

No. 25-581

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**In the Supreme Court of the United States**

ST. MARY CATHOLIC PARISH IN LITTLETON, ET AL.,

*Petitioners,*

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE  
DIRECTOR OF THE COLORADO DEPARTMENT OF  
EARLY CHILDHOOD, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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**BRIEF FOR PETITIONERS**

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## QUESTIONS PRESENTED

1. Whether proving a lack of general applicability under *Employment Division v. Smith* requires showing unfettered discretion or categorical exemptions for identical secular conduct.

2. Whether *Carson v. Makin* displaces the rule of *Employment Division v. Smith* only when the government explicitly excludes religious people and institutions.

**PARTIES TO THE PROCEEDINGS**

Petitioners St. Mary Catholic Parish in Littleton and St. Bernadette Catholic Parish in Lakewood are Colorado corporations sole. Both were plaintiffs below.

Petitioners Daniel and Lisa Sheley are parents of preschool-age children in Littleton, Colorado. Both were plaintiffs below.

Petitioner The Archdiocese of Denver is a Colorado corporation sole. It was a plaintiff below.

Respondent Lisa Roy is Executive Director of the Colorado Department of Early Childhood. Respondent Dawn Odean is Director of Colorado's Universal Pre-school Program. Both were defendants below and are sued in their official capacities.

**CORPORATE DISCLOSURE STATEMENT**

Petitioner St. Mary Catholic Parish in Littleton is a corporation sole, does not have a parent corporation, and does not issue stock. Petitioner St. Bernadette Catholic Parish in Lakewood is a corporation sole, does not have a parent corporation, and does not issue stock. The Archdiocese of Denver is a corporation sole, does not have a parent corporation, and does not issue stock. No publicly held corporation owns any portion of any Petitioner, and no Petitioner is a subsidiary or an affiliate of any publicly owned corporation.

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## INTRODUCTION

In *Carson v. Makin*, this Court held that excluding “otherwise eligible schools” from a public tuition assistance program “on the basis of their religious exercise” triggers strict scrutiny under the Free Exercise Clause. 596 U.S. 767, 789 (2022). That conclusion follows from this Court’s longstanding rule that the government may not condition access to a public benefit on a recipient’s abandoning religious exercise.

*Carson* should have made this case an uncomplicated one. Colorado created a “universal” preschool program (UPK) with the express purpose of funding preschool “for all Colorado children in the year preceding kindergarten.” Yet despite these stated aspirations to universality, it is undisputed that Colorado knowingly excluded Catholic preschools solely on account of their religious exercise. The resulting burden on Petitioners’ religious exercise is unsurprising. Enrollment in Petitioners’ preschools has dropped almost twenty percent, Petitioner St. Bernadette closed its preschool, and Petitioners Daniel and Lisa Sheley have been denied over \$12,000 in tuition assistance simply for choosing a Catholic education. Colorado’s interference with Petitioners’ free *exercise* of religion ought to have been obvious.

But rather than apply *Carson*, the Tenth Circuit quarantined it, limiting *Carson* to situations where government exclusions are “on the explicit basis” of religion. Pet.App.21a. In the Tenth Circuit’s view, unless the wolf comes as a wolf, it must be a sheep. That reconceived Free Exercise Clause flies in the face of this Court’s precedent and offers little comfort to religious people, who suffer the same burden whether government openly singles out religion or not.

Eschewing *Carson*, the Tenth Circuit instead relied on *Employment Division v. Smith* to uphold Colorado's exclusion of Petitioners from the State's universal preschool program. But even under *Smith*'s flawed framework, Colorado's actions fall short because they are far from generally applicable. Colorado has gone out of its way to allow over 1,000 *other* UPK preschools to serve four-year-olds in "specific communities" by, among other things, creating both categorical and discretionary exceptions from the same statutory provision it is strictly enforcing against Petitioners.

Worse, Colorado has repeatedly modified its regulations in response to this lawsuit to ensure other preschools can continue serving specific communities while keeping Petitioners out. Colorado even allows UPK preschools to discriminate in favor of "gender-nonconforming children," "children of color," or members of "the LGBTQ community." Yet the State maintains that Petitioners' preschools cannot even consider a prospective family's religious affiliation if they want to participate in UPK. Colorado's actions require strict scrutiny.

The rest follows rapidly. Since Colorado actively encourages preschools tailored to other "specific communities," Colorado can have no compelling interest in excluding Petitioners' religious communities. And it has not used anything like the least restrictive means available to advance its supposed interest. It has therefore violated the Free Exercise Clause.

\* \* \*

Arguments for limiting the free exercise of religion have long invoked the specter of "anarchy." Sophocles, *Antigone* 751-752 (Robert Fagles trans., Penguin Books 1984); *Employment Div. v. Smith*, 494 U.S. 872,

888 (1990). But if Colorado’s behavior shows anything, it is that the anarchy runs all the other way. Colorado’s bobbing and weaving across the course of this litigation shows that obsessive government attempts to suppress disfavored religious exercise do far more damage to the rule of law than thoughtful accommodations of religion ever will. The Court should put the law of free exercise back on the right path and reverse the decision below.

### **OPINIONS BELOW**

The Tenth Circuit’s opinion is reported at 154 F.4th 752 and reproduced at Pet.App.1a. The district court’s opinion is reported at 736 F. Supp. 3d 956 and reproduced at Pet.App.50a.

### **JURISDICTION**

The Tenth Circuit entered judgment on September 30, 2025. The petition was timely filed and granted on April 20, 2026. This Court has jurisdiction under 28 U.S.C. 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The First Amendment to the United States Constitution provides in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” U.S. Const. Amend. I.

Colo. Rev. Stat. §§ 26.5-4-201 *et seq.* is reproduced in relevant part at Pet.App.187a-208a.

8 Code of Colorado Regulations § 1404-1 is reproduced in relevant part at Pet.App.209a-215a.

## STATEMENT OF THE CASE

### A. Colorado’s universal preschool program

In 2020, Colorado voters passed a ballot proposition to provide state funding for a new universal preschool program (UPK) intended to make preschool “widely available for free.” Colo. Proposition EE (approved Nov. 3, 2020). The Colorado General Assembly responded by codifying the new program into law and creating the Department of Early Childhood to administer the program. Colo. Rev. Stat. §§ 26.5-4-201 *et seq.* (UPK statute).

The “purpose[.]” of UPK is “[t]o provide children in Colorado access to voluntary, high-quality, universal preschool services free of charge.” Pet.App.195a. As the General Assembly found, “[i]n approving proposition EE, the voters supported funding for \* \* \* high-quality preschool programming for all Colorado children in the year preceding kindergarten.” Pet.App.190a.

The General Assembly also found that research demonstrates “the positive and long- and short-term impacts of high-quality preschool, including improved early literacy, reduced grade retention, decreased probability of developing a significant reading deficiency, improved performance on statewide standards-based assessments, and increased rate of high school graduation.” Pet.App.187a. It further found that research demonstrates “that economically disadvantaged children derive greater benefits from preschool programs in states that offer universal programs than in states that offer preschool programs specifically for economically disadvantaged children.” *Ibid.* Accordingly, Colorado embraced a universal rather than a targeted preschool funding program.

UPK reimburses the cost of fifteen hours per week of preschool for all four-year-old Colorado children “regardless of their economic circumstances.” Pet.App.187a; Pet.App.51a. Colorado currently values this tuition assistance at, on average, \$6,300 per child. See Department of Early Childhood, Press Release, (Dec. 9, 2025), <https://perma.cc/S7TR-Q4JX>. Since 2023, Colorado has provided this benefit to over 87,000 children. *Ibid.*

To maximize preschool options, the UPK statute requires a “[m]ixed delivery system,” meaning that families can use UPK funding to send their child to the participating preschool of their choice—public, private, or faith-based. Pet.App.193a. This is a “foundational aspect of the UPK Program.” Pet.App.59a. The program’s “goal” is “to recruit and engage providers \* \* \* of all types,” in order to “give families every opportunity to seek a provider of their choosing, and that includes faith-based providers.” Pet.App.60a.

