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' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Court should not hold this case in abeyance pending the Supreme Court's decision in the consolidated cases *Oklahoma Statewide Charter School Board v. Drummond* and *St. Isidore of Seville Catholic Virtual School v. Drummond*, Nos. 24-394 & 24-396 (cert. granted Jan. 24, 2025) ("*St. Isidore*"). Plaintiffs urgently need relief from this Court. Plaintiffs filed this suit in August 2023, seeking to vindicate the right of Catholic preschools to participate on equal footing in Colorado's "universal" preschool funding program without disavowing their religious exercise. Since then, one Plaintiff preschool—now forced to compete for students with the roughly 2,000 private and public preschools that Colorado suddenly made *free* to attend—has closed. And countless families (including Plaintiffs Daniel and Lisa Sheley) who desire a Catholic education for their children have been forced to pay out of pocket for it—while also subsidizing the preschools participating in UPK Colorado that don't share Plaintiffs' Catholic beliefs. Delay will only add to these irreparable harms.

In addition, recent free-exercise decisions from the Supreme Court confirm Plaintiffs' entitlement to relief now. While *St. Isidore* is likely to reaffirm these principles, there is no need to await the Supreme Court's decision since no party there has challenged the free-exercise precedent that governs here. Accordingly, Plaintiffs respectfully urge the Court to either hear oral argument as scheduled on March 18, 2025, or to hold a

special sitting in July 2025, so that Plaintiffs aren't relegated to missing out on a *third* year of UPK Colorado funding simply for following their faith.

ARGUMENT

I. Urgent relief is needed to prevent ongoing irreparable harm.

Plaintiffs respectfully ask the Court to resolve this case expeditiously. For two academic years now, Plaintiffs have been excluded from UPK Colorado on account of their sincere religious exercise.[1] This is causing irreparable harm. One of the Plaintiff preschools has closed due to financial stress. Reply 3. And Plaintiffs Daniel and Lisa Sheley have forfeited roughly $4,700 each year simply because their children attend a Catholic preschool. A061; 3.App.0674-77. The Sheleys are not alone: countless other families whose religious beliefs direct them to provide a Catholic education for their children face the difficult choice of either paying out of pocket for the preschool that will best meet their family's needs or accepting UPK funding to attend a different preschool. *E.g.*, Amicus Br. of

[1] Plaintiffs filed suit before the start of UPK Colorado's first year and quickly sought a preliminary injunction. 1.App.0005-06, 0018. At the district court's urging, the parties conducted expedited discovery in anticipation of final merits resolution by the end of December 2023. 2.App.0560. After expedited discovery, Plaintiffs filed a motion for summary judgment or, in the alternative, a preliminary injunction. *See* 1.Supp.App.0054-106. On December 30, 2023, the court denied Plaintiffs' motion. 1.App.0014, 2.App.0311-42. The court then held a bench trial starting January 2, 2024. 3.App.0577. The Court issued its opinion on June 4, 2024. 2.App.0445.

Conscience Project at 1-15. What is more, Defendants have continued to allow a preschool with similar religious beliefs and religiously motivated policies—Darren Patterson Christian Academy—to participate in UPK Colorado for the past two years, choosing not to appeal the entry of a preliminary injunction against them while that case has progressed. Br.15-16. Plaintiffs' exclusion from UPK Colorado has also made it far more difficult for Archdiocesan preschools to retain staff, and Archdiocesan preschools have seen a marked decrease in enrollment as UPK preschools continue to expand. Reply 3. With another academic year approaching, delaying this appeal will further compound these harms.

II. This Court need not await a decision in *St. Isidore* because recent Supreme Court precedent confirms Plaintiffs' free-exercise claims should prevail.

Nor is there any legal need for such a delay. In the past four years, the Supreme Court has decided three cases—*Carson, Tandon*, and *Fulton*—which all confirm that Colorado's actions violate the Free Exercise Clause. The Supreme Court's decision in *St. Isidore* is highly unlikely to upset any of this free-exercise precedent.

The Supreme Court in *St. Isidore* granted certiorari on two questions presented. The first asks whether Oklahoma charter schools are state actors, and the second asks "[w]hether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter school program solely because the schools are religious[.]" Pet. for Writ of Cert. at i, *St. Isidore of Seville Catholic Virtual Sch. v.*

Drummond, No. 24-396 (U.S. Oct. 7, 2024). Resolution of the first question presented is likely to be outcome determinative. If the religious charter school there, St. Isidore, is a state actor, it is likely to be bound by limitations on religious exercise that apply to government-run schools—including the Establishment Clause. If, on the other hand, St. Isidore is not a state actor, *Carson v. Makin* already tells us that "excluding privately run religious schools" from a government funding program (there, Oklahoma's charter school program) "solely because the schools are religious" violates the First Amendment. Indeed, neither Oklahoma in its Brief in Opposition nor the Oklahoma Supreme Court in the decision under review argued that St. Isidore should lose under *Carson*'s rule if the school is not a state actor. *See* Br. in Opp'n at 26-34, *St. Isidore of Seville Catholic Virtual Sch. v. Drummond*, No. 24-396 (U.S. Dec. 9, 2024) (distinguishing *Carson* by arguing that St. Isidore is a state actor); Pet.App.24-25a, *St. Isidore of Seville Catholic Virtual Sch. v. Drummond*, No. 24-396 (U.S. Oct. 7, 2024) (holding that free-exercise cases "do not apply to the governmental action in this case").

