No. 25-1187

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DARREN PATTERSON CHRISTIAN ACADEMY,

Plaintiff-Appellee,

v.

LISA ROY, *et al.*,

Defendants-Appellants.

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

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that are united in respecting the important but distinct roles of religion and government in our nation. They believe that the right to exercise religion freely is fundamental, but that it does not include an unfettered license to cause harm. *Amici* also recognize and oppose the threat to religious freedom that would result if the Constitution were understood to require the state to subsidize religion-based discrimination.

The *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
- American Civil Liberties Union of Colorado.
- Central Conference of American Rabbis.
- DignityUSA.
- Freedom From Religion Foundation.
- Global Justice Institute, Metropolitan Community Churches.
- Hindu American Foundation.

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

- Interfaith Alliance.
- Interfaith Alliance of Colorado.
- Keshet.
- Lambda Legal Defense and Education Fund.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- Sadhana: Coalition of Progressive Hindus.
- Union for Reform Judaism.
- Unitarian Universalist Association.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

To ensure that all children in Colorado can access free, safe, and high-quality education services in the school year preceding kindergarten, Colorado established its Universal Preschool Program (the "Preschool Program") in 2022. *See* Colo. Rev. Stat. § 26.5-4-204. Colorado requires all providers in the Preschool Program to comply with an equal-opportunity requirement, which prohibits discrimination against children and their families because of their gender identity, among other reasons. *Id.* § 26.5-4-205(2)(b).[2] The equal-opportunity requirement is one of the Preschool Program's statutorily mandated "quality standards" that all providers must meet to obtain funding. *See id.* § 26.5-4-205(1)(a), (2)(b). This guarantees that all eligible preschool-aged children—including children who are transgender or have transgender family members—have access to the Preschool Program, free from the stigma and degradation associated with discrimination. At issue here is Darren Patterson Christian Academy's request for an exemption to the equal-opportunity requirement regarding gender identity.

[2] The equal-opportunity requirement requires all providers to "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).

In a nation defined by its religious pluralism, the many and varied beliefs among our people make it inevitable that secular laws—such as the Preschool Program's equal-opportunity requirement—will at times offend someone's religious sensibilities. But while religion and religious practices may not be specially disfavored, there is no Free Exercise Clause violation when, as here, a governmental body conditions a public benefit on a generally applicable and religion-neutral requirement. The plaintiff-appellee, Darren Patterson Christian Academy, is merely being asked to follow the same prohibition against gender-identity discrimination that applies to every other provider in the Preschool Program—a prohibition that is grounded in secular, not religious, concerns. Nothing about the prohibition on gender-identity discrimination runs afoul of the Supreme Court's caselaw involving grant programs that expressly excluded religious schools or otherwise offends the guarantee of free religious exercise.

The Academy's argument (*see* 3.App.598–99) that a governmental body cannot condition public funding on compliance with a religion-neutral requirement that incidentally burdens religious practice—an argument which was treated with approval by the district court at the preliminary injunction stage, but not addressed in the court's summary judgment order—ignores longstanding Supreme Court precedent that generally applicable and religion-neutral rules do not violate the Free Exercise

Clause. And the equal-opportunity requirement is just such a generally applicable and neutral rule: It neither gives the government impermissible discretion to grant exemptions (*see Fulton v. City of Philadelphia*, 593 U.S. 522, 535 (2021)), contains exemptions that favor comparable secular conduct (*see Tandon v. Newsom*, 593 U.S. 61, 62 (2021)), nor enacts a "religious gerrymander" (*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring))).

In coming to the opposite conclusion in its summary judgment order, the district court relied on two provisions that it incorrectly characterized as exemptions—one of which was repealed even before the district court's order was entered, and the other of which does not apply to the equal-opportunity requirement. 10.App.2203–04. The district court did not address the other arguments raised by the Academy in its motion for summary judgment (*see* 3.App.593–98), and this Court should not heed them here, either. But even if this Court were to conclude that the prohibition at issue is not neutral or generally applicable and should be subjected to strict scrutiny, it meets that scrutiny because it is narrowly tailored to the state's compelling interest in protecting transgender children and children with transgender family members from discrimination in education.