Any licensed preschool can participate in the program if it signs a UPK provider contract and meets the Department’s “quality standards.” Pet.App.6a-7a. Most standards address issues like “the minimum number of teaching hours, classroom sizes, [and] teacher qualifications.” Pet.App.6a; Colo. Rev. Stat. § 26.5-4-205. The UPK statute, however, also imposes an “equal opportunity” mandate. Pet.App.204a. This mandate requires 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[.]” *Ibid.*; Pet.App.6a, 62a, 212a.<sup>1</sup>

### **B. Colorado’s enrollment system**

The UPK enrollment process is designed to help families “access programming that best fits their family’s needs” as well as to “help match preschools with specific groups of students that [the preschools] are designed to serve.” Pet.App.59a, 65a, 7a. To manage this process, Colorado created a lottery system with flexible exceptions called enrollment “preferences.” Pet.App.65a.

1. Families first sign up to receive UPK benefits through an online portal. Pet.App.64a. The portal allows families to select up to five participating preschools and rank them in order of preference. *Ibid.* The Department then uses a customized algorithm to match families with one of their ranked choices. Pet.App.65a. If none of a family’s first five choices is available, that family can seek to match with additional preschools. Pet.App.7a.

When the Department implemented this new system, however, many preschools expressed concern that “important considerations were being overlooked.” Pet.App.65a. In particular, preschools complained that “this kind of ranking system was too haphazard because schools had no control over which students they were matched with.” Pet.App.7a. The Department agreed, acknowledging that, given the wide

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<sup>1</sup> The Department also created a nondiscrimination provision that would “permit the Department to dictate the hiring decisions of faith-based providers.” Pet.App.63a. After Petitioners challenged that provision in this litigation, Colorado “disavowed enforcement” of the requirement and “removed” it. Pet.App.63a-64a.

variety of providers and the specific “communit[ies]” or “families” those providers aimed to serve, “it would be ‘really difficult’ for providers to be able to participate if they had to accept every child who could be matched to them.” Pet.App.72a.

2. The Department therefore created a system of enrollment “preferences” for UPK preschools to use. These preferences allow preschools “to decline to enroll children they are matched with who do not fit their enrollment preference.” Pet.App.7a. After announcing additional amendments to the proposed preference system the day before trial, J.A.313, the Department adopted final regulations on March 28, 2024, that included ten different enrollment preferences:

1. Faith-based preschools may limit enrollment to “members of their congregation.” Pet.App.8a.
2. Cooperative preschools may limit enrollment to families whose parents will actively participate in the school. Pet.App.8a.
3. Public preschools may limit enrollment “consistent with their established [geographic] boundaries.” Pet.App.8a.
4. Preschools may limit enrollment to children “with an Individualized Education Program (IEP),” Pet.App.8a, 35a-37a, or “only serve children with certain disabilities,” Pet.App.347a.
5. Head Start preschools may limit enrollment to low-income families. Pet.App.347a; Pet.App.8a, 35a-37a.
6. Preschools may prioritize children of their employees. Pet.App.8a.

7. Preschools may prioritize children previously enrolled in the same preschool. Pet.App.8a.
8. Preschools may prioritize students “to keep siblings similarly located.” Pet.App.8a.
9. Preschools may prioritize “an eligible child who is multilingual.” Pet.App.8a-9a.
10. Preschools may limit enrollment based on the child “being a part of a specific community,” “having specific competencies or interests,” “participating in a specific activity,” “receiving specific public assistance benefits,” or “having a specific relationship to the provider.” Pet.App.9a.

The tenth enrollment preference is a “catchall,” designed to allow “participating preschool providers [to] grant [an enrollment] preference” to specific families or specific communities on a preschool-by-preschool basis. Pet.App.9a. The Department created this catchall preference because it “couldn’t anticipate each provider’s individualized needs,” Resp.C.A.Br.8, but wanted to be “inclusive of different types of communities” and to “honor mixed delivery and family choice,” Pet.App.340a, 344a.

The catchall provision lists six “[e]xamples of approved preferences”:

- [1] providers who require a focus in a certain knowledge area \* \* \* ;
- [2] providers who serve families with a family member who works or attends school at a specific site(s) or location(s);
- [3] providers who serve families within a specific geographical catchment area;
- [4] providers who require a certain amount of volunteering

or participation by the participating family; [5] providers who require certain vaccinations for the health and safety of its staff and students; and [6] providers who serve families who are receiving a specific public assistance benefit(s) such as housing assistance.

Pet.App.10a. The catchall provision, however, notes that approved preferences are “not limited to” these examples. *Ibid.* It also provides that any preferences must still be consistent with the equal-opportunity mandate, which prohibits enrollment preferences based on “race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.” Pet.App.6a.<sup>2</sup>

The UPK statute also includes a temporary exemption for out-of-compliance preschools: “[T]he 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.” Pet.App.7a; Pet.App.203a.

3. The system of enrollment preferences operates on both the front and back ends of the enrollment process. On the front end, when families use the online UPK portal, the Department may ask them questions to determine if they qualify to enroll in specific UPK preschools before they see which preschools are available. Pet.App.69a. On the back end, if a child is matched with a preschool but does not satisfy that preschool’s enrollment preferences, the preschool may decline to enroll the child. Pet.App.7a; Pet.App.69a.

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<sup>2</sup> The mandate allows enrollment preferences based on sex. *E.g.*, Pet.App.122a (UPK preschool serving only children of teenage mothers).

In practice, the Department has approved numerous enrollment preferences affecting many thousands of children. Of approximately 2,000 preschools in UPK, over 1,000 preschools impose “at least one preference,” and some impose several. Pet.App.69a, 363a-364a. Each preschool’s enrollment preferences are displayed prominently below the preschool’s name in the Department’s online UPK portal. S.J.A.2-8, J.A.124-25; Pet.App.69a. A UPK preschool’s description in the UPK portal may state, for example: “This is a provider that prioritizes placement for the children of their employees” or “[t]his is an immersive or dual language provider and children may need to be screened to participate in the program.” S.J.A.2-8, J.A.124-125 (listing several more examples).

Some UPK preschools impose Department-approved enrollment preferences that expressly conflict with the equal-opportunity mandate’s equal access requirement. For example, some preschools deny enrollment to families based on their income level, giving preference to low-income families who fall into specific income brackets. Pet.App.35a-37a. Other preschools deny enrollment based on disability, enrolling only children who have “certain disabilities.” *Ibid.*; J.A.311.

The Department has also “granted many individual preferences” under the catchall provision. Pet.App.73a. For example, it has granted requests “to admit only ‘fully vaccinated children’ and to prioritize subdivision residents.” *Ibid.* The Department’s Director, Respondent Dawn Odean, also testified that the catchall provision would allow a preschool to limit enrollment to “gender-nonconforming children,” to “prioritize ‘children of color,’” or to “grant preference to a child based on the child or family being part of the LGBTQ community.” Pet.App.71a-72a; J.A.315-318.

4. The enrollment preference for “[f]aith-based providers granting preference to members of their congregation,” however, proved amorphous and short-lived. At first, Colorado kept the term “congregation” undefined, leaving it to faith-based preschools to “define their own community.” Pet.App.69a-70a; J.A.300. After this lawsuit was filed, Colorado adopted a geographically focused definition, narrowing it to a “religious-based convocation \* \* \* in a geographic area.” J.A.311-312.

At trial, Colorado then took the position that faith-based preschools “may designate seats for preschoolers from families that adhere to a specific faith and may decline children from other families.” Pet.App.70a. And after trial, Colorado promulgated a final rule defining congregation to mean the “members of the community that the faith-based provider serves as the faith-based provider defines that community.” *Ibid.*

Regardless of these shifting definitions, Respondent Odean “insisted \* \* \* that no faith-based provider is allowed to discriminate on the basis of religion or religious affiliation, and if the Department learned that a provider was utilizing the congregation preference in a discriminatory way, it would investigate.” Pet.App.70a. While this case was pending in the Tenth Circuit, Colorado repealed the congregation exemption entirely. Pet.App.16a. The UPK regulations thus no longer allow faith-based preschools to limit enrollment to either congregants or co-religionists.

### **C. Catholic preschools and their exclusion from the UPK program**

1. Petitioner Archdiocese of Denver currently oversees 34 Catholic preschools, including the preschool at

Petitioner St. Mary Catholic Parish. Petitioner St. Bernadette Catholic Parish was forced to close its school—Wellspring Catholic Academy—during this litigation due to funding shortfalls. Petitioners Daniel and Lisa Sheley are Catholic parishioners whose children attend St. Mary’s school. Pet.App.84a.

The Catholic Church teaches that “the first responsibility” for education rests with a child’s “[p]arents.” Catechism of the Catholic Church § 2223. Schools are intended to provide “assistance to parents” in fulfilling that role. Code of Canon Law c.796 § 1. Thus, the Archdiocese’s preschools exist to “partner[] with families so their children can come to encounter Jesus Christ.” Pet.App.224a, 235a. Put another way, these schools carry out their religious mission by “bringing [children] to Jesus Christ through [the] family.” Pet.App.235a.

