaintiff preschools. *Speech First*, 92 F.4th at 950. But the record on this point is clear, and Defendants disputed nothing of the sort. Meanwhile, the court didn't cite a single case supporting its novel "separate legal entities" theory, and Plaintiffs know of none.

The district court also suggested that the non-Plaintiff preschools' participation was required because Plaintiffs assert as-applied challenges. But associations can bring as-applied challenges on behalf of their members. *See, e.g.*, *NAACP*, 357 U.S. at 458-59. And although the court suggested that perhaps not every Archdiocesan preschool would "desire[] to

participate in UPK," 2.App.0331, that doesn't change the analysis: again, associational standing requires only that "at least one" member would have standing in its own right, not that *all* of them would. *Citizens for Const. Integrity*, 57 F.4th at 759; *see also*, *e.g.*, *NCAA v. Califano*, 622 F.2d 1382, 1391-92 (10th Cir. 1980) (associational standing not precluded even in the extreme case where some members are o*n the other side* of the litigation, provided "one or more of the members" support it).

Likewise, nothing about the application of strict scrutiny forecloses associational standing. Indeed, the Supreme Court itself recently found associational standing in a case applying strict scrutiny. *SFFA*, 600 U.S. at 213-218. To be sure, strict scrutiny is properly analyzed with respect to the "specific exemptions" sought by the "particular religious claimant." *Fulton*, 593 U.S. at 541. But here, the particular religious claimant is the Archdiocese, suing on behalf of members who are identically situated by virtue of being bound by identical religious policies. *See Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1280 (5th Cir. 1981) ("[B]ecause the religious activity of the members was inherently intertwined with the services and facilities of the Church," "the claims could properly be presented by the Church on behalf of its members."). And all of Plaintiffs' strict-scrutiny arguments detailed above apply equally to all Archdiocesan preschools. *Supra* pp. 37-47. Indeed, while the district court (incorrectly) ruled against Plaintiffs on strict scrutiny, none of *its* reasoning turned on any preschool-specific factor. *See* 2.App.0528-35.

In short, the Archdiocese is the party that determined the religious admissions and operations policies at issue in this case, the Archdiocese is the party responsible for ensuring that its preschools abide by those policies, and the Archdiocese is the party that determined its preschools could not participate in UPK Colorado given Defendants' efforts to condition participation on their abandoning those policies. The Archdiocese thus has associational standing.

B. The Archdiocese has standing in its own right.

Because the Mandate impairs the Archdiocese's ability to carry out its mission and chills its religious exercise, the Archdiocese also has standing in its own right. Under Article III, a plaintiff must have suffered an injury in fact that is fairly traceable to the defendant's challenged conduct and likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

As discussed, the Archdiocese fulfills its mission and duty to provide Catholic education through its schools. And, as the district court recognized, the "effect of the equal-opportunity requirement" is a "special tax on religious preschools," 2.App.0492. Thus, the Department's discriminatory application of the Mandate has "directly affected and interfered with" the Archdiocese's "core" religious ministry. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024).

Moreover, the discriminatory barrier created by the selective application of the Mandate also chills the Archdiocese's religious exercise. It is

the Archdiocese's policies and teachings that the Mandate conflicts with and it was the Archdiocese that had to instruct its schools not to join UPK Colorado. 3.App.0613, 3.App.0623-24, 3.App.0632-36. The Archdiocese's "instruct[ion to] its" preschools not to sign the provider agreement is "the precise sort of 'chilling effect' and 'self-censorship'" that standing doctrine recognizes as cognizable. *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 976-77 (10th Cir. 2020) (cleaned up) (instructions to subcontractors not to engage in speech due to government regulation was First Amendment injury); *see Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1145 n.6 (10th Cir. 2007) ("[S]elf-censorship through the chilling of protected First Amendment activity" is a "constitutionally sufficient injury."). This First Amendment chill and interference with the Archdiocese's core activities are both directly traceable to the Mandate, and the injunction the Archdiocese seeks would redress those injuries. Due to both the chill on Archdiocese's religious exercise and impairment of a "critically important" component of its mission, the Archdiocese undoubtedly is more than "a mere bystander, but instead [has] a personal stake in the dispute." *Hippocratic Med.*, 602 U.S. at 379 (cleaned up).

CONCLUSION

This Court should reverse the district court's dismissal of the Archdiocese of Denver for lack of standing; reverse the district court's entry of judgment for Defendants on the remaining Plaintiffs' claims; and remand

this case for entry of an injunction permitting Archdiocesan preschools to participate in UPK Colorado consistent with their religious exercise.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Counsel believes that oral argument may be helpful to the Court given the importance and complexity of the issues this First Amendment case presents.

Respectfully submitted,

/s/ Nicholas R. Reaves
Eric C. Rassbach
Mark L. Rienzi
Joseph C. Davis
Nicholas R. Reaves
Jordan T. Varberg
Amanda G. Dixon
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave, N.W.
Suite 400
Washington, D.C. 20006
(202) 955-0095
nreaves@becketlaw.org

Counsel for Plaintiffs-Appellants

August 14, 2024

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Dated: August 14, 2024 /s/ Nicholas R. Reaves
Nicholas R. Reaves

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I hereby certify that on August 14, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Nicholas R. Reaves