ARGUMENT

I. Conditioning a public benefit on compliance with a religion-neutral law does not violate the Free Exercise Clause.

Religious freedom is a value of the highest order. But the constitutional guarantee of religious freedom is not an entitlement to "general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020). Under *Employment Division v. Smith*, 494 U.S. 872 (1990), laws that apply generally and are neutral with respect to religion do not trigger heightened scrutiny under the Free Exercise Clause, even if they "ha[ve] the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531 (citing *Smith*, 494 U.S. 872); *accord Mahmoud v. Taylor*, 145 S. Ct. 2332, 2360 (2025) ("Under our precedents, the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable.").

A contrary rule would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)). As this Court stated in *Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694, 702 (10th Cir.

1998), "[n]othing in the Free Exercise Clause requires that . . . special treatment [from the government] be provided."

Yet the district court embraced this very reasoning in its preliminary injunction decision. Looking to *Carson ex rel. O.C. v. Makin*, 596 U.S. 767 (2022), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), and *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), the court found the Academy was likely to succeed on its claim that "[t]he First Amendment forbids" forcing the Academy to choose between "abandoning religiously motivated practices or foregoing otherwise available public funding." 1.App.282. The district court did not take up that reasoning in its summary judgment decision, despite arguments made by the Academy (*see* 3.App.598–99), and this Court should not indulge it on this appeal. The approach is wholly inconsistent with Supreme Court precedent.

In *Carson*, the Supreme Court concluded that a Maine tuition funding program that allowed only nonsectarian schools to receive payments violated the Free Exercise Clause. 596 U.S. at 789. The Court applied strict scrutiny and held the program unconstitutional because it excluded schools from participating "solely because of their religious character." *Id.* at 780 (quoting *Trinity Lutheran*, 582 U.S. at 462); *see also Espinoza*, 591 U.S. at 475.

As the Fourth Circuit recently affirmed in *Kim v. Board of Education*, 93 F.4th 733, 748 (4th Cir. 2024), *Carson* and similar cases "stand only for the point that religious schools cannot be excluded from grant programs solely because of their religious character." That is not the case here: The Preschool Program does not exclude the Academy or any other providers based on their religious nature.[3] Providers are excluded—regardless of whether they are religious or secular—if they refuse to comply with the equal-opportunity requirement. This case is therefore controlled by *Smith*, not *Carson*.

Any holding that the Free Exercise Clause is violated because the Preschool Program requires compliance with a rule the Academy religiously disagrees with would, in effect, disregard *Smith*. If a law were subject to strict scrutiny anytime it imposed requirements to which there were religious objections, then there would be no need for *Smith*'s neutrality and general applicability analysis. The Supreme Court's decision in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), however, tells us that is incorrect. In *Fulton*, as here, the issue was whether it violated the rights of a

[3] The Academy contended below that Colorado told faith-based providers that they could not use state funds for religious programming. *See* 3.App.598. But Colorado never conditioned "use of [Preschool] Program funds on forgoing religious instruction," and the state took pains "to clarify no such condition existed." 9.App.1820 ¶¶ 67–68.

religiously affiliated organization to require it to comply with nondiscrimination requirements as a condition of receiving a government contract. *Id.* at 532. But rather than skipping straight to strict scrutiny, the *Fulton* Court adhered to *Smith*, analyzing the provision at issue to see if it was neutral and generally applicable. *Id.* at 533. Any ruling such as that embraced by the district court in issuing the preliminary injunction would therefore conflict with *Smith* and *Fulton* and violate the rule that "[o]nly the Supreme Court can overrule its own precedents." *United States v. Maloid*, 71 F.4th 795, 808 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1035 (2024).