Because this partnership between schools and parents is “vital,” Pet.App.235a, Archdiocesan preschools take care to ensure that families are aligned with the Catholic Church’s mission and teachings before they enroll. All Archdiocesan preschools require parents to review and sign a statement of “Community Beliefs and Commitments” before enrolling, which describes the Archdiocese’s religious mission and specifically highlights “teachings of our faith” that are “increasingly at odds with” the “assumptions of the secular culture”—including “the sanctity of life from the moment of conception to natural death,” and “Catholic teachings on sexual identity, marriage, family, and parenting.” Pet.App.234a-237a.

All families must also agree to “understand and display a positive and supportive attitude toward the Catholic Church, her teachings, her work, and the mission of the Catholic school.” Pet.App.234a-240a. And

while no “members of our community are expected to be perfect,” families also agree to “refrain from public promotion or approval of any conduct” that would “be considered a counter-witness to Catholic doctrine or morals.” Pet.App.240a, J.A.502, Pet.App.62a. This alignment is important because, if parents publicly oppose the Church’s teachings, their participation in the school community would impair the ability of the school to form its students in the faith. Pet.App.240a, J.A.502, Pet.App.62a; Pet.App.272a-275a, J.A.502, Pet.App.62a; Pet.App.316a-317a. And while Archdiocesan preschools prioritize Catholic families if there is a waiting list, J.A.145, all families who agree with these commitments are welcome to enroll, J.A.157; see Pet.App.11a.<sup>3</sup>

The Archdiocese provides its schools with binding guidance on how to implement these religious practices “with pastoral care that is rooted in love and concern for the person.” Pet.App.242a-279a, J.A.502, Pet.App.62a; Pet.App.308a-320a. School leaders are instructed to be “abundantly clear” at the time of enrollment about what the school teaches on matters of faith, specifically regarding sexual orientation and gender identity. Pet.App.314a-318a. “If the family doesn’t see eye to eye on [the Catholic Church’s teachings about biological sex and marriage], we ask our

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<sup>3</sup> Not every Archdiocesan affiliate has the same mission. For example, Catholic Charities of the Archdiocese of Denver has a “distinct ministry” ordered “not towards the ends of discipleship but towards the end of providing for the poor.” J.A.155-156. To advance that mission, it operates certain Early Head Start programs “specifically directed to assist parents who find themselves in poverty”; these programs do not require families to make the same commitment to support Catholic teaching. *Ibid.*

school leaders to please not admit the child out of abundant respect for the family.” Pet.App.318a.

Making families aware of these religious beliefs at the time of enrollment helps avoid unnecessary conflicts. In part for this reason, while Archdiocesan preschools have been licensed for decades, none “has any history of a complaint from an LGBTQ family or other person alleging LGBTQ-based discrimination.” Pet.App.306a. Nor has there ever been—to the Archdiocese’s knowledge—a situation where a child who is enrolled in an Archdiocesan preschool “begins asserting an identity that’s at odds with his or her biological sex.” J.A.143-144, 158, 1358-1359. But were this situation to arise, school leaders are directed to “share with the parents the church’s teaching” and to “explain that we would not be able to make accommodations that we might see in secular institutions,” like using “pronouns,” “bathroom[s]” and “uniform[s]” that are “inconsistent with the child’s biological sex.” Pet.App.318a-319a. “[E]very preschool is expected to follow this guidance” while also considering each individual situation with “discretion, sensitivity, prudence, and prayer to discern the best response.” Pet.App.319a; Pet.App.262a, J.A.502, Pet.App.62a.

2. Soon after UPK was enacted, and throughout the development of the implementing regulations, the Archdiocese and other religious groups expressed concerns about the equal-opportunity mandate, which forbids enrollment preferences based on, *inter alia*, “religious affiliation, sexual orientation, [or] gender identity.” Pet.App.6a; Pet.App.12a. Some faith-based preschools, including the Archdiocese’s preschools, cannot comply with this mandate without violating their religious beliefs. Pet.App.283a, J.A.124-125.

Accordingly, as the Department rolled out UPK in early 2023, the Archdiocese and a coalition of faith-based preschool providers—representing Catholic, Lutheran, Jewish, and other preschools—sent a letter to the Department asking it to grant a religious exemption from the equal-opportunity mandate. Pet.App.285a-286a, J.A.124-125. Their letter explained that similar exemptions are “routinely and automatically provided at the federal level” and are necessary to “maintain the legal and constitutional integrity of the program while enhancing the number and variety of preschools from which Colorado parents can choose.” *Ibid.*

The Department responded that it was “aware of [these] concerns,” but that “an exemption would be inconsistent with statute and therefore void.” Pet.App.289a, J.A.124-125. The Department stated that while faith-based preschools “may give preference to members of their congregation,” via the (now-repealed) congregation exemption, they cannot “discriminate against children or families in violation of state statute.” Pet.App.289a-290a, J.A.124-125.

#### **D. Proceedings below**

1. Petitioners filed suit on August 18, 2023, alleging that their exclusion from UPK violated the Free Exercise Clause in several respects.

First, they argued that the equal-opportunity mandate violated *Carson* by excluding them from UPK “based solely on [their] preschools’ religious character and exercise”: namely, requiring all families to be supportive of Catholic teaching. Pet.App.85a, 103a.

Second, they argued that the equal-opportunity mandate violated *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), because the Department granted

exemptions for secular conduct—like making enrollment decisions based on income level and disability—that undermines the government’s interest in the mandate, but not for comparable religious conduct. Pet.App.85a, 103a.

Third, they argued that the equal-opportunity mandate violated *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), because the Department retained broad discretion to make individualized exemptions under the “catchall” provision—such as allowing pre-schools to give enrollment preferences to “gender-non-conforming children,” “children of color,” or members of “the LGBTQ community.” Pet.App.71a-72a.

2. After a three-day bench trial, the district court largely rejected Petitioners’ claims. First, the court rejected application of *Carson* and instead applied *Smith*, reasoning that *Carson* is confined to “program[s] that ‘specifically carve[] out’ religious organizations from those eligible to receive funding.” Pet.App.107a. Second, the court rejected application of *Tandon*, concluding that the Department’s exemptions for enrollment decisions based on income and disability did not undermine the equal-opportunity mandate and, in any event, were not comparable to Petitioners’ enrollment decisions based on religion. Pet.App.129a-132a. Third, the court rejected application of *Fulton*, reasoning that the catchall provision “does not give the Department any discretion to grant exemptions from the equal-opportunity requirement.” Pet.App.120a.

The court did, however, reach a different conclusion on what it called “the religious affiliation aspect of the equal-opportunity requirement.” Pet.App.135a. As to that requirement, the court noted that the Department had authorized a “congregation preference” allowing faith-based providers to give preference to

“members of their congregation.” *Ibid.* This, the court said, rendered the religious affiliation aspect of the equal-opportunity mandate “not generally applicable” and therefore subject to strict scrutiny—which it failed. *Ibid.*

The result of this ruling was that the Department remained free to continue excluding Petitioners from UPK based on the “sexual-orientation and gender-identity aspects of the equal-opportunity” mandate. Pet.App.133a-135a. But the Department was enjoined from enforcing the “religious affiliation” aspect of the mandate “for as long as” the Department retained the congregation exemption. Pet.App.171a-172a. In response, Colorado amended its regulations while this case was on appeal to remove the congregation exemption—and then argued that this released it from the injunction and allowed it to continue excluding faith-based preschools that make enrollment decisions factoring in “religious affiliation,” as well as sexual orientation or gender identity. Pet.App.16a.

3. The Tenth Circuit affirmed. First, it held that *Carson* was “distinguish[able]” because other religious schools were “welcome participants in Colorado’s UPK program,” and because the mandate did not exclude religious schools “on the explicit basis that they were religious and not secular.” Pet.App.21a. Next, the court found that Petitioners’ religious exercise was only “infringed incidentally,” and applied *Smith*. Pet.App.22a. Rejecting Petitioners’ general applicability arguments, the court also held that the mandate did not permit any “comparable” categorical exemptions because any secular exemptions Colorado might have allowed were from *different* protected characteristics listed in the mandate (*e.g.*, disability, not gender identity), Pet.App.40a, and “the Department has no

discretion” to make individualized exemptions because, despite contrary testimony, the text of the Department’s regulations nominally forbid it, Pet.App.34a.

