School Choice for Me but Not for Thee

Lawsuits in Colorado seek exemption for religious preschools to access state funds

By JOSHUA DUNN

OVER THE PAST 12 YEARS, the U.S. Supreme Court has significantly buttressed the rights of religious organizations to control how they govern themselves and to not be excluded from public programs simply because they are religious. The court's Free Exercise Clause decisions have declared that religious institutions have substantial autonomy in deciding whom to hire (and fire) under the "ministerial exception," that they cannot be barred from participating in adoption programs because of government nondiscrimination policies, and that they cannot be deprived of otherwise available benefits because of their religious beliefs and practices. Considering these doctrinal developments, one would think that states would be careful about religiously based discrimination. But as two recent lawsuits from Colorado show, one would be wrong.

In 2022, the Colorado legislature passed one of Governor Jared Polis's signature initiatives: a universal preschool program. The program, which went into effect in 2023, provides up to 15 hours of state-funded tuition at participating preschools, including private providers. However, the Colorado Department of Early Childhood required all preschools wishing to participate in the program to sign a "program service agreement" forbidding discrimination based on "gender, race, ethnicity, religion, national origin, age, sexual orientation, gender identity, citizenship status, education, disability, socio-economic status, or any other identity" and prohibiting "deliberately misusing an individual's preferred name, form of address, or gender-related pronoun." This led a coalition of Catholic, Protestant, and Jewish organizations to request an exemption from the nondiscrimination requirements, since the rules would compel these organizations to abandon their religiously based policies regarding sexual orientation and gender identity. Lisa Roy, the agency's executive director, denied their request, contending that the anti-discrimination provisions were mandated by state law.

GOVERNOR'S OFFICE

Governor Jared Polis saw his universal preschool program become law in 2022.

Two lawsuits immediately followed. The Darren Patterson Christian Academy in Buena Vista sued in June 2023, followed in August by the St. Mary Catholic Parish, the St. Bernadette Catholic Parish, the Archdiocese of Denver, and two Catholic parents. Both suits are likely to succeed.

Darren Patterson was granted a preliminary injunction in October 2023 by federal Judge Daniel Domenico, a Trump appointee, based on several constitutional claims. The school first argued that the state's policy would interfere with its right to hire only teachers who share its Christian faith. Under the Supreme Court's ministerial exception doctrine, outlined in *Hosanna Tabor v. EEOC* (2012) and *Our Lady of Guadalupe School v. Morrissey-Berru* (2020), the school is entitled to hire only teachers who agree with their statement of faith. The school also argued that, under *Boy Scouts of America v. Dale* (2000) and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995), the First Amendment protects its right as an expressive association not to be forced to associate with those who disagree with their views. What's more, the school claimed that the program was not neutral toward religion, since it allowed exemptions for other reasons in order to insure a "mixed delivery system"—that is, one that includes a variety of preschool providers. Moreover, the school contended, the state policy would violate *303 Creative, LLC v. Ennis* from the Supreme Court's last term, which held that "the government may not compel a person to speak its own preferred messages."

While Domenico said Darren Patterson was likely to succeed on all these claims, the school's strongest argument was clearly grounded in *Trinity Lutheran v. Comer* (2017), *Espinoza v. Montana* (2020), and *Carson v. Makin* (2022). Collectively, this trilogy forbids the government from excluding religious believers from otherwise available benefits solely because of their beliefs. The state, as *Espinoza* held, does not have to "subsidize private education," but once it does, "it cannot disqualify some private schools solely because they are religious." To do otherwise constitutes unconstitutional discrimination under the Free Exercise Clause. Whatever happens with the other claims as the case makes its way through the courts, it is difficult to see how the state's policy can overcome this one.

The lawsuit by the Catholic plaintiffs largely mirrors the

free-exercise claims made by Darren Patterson. In particular, they point out that "the Archdiocese's consistent position has been that those who teach in its schools and participate in its faith communities must be open to and supportive of the Catholic Church's teachings," including those on "the human person and sexual identity." Under the state's policy, it is clear that the Catholic schools' participation is forbidden, but their exclusion, once again, would appear to contradict the court's reasoning in *Comer, Espinoza,* and *Makin.* Before the case went to trial in January 2024, district-court Judge John Kane ruled that the schools were separate legal entities and that they, along with the parents, could allege harm as plaintiffs—though he dismissed the Archdiocese for lack of standing. Kane is a Carter appointee with a politically eclectic record who is likely less inclined to agree with the plaintiffs' claims. During the trial, for instance, he referenced Pope Francis's allegedly evolving positions on sexual ethics but then acknowledged that it was inappropriate for him to question the "authenticity" of the plaintiffs' beliefs, an equivocation the plaintiffs probably did not find reassuring.

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These cases likely foreshadow future conflicts over school choice in Colorado and nationally and will give some indication of how the Supreme Court's decisions related to religious practice and speech will be applied by lower courts. Colorado has long been a leader in the charter-school movement. The outcomes of these cases could inspire charter-school advocates to test whether the court's decisions require the state to allow the creation of religious charter schools as Oklahoma has now done. Following the court's decision in *Makin,* it was obvious that blue states would try to use nondiscrimination policy to justify excluding religious providers. If Colorado is told it cannot forbid religious preschools on grounds of nondiscrimination, then one can certainly expect religious groups to challenge Colorado's current law, which requires that charter schools be "nonsectarian" and "nonreligious." Discrimination cuts both ways.

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