II. The Universal Preschool Program's equal-opportunity requirement does not otherwise trigger strict scrutiny.

In the proceedings below, the district court held that the equal-opportunity requirement is not generally applicable based on two provisions it mistakenly deemed exemptions to the equal-opportunity requirement. 10.App.2203–04. The district court's ruling was incorrect. And the other arguments raised by the Academy in the proceedings below for why the requirement is not generally applicable or neutral (*see* 3.App.593–98) likewise lack any merit.

A. The equal-opportunity requirement is generally applicable.

The equal-opportunity requirement is generally applicable. General applicability is the requirement that the "government, in pursuit of legitimate interests, [must not] in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Government thus may not burden religious conduct while affording more favorable treatment to nonreligious conduct that is as detrimental to the underlying governmental interests. *See Tandon*, 593 U.S. at 62. Nor may the government utilize a "formal system of entirely discretionary" and "individualized" exemptions to favor requests for secular exceptions over religious ones. *Fulton*, 593 U.S. at 533, 536 (quoting *Smith*, 494 U.S. at 884).

In the proceedings below, the district court relied on two provisions related to the Preschool Program in erroneously holding that the equal-opportunity requirement is not generally applicable: the congregation preference and the temporary-waiver provision. *See* 10.App.2203–04. But neither of these provisions undermines the equal-opportunity requirement's general applicability.

Most obviously, the congregation preference, which previously allowed faith-based providers to save spots for members of their congregations, was

repealed before the district court's decision. *See* 10.App.2186.[4] A preference that no longer exists cannot, under any logical analysis, affect a law's general applicability.

The district court's analysis of the temporary-waiver provision was equally flawed. Relying on *Fulton*, the court found that the Preschool Program's temporary-waiver provision constitutes a discretionary exemption to the equal-opportunity requirement that undermines the requirement's general applicability. *See* 10.App.2204. But the temporary-waiver provision is not an exemption—much less an individualized, discretionary exemption (*see Fulton*, 593 U.S. at 535)—to the equal-opportunity requirement at all. The temporary-waiver provision permits the state to "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 with the quality standards" if it is "necessary to ensure the availability of a mixed delivery system within a community." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II). Importantly, however, the statute clarifies that all providers are still required to "meet all quality standards

[4] The Defendants notified the district court on January 16, 2025, that the congregation preference was repealed. *See* 10.App.2186. Yet the district court did not acknowledge the repeal in its subsequent order, on February 24, 2025, and appears to have mistakenly assumed that the congregation preference was still in effect. *See* 10.App.2203 (stating "[t]hat remains the case now," in reference to the congregation preference).

relating to health and safety" (*id.*), including the equal-opportunity requirement, which protects children from discrimination that interferes with their health and safety (*see* 9.App.1815 ¶¶ 25–26; 9.App.1824 ¶ 1). Thus, in contrast to the "entirely discretionary" exemption at issue in *Fulton*, which gave the government leeway to exempt individual providers from antidiscrimination requirements (*see* 593 U.S. at 535–36), the temporary-waiver provision here does not give Colorado *any* discretion to exempt *any* providers from the equal-opportunity requirement (*see* 9.App.1815 ¶¶ 25–26; 9.App.1824 ¶ 1; *see also St. Mary Cath. Par. in Littleton v. Roy*, 736 F. Supp. 3d 956, 995 (D. Colo. 2024) (concluding that the Preschool Program's temporary-waiver provision "does not give the Department any discretion to grant exemptions from the equal-opportunity requirement"), *appeal docketed*, No. 24-1267 (10th Cir. June 24, 2024)).