4. Colorado’s actions have had significant consequences. Two parish preschools—at Wellspring Catholic Academy (the parish school of Petitioner St. Bernadette) and Guardian Angels Catholic School—closed during this litigation due to shortfalls in funding and decreased enrollment. Across the Archdiocese, parish preschool enrollment has declined almost twenty percent since UPK was enacted. And Petitioners Daniel and Lisa Sheley have so far lost over \$12,000 in UPK funding that would have defrayed the cost of sending their children to Catholic preschool.

#### SUMMARY OF THE ARGUMENT

Since *Smith* was decided 36 years ago, this Court has applied it only twice to rule against religious litigants—once in *Smith* itself, and once in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). In this Court, at least, *Smith* has functioned more as a residual rule than as a primary rule of decision. Indeed, in at least eight categories of cases, this Court has employed a Free Exercise Clause standard other than *Smith*.

The lower courts, however, have not followed this Court’s lead, often relying on *Smith* as the overarching rule of decision to the exclusion of other lines of this Court’s Free Exercise Clause precedent. In this case, the Tenth Circuit faced those diverging lines of caselaw and took the path of *Smith* rather than following this Court’s on-point public benefits precedents, many of which have arisen specifically in the context of religious schools.

That made all the difference. Under the trilogy of *Trinity Lutheran*, *Espinoza*, and *Carson*, this case is straightforward. In *Carson*, the Court held that the First Amendment “prohibit[s] \* \* \* denying [a] benefit based on a recipient’s religious exercise.” 596 U.S. at 785. The Tenth Circuit “distinguishe[d]” *Carson* by claiming it applied only when religion is “specifically targeted.” Pet.App.21a, 22a (relying on *Trinity Lutheran* and *Smith*). But that view, if accepted, would dramatically narrow *Carson* and make it easy to evade. It would also run afoul of decades of precedent—before and after *Smith*—prohibiting religious exclusion even when the law appears “neutral on its face.” *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981).

But even under the ill-fitting *Smith* framework, Colorado’s mandate fails because it is not generally applicable. Instead, Colorado has granted—and has the discretion to grant—numerous exceptions that violate the plain text of the mandate and thus undermine Colorado’s asserted interest in ensuring equal access. This includes categorical exemptions for preschools that prefer low-income families and children with disabilities. It also includes Colorado’s discretion to allow UPK preschools to discriminate in favor of LGBTQ families and other groups. Petitioners have no objection to Colorado’s decision to allow over 1,000 UPK preschools to selectively serve the communities they are designed to serve—Petitioners simply want the same accommodation extended to them.

Having triggered strict scrutiny, Colorado fails it. Colorado has not behaved as if it has a compelling interest, instead affirmatively encouraging preschools to serve particular communities and allowing a wide range of secular preschools to flout the mandate without penalty. Nor has Colorado identified any actual

problem it needs to solve; instead, it admits that any harm to an LGBTQ family from Petitioners' religious practices is entirely speculative, while it is willing to impose real harm on thousands of Catholic families who have zero Catholic UPK preschools available to them. Because Colorado lacks a compelling interest, as well as any indication that it even considered less restrictive alternatives, its religious exclusion must be set aside.

## ARGUMENT

### I. This Court rarely applies *Smith*, but lower courts treat it as controlling.

“Under this Court’s precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). That observation is borne out by the variety of Free Exercise Clause standards this Court has applied, depending on the specific claim or defense presented or the particular burden on religious exercise that is implicated.

There is a disjunct, however, between this Court’s practice and that of the lower courts. Lower courts typically equate Free Exercise Clause analysis with *Smith*, treating it as controlling even where this Court has expounded a different rule. That is a tendency this Court should reprove.

#### A. This Court rarely applies *Smith* to reject Free Exercise Clause claims or defenses.

In *Smith*, this Court held that laws burdening religious exercise that are “neutral” and “generally applicable” are subject only to rational basis review. 494 U.S. at 878. But this rational basis rule has been infrequently applied by the Court. Far more often, this

Court has found either that a different Free Exercise Clause standard applies or that *Smith*'s prerequisites—that the law in question is both neutral and generally applicable—are not met.

Out of the eighteen free exercise cases this Court has resolved since *Smith* in 1990, this Court has relied on *Smith* only twice to rule against the religious objector: once in *Smith* itself (“across-the-board criminal prohibition”), and once in a footnote in *Martinez*, 561 U.S. at 697 n.27 (“across-the-board all-comers policy”).

Of the other sixteen Free Exercise Clause cases, in five the Court found that the laws in question were either not neutral or not generally applicable and failed strict scrutiny. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-547 (1993); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (per curiam); *Tandon*, 593 U.S. at 62; *Fulton*, 593 U.S. at 534; *Kennedy*, 597 U.S. at 526.

And in the remaining eleven cases, the Court either held that a different Free Exercise Clause rule applied, or said nothing about *Smith* at all. See *Locke v. Davey*, 540 U.S. 712 (2004); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189-190 (2012); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017); *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 638-639 (2018); *Sause v. Bauer*, 585 U.S. 957, 959 (2018) (per curiam); *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 478 (2020); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 756 (2020); *Carson*, 596 U.S. at 781; *Catholic Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 248 (2025); *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025); *Mirabelli v. Bonta*, 607 U.S. 492, 496 (2026) (per curiam).

Given how sparingly this Court has applied *Smith* over the past 36 years, it is therefore unsurprising that this Court’s decisions reveal a variety of doctrines that govern different subgenres of Free Exercise Clause claims.

**B. This Court has held that *Smith* does not control many categories of Free Exercise Clause cases.**

This Court has identified at least eight different categories of cases where *Smith* does not control:

***Animus or hostility.*** *Smith*’s rational basis rule does not control religious animus cases. “A plaintiff may also prove a free exercise violation by showing that ‘official expressions of hostility’ to religion accompany laws or policies burdening religious exercise; in cases like that we have ‘set aside’ such policies without further inquiry.” *Kennedy*, 597 U.S. at 525 n.1 (quoting *Masterpiece*, 584 U.S. at 639).

***Church autonomy.*** *Smith* also does not control Free Exercise Clause claims or defenses involving “matters of church government as well as those of faith and doctrine.” *Our Lady*, 591 U.S. at 737 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). These questions of internal governance include the hiring and firing of ministers, *Hosanna-Tabor*, 565 U.S. at 196, control over church property, *Kedroff*, 344 U.S. at 119-120, and matters of “ecclesiastical government” such as “church polity” and “church discipline,” *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709, 714 (1976) (quoting *Watson v. Jones*, 13 Wall. 679, 773 (1872)); see also Transcript at 38, *Hosanna-Tabor*, *supra* (No. 10-553) (Scalia, J.) (“*Smith* didn’t involve employment by a

church. It had nothing to do with who the church could employ.”).

Church autonomy also includes “the conformity of the members of the church to the standard of morals required of them,” and whether someone may become or remain a part of the religious community. *Watson*, 13 Wall. at 733; see also *id.* at 729 (Community members give “implied consent to [church] government, and are bound to submit to it.”); *Bouldin v. Alexander*, 15 Wall. 131, 139 (1872) (“ordinary acts of church discipline, or of excision from membership” off-limits for government officials).

***Discrimination among religions.*** *Smith* does not control discrimination-among-religions claims. Without mentioning *Smith*, this Court held in *Catholic Charities* that under both Religion Clauses the “government may not ‘officially prefe[r]’ one religious denomination over another.” *Catholic Charities*, 605 U.S. at 247-248 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). And “[a] law that differentiates between religions along theological lines is textbook denominational discrimination.” *Id.* at 248. That includes “differentiating between religions based on theological practices,” “establish[ing] a preference for certain religions based on the commands of their religious doctrine,” or making “distinction[s] between religious practices.” *Id.* at 250-251; see also *Lukumi*, 508 U.S. at 532-533 (discussing discrimination among religions).

***Forced participation in ceremonies.*** Also apart from *Smith* is the rule of *West Virginia State Board of Education v. Barnette*, which focused on whether government officials could require a “conscientious child to stultify himself in public” by participating in a ceremony that went against his religious beliefs. 319 U.S.

624, 635 n.15 (1943). The Court held that they could not, and that “compelling the flag salute and pledge \* \* \* invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* at 642.<sup>4</sup> *Smith* did not purport to alter this Free Exercise Clause ruling. See *Smith*, 494 U.S. at 882.