Here, on the other hand, there is no dispute that the Plaintiff preschools are private parties, not state actors. Reply 23-24. Neither Colorado nor the district court below have argued the private preschools are state actors, and Colorado's legal arguments on appeal—pushing back on the *scope* of Plaintiffs' free-exercise protections but never contesting Plaintiffs' *ability to raise* them—further confirm that Plaintiffs are

private actors with constitutional rights, not government entities. Accordingly, only the second question presented in *St. Isidore* could even possibly have any bearing on this case. And, as explained above, answering that question is easy.[2]

As *Carson v. Makin* explained just three years ago, excluding a would-be recipient from a generally available school funding program "based on [the] recipient's religious exercise" triggers strict scrutiny. *Carson v. Makin*, 596 U.S. 767, 785 (2022). This case falls squarely within *Carson*'s rule. *See* Br.20-24; Reply 4-7. Colorado has created a generally available public benefits program (UPK Colorado), the Plaintiffs are religious, and they are excluded from this program solely on account of what is undisputedly a religious exercise (operating and attending Catholic preschools). *Carson* is thus sufficient to resolve this case.

What is more, *St. Isidore* will have no bearing on the other "bedrock" free-exercise principles that independently support a reversal in

[2] To be clear, a ruling in favor of *St. Isidore* could *reinforce* Plaintiffs' entitlement to relief. For example, the Oklahoma Attorney General suggested that *Carson* wouldn't apply because "[h]ere, private schools, religious and secular alike, are categorically excluded from the charter program." Br. in Opp'n at 33, *St. Isidore of Seville Catholic Virtual Sch. v. Drummond*, No. 24-396 (U.S. Dec. 9, 2024). Colorado makes a similar argument, claiming that *Carson* isn't implicated because the state's exclusion of Plaintiffs is not solely along religious lines. Resp.15-16. But, as Plaintiffs have explained, *Carson* already rejected this argument. Reply 5-6. So further confirmation from the Supreme Court—to the extent it even addresses this point—would be unnecessary.

Plaintiffs' favor here. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 (9th Cir. 2023) (en banc) ("First, a purportedly neutral 'generally applicable' policy may not have 'a mechanism for individualized exemptions.' Second, the government may not 'treat … comparable secular activity more favorably than religious exercise. Third, the government may not act in a manner … inconsistent with the Free Exercise Clause's bar on even 'subtle departures from neutrality.'") (internal citations omitted). These principles—all recently reaffirmed by the Supreme Court but not at issue in *St. Isidore*—provide straightforward, alternative paths to dispose of this appeal:

- First, Defendants' actions—including their creation of categorical exceptions and use of a broad "catch-all" exemption—demonstrate that the Department retains discretion under the UPK statute to exempt preschools from the same UPK provision (the Mandate) that bars Plaintiffs' religious exercise. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 537 (2021); Br.17-18.
- Second, by creating categories of secular exceptions *from this same UPK provision*, Defendants have favored secular conduct over Plaintiffs' religious exercise. *See Tandon v. Newsom*, 593 U.S. 61, 62 (2021); Br.11-13.[3]

[3] Colorado also continues to grant exceptions from the Mandate for other forms of *religious* exercise while denying Plaintiffs a comparable accommodation. Reply 13-14. *See, e.g.*, *UPK Colorado Profile: Inner City*

- Third, Defendants have admitted that the Mandate's burden falls only on *religious* preschools—all other preschools that might need an accommodation either have Department-approved exceptions or can rely on Defendants' creative reinterpretation of the Mandate to participate in UPK Colorado. *E.g.*, Resp.31-36 (Mandate as selective one-way ratchet). And when a law's burden falls solely on religious conduct, that law is not neutral. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 535 (1993); Br.18-19.

* * *

Weighing the pressing need to resolve this case against the marginal chance that *St. Isidore* will have an outcome-determinative effect on this appeal, Plaintiffs respectfully suggest that the balance tilts strongly in favor of resolving this appeal on its current schedule. Nevertheless, should this Court desire to await a decision in *St. Isidore* before deciding this case, Plaintiffs encourage the Court to still hear argument during the March sitting but to withhold judgment until the Supreme Court issues its decision in *St. Isidore* (most likely in June). This Court could then, if it deems it necessary, request supplemental briefing on the

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Christian School, Colorado Universal Preschool, https://perma.cc/89NH-PTAD (Feb. 24, 2025) (continuing to allow UPK providers to exclude families based on religious affiliation via the "catch-all" provision: "Please note: This provider may require families to be a part of their congregation."). This also triggers strict scrutiny.

impact of *St. Isidore*. This approach would help ensure that Catholic families are not left in limbo for yet another academic year, as could be the case if this Court did not hear oral argument until its September sitting. Alternatively, if the Court wished to await a ruling in *St. Isidore* before hearing oral argument, it could schedule a special sitting in July to ensure that it can reach a decision in time for the new academic year that begins in August 2025.

CONCLUSION

The Court should not hold this appeal in abeyance pending a decision in *St. Isidore*.

Respectfully submitted,

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February 24, 2025

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This brief complies with the page limitation of the Court's February 13th, 2025, order because it is less than 15 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), 10th Cir. R. 32(A), the Court's February 13th, 2025, order, and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2021 in 14-point font.

Dated: February 24, 2025 /s/ Nicholas R. Reaves
Nicholas R. Reaves

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made.

2. If required to file additional hard copies, the hard copies submitted to the clerk are exact copies of the ECF submission.

3. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Defender Antivirus, and according to the program is free of viruses.

Dated: February 24, 2025 /s/ Nicholas R. Reaves
Nicholas R. Reaves

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2025, 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.

Dated: February 24, 2025 /s/ Nicholas R. Reaves
Nicholas R. Reaves