In the proceedings below, the Academy also argued that the equal-opportunity requirement is not generally applicable because it allows providers to diverge from the default enrollment algorithm for matching students by incorporating specific preferences. *See* 3.App.594–95. But the matching preferences are not exemptions from the equal-opportunity requirement, and there is no evidence showing otherwise. For example, the Academy alleged below that the preferences would permit providers to serve only multilingual children, refugees, or all boys or all girls, and to limit

enrollment based on parents' marital statuses. *See* 3.App.595. But these aren't "exceptions" to the equal-opportunity requirement because the requirement doesn't include language ability, immigration status, sex, or marital status among its protected characteristics. *See* Colo. Rev. Stat. § 26.5-4-205(2)(b). The Academy additionally pointed out that the preferences allow providers to save spots for employees' children; to reserve placements for children with Individualized Education Plans; to consider federal eligibility requirements if providers have a Head Start Program; and to give priority to children and families receiving certain public-assistance benefits. *See* 3.App.594–95. But, again, none of these preferences is an exemption to the equal-opportunity requirement: Saving spots for employees' children does not give providers license to discriminate on any protected basis (*see* 9.App.1825 ¶ 5); the IEP preference does not allow providers to exclude, or otherwise discriminate against, students who have disabilities (*see* 9.App.1821–22 ¶ 82); and preferences related to income level serve the statutorily mandated prioritization of low-income families (*see* Colo. Rev. Stat. §§ 26.5-4-202, 26.5-4-204(1)(b)), and so do not violate the equal-opportunity requirement (*see St. Mary Cath. Par.*, 736 F. Supp. 3d at 1000).

Even if the matching preferences somehow constituted exemptions from the equal-opportunity requirement, they still would not undermine the

requirement's general applicability. First, the preferences do not "'invite[]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). The preferences give no discretion to the government to permit or deny exemptions based on a provider's reasons for utilizing the preferences. Instead, the preferences may be utilized by *any* eligible provider—religious or secular—for *any* reason—religious or secular.

Second, the matching preferences are not exemptions that treat "comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The public-health law in *Tandon*, for example, was not generally applicable because it restricted religious gatherings while allowing secular gatherings that posed a greater or equal risk of transmission of COVID-19. *See id.* at 63. The matching preferences, by contrast, do not disfavor religious exercise because they allow *all* providers that meet the criteria for the specific preference to diverge from the default algorithm. *See* 8 Colo. Code Reg. 1404-1 § 4.109(A). Moreover, the preferences are not exemptions for "comparable activity"—meaning, an activity that equally conflicts with the underlying "government interest that justifies the [law] at issue." *Tandon*, 593 U.S. at 62; *Cf. Foothills Christian Ministries v. Johnson*, No. 24-4049, 2025 WL 2351204, at *6 (9th Cir. Aug. 14, 2025) ("[E]xemptions only matter if they are 'comparable' to regulated

religious conduct." (quoting *Tandon*, 593 U.S. at 62)). Colorado's "interests in prohibiting discrimination on different protected grounds are not identical, as unique policy and legal considerations underlie how the public accommodations laws deal with discrimination against members of different protected groups." *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 111 (2d Cir. 2024). Thus, exemptions to prohibitions against discrimination on grounds different from gender identity (such as discrimination based on disability and income) do not and cannot undermine Colorado's interests in preventing gender-identity discrimination in publicly funded educational programs.

B. The equal-opportunity requirement is neutral.

The equal-opportunity requirement is neutral. Neutrality means that a law must not "restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. To trigger strict scrutiny for lack of neutrality, the claimant must show that the government has targeted specific religious conduct or beliefs for maltreatment. *See id.* Discriminatory intent may be apparent on the face of a law, or it may be revealed through the law's practical effects—for example, when legal requirements have been "gerrymandered with care to proscribe" religious conduct. *See id.* at 542.

Here, far from intentionally "target[ing] religious conduct for distinctive treatment" (*id.* at 534), the equal-opportunity requirement prohibits

gender-identity discrimination by all providers for any reason (*see* 9.App.1824 ¶ 17). A provider's motivations for discriminating, religious or otherwise, are immaterial under the law. And there is no evidence that the equal-opportunity requirement was enacted with the intent of discriminating against religion. *See Lukumi*, 508 U.S. at 534.