**Hybrid situations.** *Smith* likewise does not control challenges in “hybrid situation[s]” where a free-exercise claim is linked with “other constitutional protections, such as freedom of speech.” *Smith*, 494 U.S. at 881-882 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-307 (1940), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. Town of McCormick*, 321 U.S. 573 (1944)). This understanding of *Smith* has occasionally been applied in the lower courts. See, e.g., *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759-760 (8th Cir. 2019).

**Parental rights.** Government actions that “substantially interfere with the ‘right of parents to guide the religious development of their children’” are also not subject to *Smith*. *Mirabelli*, 607 U.S. at 496 (quoting *Mahmoud*, 606 U.S. at 559). As this Court explained in *Mahmoud*, when government “imposes a burden of th[is] \* \* \* character,” the court “need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny.” 606 U.S. at 564-565; see also *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

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<sup>4</sup> Although often described as a free speech case, *Barnette* reached this Court solely as a free exercise case. *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W.Va. 1942).

***Penalizing religious beliefs as such.*** *Smith* also does not control in cases involving penalties on religious beliefs. “The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.” *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality). Thus, “[i]n the words of Justice Brennan, the ‘government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.’” *Morris Cnty. Bd. of Chosen Freeholders v. Freedom From Religion Found.*, 586 U.S. 1213, 1214 (2019) (statement of Kavanaugh, J.) (quoting *McDaniel*, 435 U.S. at 639 (Brennan, J., concurring in the judgment)). The Court has repeatedly reiterated this principle, holding not just that such a penalty triggers liability but that it cannot be justified, even under strict scrutiny. See, e.g., *Lukumi*, 508 U.S. at 533 (“a law targeting religious beliefs as such is never permissible”); *Trinity Lutheran*, 582 U.S. at 466 n.4 (same).

***Public benefits.*** Most importantly for this case, the Court has long held that “a person may not be compelled to choose between [religious] exercise” and “participation in an otherwise available public program.” *Thomas*, 450 U.S. at 716. Thus, when government conditions “a benefit or privilege” on a person’s “willingness to violate” her religious beliefs, its actions are constitutional only if they serve a “compelling state interest” that cannot be served otherwise. *Sherbert v. Verner*, 374 U.S. 398, 404-406 (1963); see also *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 140 (1987) (“coercive impact of the forfeiture of benefits” was “undeniable”).

This rule reflects the straightforward First Amendment principle that each faith must “flourish” or wither “according to the zeal of its adherents and the

appeal of its dogma,” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)—not according to a governmental thumb on the scale. And the rule has deep roots: Nearly eighty years ago this Court recognized that a state unlawfully “hamper[s] its citizens in the free exercise of their own religion” if it “exclude[s] individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

This Court has repeatedly reaffirmed the principle since then, without treating *Smith* as controlling. See *Trinity Lutheran*, 582 U.S. at 466; *Espinoza*, 591 U.S. at 484; *Carson*, 596 U.S. at 785; see also *Mahmoud*, 606 U.S. at 530, 561.

### **C. Lower courts continue to treat *Smith* as the primary rule of decision.**

The story is entirely different in the lower courts. There, *Smith* controls Free Exercise Clause claims in the first, and often last, instance. As Judge Wilkinson recently put it, with respect to Free Exercise Clause claims, “the Supreme Court’s position in *Employment Division v. Smith* controls. \* \* \* That is, as they say, elementary.” *Polk v. Montgomery Cnty. Pub. Schs.*, 166 F.4th 400, 422 (4th Cir. 2026) (Wilkinson, J., dissenting).

Judge Wilkinson’s sentiment is widely shared: Lower courts treat *Smith* as the overarching standard for deciding Free Exercise Clause claims, the first step in free exercise analysis. In *Olympus Spa v. Armstrong*, for example, the Ninth Circuit relied in the first instance on *Smith* to rule against a Christian Korean-American spa’s challenge to state enforcement of

a public accommodations law: “[T]he Spa’s religious expression is only incidentally burdened. \* \* \* [Enforcement] does not prohibit the Spa from expressing its religious beliefs.” 169 F.4th 817, 832 (9th Cir. 2026).

Cases from other circuits often start off on the *Smith* foot too. See, e.g., *We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130, 144 (2d Cir. 2023) (In *Smith*, “the Supreme Court reaffirmed that a law that incidentally burdens religious exercise is constitutional when it (1) is neutral and generally applicable and (2) satisfies rational basis review.”); *Mahmoud v. McKnight*, 102 F.4th 191, 206 (4th Cir. 2024), rev’d, *Mahmoud*, 606 U.S. 522 (“the currently applicable standard set out in *Employment Division v. Smith*”).

To be sure, lower courts do recognize that *Smith* does not control in certain contexts, particularly when it comes to issues like the ministerial exception and church autonomy. See, e.g., *McRaney v. North Am. Mission Bd.*, 157 F.4th 627, 633-641 (5th Cir. 2025), cert. denied, 224 L.Ed.2d 16 (2026). But this does not diminish the fact that, unlike this Court, lower courts typically rely first and foremost on *Smith* in analyzing Free Exercise Clause claims.

## **II. Colorado excluded Petitioners from the UPK program because of their religious exercise, triggering strict scrutiny under *Carson*.**

The Tenth Circuit decided that the *Carson* trilogy of cases did not control. Pet.App.21a. That was error.

**A. Conditioning access to UPK benefits on abandoning religious exercise triggers strict scrutiny.**

1. *Carson* recognized that the Free Exercise Clause prohibits denying otherwise available public benefits “based on a recipient’s religious exercise.” 596 U.S. at 785. Indeed, *Carson* applied this rule in the precise context presented here: the exclusion of religious schools from a state tuition benefits program. In *Carson*, Maine offered tuition assistance to parents who lived in school districts that lacked a district-operated secondary school so they could send their children to “the approved private school of the parent’s choice.” *Id.* at 773. But it excluded from eligibility schools that “promot[ed]” a “particular faith or belief system” with which they were “associated and/or present[ed] the material taught through the lens of this faith.” *Id.* at 775.

*Carson* held that this exclusion violated the First Amendment. This Court, *Carson* explained, has “repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” 596 U.S. at 778 (citing *Sherbert, Everson, and Thomas*). And that principle includes a “prohibition on denying the benefit based on a recipient’s religious exercise,” *id.* at 785—like educating students through the lens of a religious faith.

Maine thus had to “satisfy strict scrutiny,” which it could not do. *Carson*, 596 U.S. at 780. The interest it asserted did not “justify \* \* \* exclud[ing] some members of the community from an otherwise generally available public benefit because of their religious exercise.” *Id.* at 780-781.

The rule against religious-exercise-based benefits denials is broad, as *Carson*'s reliance on two unemployment-compensation cases (*Sherbert* and *Thomas*) demonstrates. But this Court's more recent precedents applying this rule (*Trinity Lutheran*, *Espinoza*, and *Carson*) show that, if anything, it applies with special force in the education context. This makes good sense. "Religious education is vital to many faiths practiced in the United States." *Our Lady*, 591 U.S. at 754. And "[m]any parents" exercise their fundamental right to "direct 'the religious upbringing'" of their children "by sending their children to religious schools." *Espinoza*, 591 U.S. at 486 (quoting *Yoder*, 406 U.S. at 213-214).

Indeed, many parents, like Petitioners Daniel and Lisa Sheley, understand it to be a religious "directive" to provide a religious education for their children. Pet.App.84a; see Code of Canon Law c.798 ("Parents are to entrust their children to those schools which provide a Catholic education."). To penalize religious parents for choosing a school that meets their religious needs over a secular private school is thus to impose a free-exercise burden of an especially onerous character.

2. Under *Carson*, Colorado's actions trigger strict scrutiny. Colorado offers its citizens a benefit: "universal" preschool funding at the preschool of the family's choice. But it denies that benefit to families who choose Catholic preschools.

It is undisputed that these preschools would otherwise be eligible UPK providers. Pet.App.11a-13a. They are excluded solely because of their religious exercise—namely, their religious practices of ensuring that all enrolling families are supportive of the Catholic Church's teachings on sex and marriage and of treating enrolled four-year-olds in accordance with

their biological sex. Pet.App.83a-84a, 314a-319a. “By ‘condition[ing] the availability of benefits’ in that manner, [Colorado’s] tuition assistance program \* \* \* ‘effectively penalizes the free exercise’ of religion.” *Carson*, 596 U.S. at 780 (quoting *Trinity Lutheran*, 582 U.S. at 462). Of course, Colorado “need not subsidize private” preschools *at all*. *Espinoza*, 591 U.S. at 487. But having chosen to do so, it presumptively cannot exclude Catholic preschools “on the basis of their religious exercise.” *Carson*, 596 U.S. at 789.

Indeed, Colorado is penalizing religious exercise that “lie[s] at the very core of the mission of a private religious school”—“[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith.” *Carson*, 596 U.S. at 787 (quoting *Our Lady*, 591 U.S. at 753-754). Archdiocesan preschools’ primary mission is to partner with parents in the formation and education of their children. Pet.App.223a, J.A.502, Pet.App.62a. They cannot accomplish that mission, they believe, if their teachings conflict with the parents’, or if families in their school communities are living as a “counter-witness to Catholic doctrine or morals.” Pet.App.240a, J.A.502, Pet.App.62a; Pet.App.272a-275a, J.A.502, Pet.App.62a; Pet.App.316a-317a.

“[T]here is nothing neutral about” Colorado’s actions. *Carson*, 596 U.S. at 781. Colorado has made it free to attend over 2,000 preschools in the State. But it has barred Archdiocesan schools from participating, thus imposing what equates to a substantial new tax on parents who desire to form their preschool-aged children in the Catholic faith. As Justice Scalia explained in *Locke*, “[w]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are

measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.” 540 U.S. at 726-727 (Scalia, J., dissenting); see also *id.* at 720-721 (majority) (“requir[ing] students to choose between their religious beliefs and receiving a government benefit” violates the Free Exercise Clause (citing *Hobbie*, *Thomas*, and *Sherbert*)).

The inevitable result of Colorado’s thumb on the scale is that more Colorado children will be funneled toward preschools that share Colorado’s perspective on matters of sex and marriage. And that is not because of the relative “appeal of” competing “dogma[s].” *Zorach*, 343 U.S. at 313. It is because of Colorado’s imposition of financial pressure on preschools with disfavored religious beliefs.

This result is already coming to pass. Enrollment is dropping at the Archdiocese’s preschools, and two were forced to close in the few years since Colorado excluded them from UPK. Catholic preschools—and the families whose children attend them—are “member[s] of the community too.” *Trinity Lutheran*, 582 U.S. at 463. They are entitled to participate in Colorado’s “universal” program without abandoning their religious exercise.

### **B. The Tenth Circuit’s attempts to fetter Carson fail.**

The Tenth Circuit rejected this straightforward analysis for two reasons, both meritless.

First, the Tenth Circuit said that the “principle” of this Court’s decisions in *Carson*, *Espinoza*, and *Trinity Lutheran* is that “when a state offers subsidies for private education, it cannot *categorically* withhold those

funds from religious institutions.” Pet.App.19a (emphasis added). Thus, because Colorado does not exclude *all* “faith-based preschools from participating in UPK,” the *Carson* rule does not apply. Pet.App.21a.

But this theory of *Carson* would not even cover *Carson* itself. Like Colorado, Maine did not “categorically” exclude faith-based schools. Instead, it excluded a school “only if it promotes a particular faith and presents academic material through the lens of that faith.” *Carson*, 596 U.S. at 786-787; see also *id.* at 775. The fact that a school was religious was “not dispositive.” *Ibid.*; see also *id.* at 797 (Breyer, J., dissenting) (“it is religious activity, not religious labels, that lies at the heart of this case”). This Court rejected that supposed distinction and applied strict scrutiny.

In fact, Colorado’s willingness to include religious preschools that have religious practices conforming to the State’s requirements only makes the free-exercise problem *worse*. Part of the danger of conditioning state benefits on abandoning certain religious practices is that it allows the government to pick religious “winners and losers,” supporting religions whose practices the government likes while making it more costly to adhere to religions with practices that “legislative majorities \* \* \* find unseemly or uncouth.” *Espinoza*, 591 U.S. at 513-514 (Gorsuch, J., concurring). But “official differentiation on theological lines is fundamentally foreign to our constitutional order.” *Catholic Charities*, 605 U.S. at 248-249. And the government tilts the religious playing field in the same troubling way when it makes “eligibility” for a government benefit “ultimately turn[] on inherently religious choices,” *id.* at 250—like whether to ask that families seeking a Catholic education for their child be supportive of the Catholic faith. Cf. *ibid.* (recognizing that the choice to

“serve only co-religionists” is an “inherently religious choice[ ]”).

Second, the Tenth Circuit attempted to distinguish *Carson* on the ground that “the *Carson* line of cases addressed laws that targeted ‘religious status’ and ‘religious use’ on the explicit basis that they were religious and not secular.” Pet.App.21a. And because the mandate does not prohibit Catholic preschools’ religious conduct on the *explicit* basis that it is religious, *Carson* does not apply. Pet.App.21a-22a.

But this theory would dramatically narrow *Carson*. As this Court emphasized, its decisions in this area have “turned on the substance of free exercise protections, not on the presence or absence of magic words.” *Carson*, 596 U.S. at 785. And *Carson* specifically rejected the Tenth Circuit’s formalism, holding instead that the law’s “operat[ion]” was what mattered: “Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.” *Id.* at 789. Thus, the key to *Carson* was not that Maine used religious words in the crafting of its exclusion; it was that the religious schools and families were excluded from the program “on the basis of their religious exercise.” *Ibid.* The same is true here.

Indeed, both before and after *Carson*, this Court has prohibited religious-exercise-based benefits exclusions even when the exclusion is “neutral on its face” and thus “the burden upon religion” is “only [an] indirect consequence.” *Thomas*, 450 U.S. at 717. In *Sherbert* and *Thomas*—both relied on in *Carson*—the plaintiff was denied benefits not under a law explicitly targeting religious conduct but rather by one requiring all unemployment-benefits claimants to have had “good cause” for leaving their jobs. *Ibid.*; *Sherbert*, 374

U.S. at 401; see also *Hobbie*, 480 U.S. at 138 (same result under facially neutral “no fault of their own” requirement). As *Carson* explained, the crux of these cases was not that the states used religious terms in crafting the exclusion. It was that the conduct that led to the denial of benefits was—for the claimants—religious. See *Carson*, 596 U.S. at 778 (“A State may not withhold unemployment benefits, for instance, on the ground that an individual lost his job for refusing to abandon the dictates of his faith.” (citing *Sherbert* and *Thomas*)); see also *Sherbert*, 374 U.S. at 404 (“[A]ppellant’s declared ineligibility for benefits derives solely from the practice of her religion”). So too here.

Likewise, in *Mahmoud*, this Court invoked the rule against religious-exercise-based benefits exclusions where parents were denied the “benefit” of public education if they exercised their religion by declining to submit their children to “LGBTQ+-inclusive” instruction. 606 U.S. at 561, 563 (citing *Trinity Lutheran*). And the Court did so even though Montgomery County did not deny opt-outs “on the explicit basis that” objections were “religious.” Pet.App.21a. Rather, the County had a “no-opt-out” policy that said nothing at all about religion. *Mahmoud*, 606 U.S. at 538, 563. If the Tenth Circuit’s understanding of “the *Carson* line of cases” were correct, Pet.App.21a, then *Mahmoud*’s invocation of that line would make no sense. 606 U.S. at 561 (citing *Trinity Lutheran*).

Beyond contradicting *Carson*, the Tenth Circuit’s “explicitly religious” line reflects an empty formalism. What has always triggered the Free Exercise Clause in this context is “pressure \* \* \* to forgo” a religious practice in order to obtain a government benefit. *Sherbert*, 374 U.S. at 404; accord *Thomas*, 450 U.S. at 717-

718. That focus on pressure reflects historical understandings. See Stephanie H. Barclay, *Replacing Smith*, 133 Yale L.J. Forum 436, 455 (2023) (courts looked to whether government would “press’ the ‘weight’ of the sovereign power in a way that objectively made it more difficult for religious believers to comply with their consciences”). And here, Petitioners’ preschools face exactly the same pressure whether Colorado excludes them from UPK for explicitly religious reasons or by way of a mandate that proscribes their religious practices.

Similarly, the Tenth Circuit’s reading would render *Carson* trivially easy to avoid. A government seeking to exclude disfavored religious organizations from an otherwise available benefit could, despite *Carson*, achieve that result as long as it prohibited those organizations’ religious practices without using “explicit[ly]” religious terms. Pet.App.21a. Indeed, this is exactly what is happening in Maine, where the state has replaced the exclusion challenged in *Carson* with a nondiscrimination provision and repealed the preexisting religious exemption. See States Cert. Br.17; Notre Dame Cert. Br.14-19.