In the proceedings below, the Academy raised three arguments against neutrality, all of which fail. First, the Academy argued that the nondiscrimination requirements are not neutral because Colorado "refused to accommodate the [Academy]'s religious objections while allowing exceptions for many secular reasons." 3.App.597. But that is not true—Colorado has not, as a matter of law or practice, exempted any provider from the statute's equal-opportunity requirement. *See* 9.App.1824 ¶ 17. Similarly, the Academy asserted that Colorado required providers to agree to more onerous nondiscrimination requirements during the Preschool Program's inaugural year, which, it says, "led to religious schools and families being put to the choice of giving up their beliefs and participating [in] the Program." 3.App.597.[5] But these requirements applied to *any*

[5] These requirements were "never enforced" (9.App.1817 ¶ 40) and were subsequently removed from provider agreements altogether (*see* 10.App.2200). The district court therefore correctly found that the Academy's claims relying on these requirements were moot. *See* 10.App.2201–02.

provider, religious or secular (*see* 3.App.586 ¶ 32), and thus do not evince an effort to "target[] religious conduct for distinctive treatment" (*Lukumi*, 508 U.S. at 534). Finally, the Academy alleged that state employees told faith-based providers that they could not use state funds for religious programming. *See* 3.App.598. But to the extent that information was shared with providers, it was provided in error and subsequently corrected. Colorado has never "conditioned use of [Preschool] Program funds on foregoing religious instruction," and the state has "engaged with stakeholders . . . to clarify no such condition existed." 9.App.1820 ¶¶ 67–68.

Contrary to the narrative propounded by the Academy, the record in this case shows that Colorado actually undertook efforts to *recruit* faith-based providers for the Preschool Program, including by "conven[ing] a working group that met regularly to ensure faith-based providers' inclusion." 9.App.1825 ¶ 8. These efforts paid off: "At least forty-one faith-based providers participated in [the Program] in 2023–24, with over 1,000 children matched to them." 9.App.1823 ¶ 14.[6] This evidence simply does not

[6] The fact that the Academy objects to the equal-opportunity requirement while other religious providers do not does not mean there is a denominational preference that would trigger heightened scrutiny under the Supreme Court's recent decision in *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025). In *Catholic Charities*, the Court held that a Wisconsin unemployment insurance regime that "explicitly differentiat[ed] between religions based on theological practices" enacted a "denominational preference" and thus

support a finding of a "religious gerrymander" of any kind. *Lukumi*, 508 U.S. at 535 (citation omitted).

III. The equal-opportunity requirement would satisfy even strict scrutiny.

Even if this Court were to accept the Academy's meritless arguments and conclude that strict scrutiny applies, the Preschool Program's equal-opportunity requirement would satisfy that scrutiny. In applying strict scrutiny, a court must determine whether the challenged law is "justified by a compelling state interest and . . . narrowly tailored in pursuit of that interest." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). The Preschool Program's prohibition against gender-identity discrimination meets both components of this test.

A. The equal-opportunity requirement serves compelling governmental interests.

The Preschool Program's bar against gender-identity discrimination serves compelling governmental interests. The Supreme Court explained in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984), that "eliminating

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violated the Establishment Clause. *Id.* at 250. Importantly, though, the Court affirmed that evaluating eligibility for a public benefit based on "secular criteria"—even secular criteria that "happen to have a disparate impact upon different religious organizations"—does not raise constitutional concerns. *Id.* (citation modified). Here, the equal-opportunity requirement is just such a secular criterion; it is of no constitutional moment that the requirement happens to be consistent with some religious providers' beliefs and inconsistent with the Academy's beliefs.

discrimination and assuring . . . citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order."