In short, like the limitations *Carson* itself rejected, the Tenth Circuit’s attempt to recast *Carson* here would “see ‘the First Amendment \* \* \* reduced to a simple semantic exercise.’” 596 U.S. at 784. Based on *Carson* alone, this Court should reverse.

### **III. Colorado’s mandate also fails *Smith*’s general applicability test.**

Even if *Smith*’s framework did apply, Colorado’s interpretation and enforcement of the mandate does not “meet the requirement of being neutral and generally applicable.” *Fulton*, 593 U.S. at 533.

Colorado has allowed over 1,000 UPK preschools to decline to enroll families for myriad reasons, explaining that the ability to serve particular communities is critical to UPK’s mixed-delivery system. Pet.App.69a. Colorado officials even created a discretionary process—the catchall—intended to ameliorate the “unintended consequences” of the UPK program’s matching algorithm and to keep existing communities intact. Pet.App.72a; J.A.346 (exemptions intended to ensure “providers can continue to serve the communities that they have served”). Petitioners ask for nothing more than that same flexibility to serve their own communities consistent with their beliefs.

Such a common-sense accommodation would not decrease the availability of UPK to other families by a single seat. Meanwhile, it would serve the interests of *universal* preschool by making it more accessible for all Colorado families—including those whose faith directs them to choose a Catholic preschool. Colorado’s solicitousness for other communities suggests its insistence on strict enforcement of the mandate against Petitioners is little more than a fig leaf for its desire to exclude certain preschools with the wrong religious beliefs.

**A. The mandate is not generally applicable because Colorado permits categorical exemptions.**

1. 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; *Kennedy*, 597 U.S. at 525-526 (same). This rule is strict: A law is not generally applicable if it “treat[s] *any* comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62. And the comparability

of “two activities” is “judged against” the asserted “government interest that justifies the regulation at issue.” *Ibid.* Once a plaintiff shows that any comparable secular conduct is treated more favorably, strict scrutiny applies. *Fulton*, 593 U.S. at 540-541.

UPK’s “goal” is to “give families every opportunity to seek a [preschool] provider of their choosing.” Pet.App.60a. The various enrollment preferences Colorado allows for over 1,000 participating preschools undermine that interest far *more* than accommodating Petitioners’ religious exercise.

Yet even focusing only on the equal-opportunity mandate as “the regulation at issue,” Pet.App.38a (quoting *Tandon*, 593 U.S. at 62), the same result obtains. The interest underlying the mandate comes straight from the statutory text: equality of access regardless of certain protected characteristics. The General Assembly directed the Department to ensure that “each [UPK] 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[.]” Pet.App.204a. The government interest that justifies the mandate, then, is patent: as Colorado put it below, ensuring that “all eligible children have equal opportunity, regardless of protected-class status, to enroll in the publicly-funded preschools that best meet their needs.” Resp.C.A.Br.45; see also BIO.6. The Tenth Circuit and the district court repeatedly affirmed the same. *E.g.*, Pet.App.28a (“prevent discrimination on any grounds”); Pet.App.58a-59a.

The mandate’s text and structure further confirm this interest. The mandate sets out a “requirement”

(singular) that preschools provide “an equal opportunity” (also singular) “to enroll and receive preschool services” regardless of protected characteristics. Pet.App.204a. The mandate then includes a list of those characteristics, all subject to this same equality requirement. *Ibid.* And both Colorado and the Tenth Circuit recognize that the mandate’s text “is a hard limit” and is “absolute” in its requirement of equal access without exception. Pet.App.7a, 32a; Pet.App.26a (UPK preschools must “follow the letter of the [mandate] as enshrined in state law”); Pet.App.33a (“state law gives no room to the Department to make exceptions”); Pet.App.289a, J.A.124-125 (“I do not have the authority to create an exemption[.]”); Resp.C.A.Br.27 (same).

Nevertheless, Colorado has created via regulation two categorical exemptions allowing UPK preschools to impose additional enrollment requirements that directly undermine this equal access interest. First, Colorado allows some UPK preschools to deny families enrollment based on income level. Pet.App.8a, 35a-36a. Second, Colorado allows some UPK preschools to enroll only children with a disability. *Ibid.* Because these categorical exemptions allow UPK preschools to provide families with *unequal* access based on protected characteristics, they undermine Colorado’s asserted interest in equal access “in a similar way” to Petitioners’ requested religious accommodation. *Fulton*, 593 U.S. at 534.

Indeed, by imposing in the text of the mandate the same equal access requirement across all protected characteristics, the General Assembly has already made an implicit determination that denial of equal access based on any protected characteristic would un-

dermine its asserted interest in the same way as a denial based on any other. See *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 689-690 (9th Cir. 2023) (en banc) (“*FCA*”) (“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 ensuring equal access[.]”).

Colorado’s disability and income level exemptions are thus comparable to Petitioners’ requested religious accommodation. *Tandon*, 593 U.S. at 62. And by treating “comparable secular activity more favorably than religious exercise,” Colorado triggers strict scrutiny. *Ibid.*; see also *Lukumi*, 508 U.S. at 542 (“categories of selection are of paramount concern”).

2. The Tenth Circuit erred in holding otherwise. Notwithstanding the law’s plain text, the court concluded that Colorado could simply “interpret” the mandate to prohibit only “discriminat[ion]” *against* “low income” and “disabled children”—even though neither of these terms appears anywhere in the mandate’s text. Pet.App.36a-38a. This selective interpretation of the mandate, the court then determined, allows UPK preschools to maintain admissions policies *favoring* low-income families and children with disabilities without violating the mandate’s ban on what the court viewed to be “discrimination” (another term found nowhere in the law’s text). *Ibid.*; see Resp.C.A.Br.31 (The Department “interprets the equal-opportunity provisions as a one-way ratchet.”).

In the alternative, the court held that the eight protected characteristics listed in the mandate (*e.g.*, income level, race, and disability) each addressed different “barriers to equal access to preschool education[.]”

making them “completely different and thus not comparable.” Pet.App.38a-40a; Pet.App.41a (exemptions from each protected characteristic would have to be “challenged separately”); Pet.App.127a-129a (same).

Both alternative holdings are wrong. As to the first, Colorado’s apparent ability to reinterpret a statute contrary to its plain text (thus hiving off inconvenient exemptions) itself shows that the law is not generally applicable. *Fulton*, 593 U.S. at 537; *infra* 43-48. In any event, what matters is whether any permitted secular conduct similarly undermines the government’s asserted interest—not whether that conduct appears as an “exemption” from a broader prohibition or is instead carved out from the prohibition’s reach via “clever” reinterpretation. *Smith v. City of Atlantic City*, 138 F.4th 759, 771-772 (3d Cir. 2025). Indeed, this Court has instructed lower courts to look outside the statute at issue for any permitted secular conduct that similarly undermines the government’s interests. *Lukumi*, 508 U.S. at 535, 543-544; see also *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., joined by Alito, J., dissenting) (“[T]he Constitution cannot be evaded merely by multiplying the decrees.”).

Put simply, if Colorado can “interpret” the mandate to permit UPK preschools to deny families equal access for secular reasons the State considers important notwithstanding the mandate’s text, surely Colorado also has the discretion to “interpret” the mandate to accommodate Petitioners’ religious exercise. Cf. *Fulton*, 593 U.S. at 536-538 (rejecting Philadelphia’s reinterpretation of its regulation and contract); Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 15

(2016) (“Secular exceptions defeat general applicability no matter how important, justified, or sensible.”).

To reach the opposite conclusion, the Tenth Circuit effectively made a value judgment. It concluded that some secular exemptions from the mandate (like preferences for low-income families and children with disabilities) are *good*, while other exemptions from the mandate (like accommodating Petitioners’ religious exercise) are *bad*. See Pet.App.37a (“farcical” that preferences for low-income families and children with disabilities constituted prohibited “discriminat[ion]”).<sup>5</sup>

But these distinctions are found nowhere in the law, which proscribes *all* unequal access based on *any* protected characteristic. Pet.App.6a. And once government moves from uniformly applying a general law to instead making value judgments about which reasons for noncompliance are worthy enough to be accommodated, strict scrutiny applies. *Fulton*, 593 U.S. at 533 (law “not generally applicable if it invites the government to consider the particular reasons for a person’s conduct” (cleaned up)); see also *Diocese of Brooklyn*, 592 U.S. at 22 (Gorsuch, J., concurring) (“The only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as ‘essential’ as what happens in secular spaces.”); *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. 1042, 1055 (2020) (Kavanaugh, J., dissent-

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<sup>5</sup> The district court likewise concluded that accommodating disabilities is more important than accommodating religion because “the nuanced realities of education” and “statutory imperatives” “necessitate certain special treatment on the basis of disability, imperatives that go beyond what is required by the Free Exercise Clause.” Pet.App.130a n.37.

ing) (“Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category.”); *Masterpiece*, 584 U.S. at 637-638 (“A principled rationale for the difference in treatment \* \* \* cannot be based on the government’s own assessment of offensiveness.”).