The state has an especially compelling interest in prohibiting discrimination in publicly funded programs because the Constitution bars it from aiding discriminatory practices. *See Norwood v. Harrison*, 413 U.S. 455, 465–66 (1973); *Gilmore v. City of Montgomery*, 417 U.S. 556, 568–69 (1974); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). And "[g]overnment has few interests more compelling than its interest in [e]nsuring that children receive an adequate education," as "[e]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1205 (10th Cir. 2002) (quoting *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991)). "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Plyler v. Doe*, 457 U.S. 202, 221–22 (1982) ("[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.").

There can be no doubt that Colorado has a compelling interest in preventing gender-identity discrimination in education. *See Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 528 (3d Cir. 2018) (affirming state's compelling interest in protecting transgender students from "discrimination, harassment, and violence because of their gender identity" (citation omitted)); *see also St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43, 78 (D. Me. 2024) (finding state's compelling interest in eradicating gender-identity discrimination in education), *appeal docketed*, No. 24-1739 (1st Cir. Aug. 16, 2024).

B. The equal-opportunity requirement is narrowly tailored.

The equal-opportunity requirement is narrowly tailored to the state's compelling interest in preventing gender-identity discrimination. Ensuring equal access and prohibiting the discrimination sought to be eradicated "abridges no more [activity] than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at 628–29; *accord EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 596 (6th Cir. 2018) ("Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination . . . it makes sense that the only way to achieve the scheme's objectives is through its enforcement."), *aff'd sub nom.*, *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020). And the fact that Colorado permits no

exemptions to the equal-opportunity requirement reinforces that the requirement "can brook no departures." *Fulton*, 593 U.S. at 542.

A government body need not adopt an alternative means proposed by a party if the alternative would "not be as effective" in achieving the relevant state interest. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). The Academy's proposed alternative—that Colorado could "better tailor its matching and placement process" so that "transgender-identifying children are placed *only* in preschools" that won't discriminate (3.App.604)—would not only be less effective in achieving Colorado's interest in preventing gender-identity discrimination, but would actually "significantly undermine it" (*Doe ex rel. Doe*, 897 F.3d at 530). Indeed, the Academy's suggestion is just another way of asserting a right to discriminate. *Cf.* Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 Harv. C.R.-C.L. L. Rev. 141, 155 (2012) ("Allowing restaurants to proclaim their disinclination to serve customers because of race would perpetuate segregated eating establishments and allow racial segregation in the marketplace to persist.").

If any preschool is allowed to opt out of the equal-opportunity requirement as long as the school has a religious justification, there is no guarantee that another preschool to which a family is referred will not do the same. Allowing preschools to refuse on religious grounds to serve transgender children could result in *no* schools in the Preschool Program

being open and accessible to them, at least within a reasonable distance from their home, completely undermining Colorado's interest in eradicating gender-identity discrimination.

And even if other reasonably located preschools in the Preschool Program would be willing and able to accept these families, telling a person suffering the pain and humiliation of discrimination to "just go someplace else" is no remedy for the grave stigmatic harms that discrimination inflicts. "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . ." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring). Equal-opportunity requirements "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to'" publicly funded programs. *See id.* at 250 (majority opinion) (quoting S. Rep. No. 88-872, at 16–17 (1964)).

Put simply, "acts of invidious discrimination in the distribution of publicly available goods [and] services . . . cause unique evils" (*Roberts*, 468 U.S. at 628), which Colorado has chosen to avoid in creating a publicly funded Preschool Program with an equal-opportunity requirement. Accepting the Academy's arguments would instead give official imprimatur to discrimination. It would deny transgender children and their families the

fundamental American promise of equality for all and diminish their standing in society. The Constitution does not require government to impose such grave harms in the name of religious accommodation.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ *Jenny Samuels*

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CERTIFICATIONS OF COUNSEL

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Date: September 15, 2025 s/ *Jenny Samuels*