As to the second holding, the Tenth Circuit erred by comparing the intrinsic characteristics of “specific barriers” to equal access by, for example, asking whether discrimination based on disability is metaphysically similar to discrimination based on sexual orientation. Pet.App.39a-41a (suggesting that some protected characteristics are “fundamentally different from other suspect classifications”). It should instead have determined whether the secular conduct Colorado permits undermines the government’s equal access interest “in a similar way” to Petitioners’ requested religious accommodation. *Fulton*, 593 U.S. at 534. As *Tandon* explained, “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.” 593 U.S. at 62. Thus, instead of comparing the “reasons why people gather,” *Tandon* assessed whether different types of gatherings posed similar “risks” to the government’s asserted interest in slowing the virus. *Ibid.*; see also *Lukumi*, 508 U.S. at 544-545 (exceptions for hunters and restaurants comparable to religious accommodation).

Hence the question is not whether disparate treatment based on sexual orientation is intrinsically “similar” to disparate treatment based on, for example, income level. It is whether both forms of disparate treatment similarly undermine the government’s asserted

interest. The measure of similarity is the government’s interest, not the plaintiff’s actions.

In short, the Tenth Circuit compared the wrong things. See Pet.App.39a-40a (“*the barriers to equal access* to preschool education here are completely different and thus not comparable” (emphasis added)). Indeed, under the Tenth Circuit’s approach, Colorado could exclude Catholic preschools but still fund UPK preschools that served only white families (race), Irish families (ethnicity), or wealthy families (income level)—and still claim a “generally applicable” law because the “barriers” to equal access based on race, ethnicity, and income are “fundamentally different” and “not comparable” to barriers based on sexual orientation, gender identity, and religious affiliation. Pet.App.39a-41a; see also Pet.App.6a.

**B. The mandate is not generally applicable because Colorado has discretion to grant exemptions.**

A law also lacks general applicability if it “invite[s] 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); *Lukumi*, 508 U.S. at 537 (similar). Colorado’s regulatory “catchall” exemption, which captures a range of “unique,” case-by-case enrollment preferences, is just such a discretionary mechanism. Pet.App.29a; *supra* 8-9. Among the preferences it allows preschools to screen for are the child’s or family’s “participating in a specific activity,” “being a part of a specific community,” being “vaccinat[ed],” or having “specific competencies or interests” or even just “a specific relationship to the provider.” Pet.App.210a-211a.

While the regulations state that the catchall exemption cannot be “implement[ed]” to violate the mandate, they also list “[e]xamples of approved [enrollment] preferences” that explicitly contradict it. Pet.App.9a-10a; Pet.App.29a; Pet.App.210a-211a. For example, Colorado’s regulations allow UPK preschools to prioritize “families who are receiving a specific public assistance benefit(s) such as housing assistance.” Pet.App.211a. But the mandate requires equal access regardless of both “income level” and “lack of housing.” Pet.App.6a. Preference for families receiving housing assistance necessarily favors certain housed families over families who lack housing, and most “public assistance benefit(s)” typically include income qualifications. See also U.S.Cert.Br.16.<sup>6</sup>

Trial testimony confirms that Colorado also does not treat the mandate as a “hard limit” in practice. Pet.App.32a; see also Pet.App.26a. When asked about the types of exceptions permitted under the catchall preference, Respondent Odean testified that the catchall would allow UPK preschools to admit only “gender-nonconforming children” and to prioritize serving “children of color from historically underserved areas” and “the LGBTQ community,” among others. J.A.316-319 (same for “children in foster care” and “children of veterans or current service members”).

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<sup>6</sup> The UPK statute also gives Colorado discretion 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.” Pet.App.203a. Colorado can therefore waive the mandate for an undefined and potentially unlimited amount of time.

Odean saw no inconsistency with the mandate, stating that because it is an “antidiscrimination provision,” it allows the Department to contract with preschools to “prioritize[] families who have historically been discriminated against.” J.A.273, 295-296, 301. Five times during her testimony, Odean stated that she understands the mandate to allow the Department to give preferential treatment to those she views as disadvantaged, and that this was the yardstick she used to decide whether a UPK preschool would be permitted to apply specific admissions priorities via the catchall. J.A.267, 273, 294, 295-296, 301. She did not, however, consider Petitioners to be part of any historically marginalized group, so their requested religious accommodation was unlawful discrimination. J.A.326 (unaware whether Catholics have faced historical discrimination).

This atextual, idiosyncratic, and politically convenient construction of the mandate explains why Odean could believe that Colorado has the lawful discretion to permit schools to discriminate *in favor* of racial and sexual minorities while simultaneously denying Catholic preschools the ability to apply admissions preferences consistent with their faith. As she repeatedly explained: “it’s the law to ensure that these children and their families who historically have been discriminated against aren’t[.]” J.A.301; see also J.A.272-273, 293-294, 326-327 (similar). Odean never repudiated this testimony. Instead, her consistent view as UPK Director was that “the law” permits case-by-case exemptions for preschools that prioritize LGBTQ families and students, while giving her no ability whatsoever to permit Catholic preschools to ask enrolled families to support the Church’s teachings. J.A.301.

This discretion—both explicit in the regulations and permitted in practice—to grant one-off exemptions that are inconsistent with the plain text of the mandate triggers strict scrutiny. *Fulton*, 593 U.S. at 537.<sup>7</sup>

The Tenth Circuit resisted this conclusion by ignoring and downplaying Odean’s undisputed testimony. See Pet.App.30a-32a. In its view, Petitioners had to show “explicit[.]” discretion “contained within the law itself,” regardless of Odean’s “test[imony] that these preferences could be given.” *Ibid.*; Pet.App.31a (noting “these preferences would certainly seem to violate the nondiscrimination requirement” but rejecting this view based on the regulation’s text).

That was error. Courts cannot ignore testimony showing discretion in practice merely because that discretion is inconsistent with the law’s text. “[R]egardless whether any exceptions have been given,” the mere authority “to decide which reasons for not complying with the [mandate] are worthy of solicitude” renders the law not “generally applicable.” *Fulton*, 593 U.S. at 537. That is true whether the discretion first appears on the law’s face or instead is a product of the government’s flexible application. *Kennedy*, 597 U.S. at 527 (for a law to be generally applicable, it must also be “*applied* in an evenhanded, across-the-board way”

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<sup>7</sup> The only preschools in need of an accommodation from the mandate are religious, which is further evidence Colorado’s law is not generally applicable. Ex. 66 to Pl.’s Mot. Summ. J. at 77:5-83:3, *Darren Patterson Christian Acad. v. Roy*, 765 F. Supp. 3d 1194 (D. Colo. 2025) (No. 1:23-cv-1557), ECF.78-21 (Respondent Odean conceding only religious preschools denied exemption from mandate); *Lukumi*, 508 U.S. at 535 (finding “religious gerrymander” because “almost the only conduct subject to [the law] [wa]s religious exercise”).

(emphasis added)); *Lukumi*, 508 U.S. at 534 (“Facial neutrality is not determinative.”); *Bates v. Pakseresht*, 146 F.4th 772, 797 (9th Cir. 2025) (“[A]d hoc decision making based on non-objective criteria \* \* \* creates the distinct possibility of uneven application[.]”); see Laycock & Collis, 95 Neb. L. Rev. at 17 (“Unequal treatment of religious and secular conduct requires strict scrutiny, whether or not that inequality is reflected in the text of the challenged law.”). Holding otherwise would create perverse incentives by encouraging governments to look the other way or even grant “off the books” exemptions while pointing courts back to policies that, on their face, don’t authorize discretion.

The Tenth Circuit was also wrong to think it matters whether the governmental decisionmaker has “sole” and unfettered discretion or would normally “consult[] others” before making a discretionary decision. Contra Pet.App.31a-32a. What triggers strict scrutiny is the very fact of case-by-case decision making and the attendant risk of misuse to disfavor religion. See *Fulton*, 593 U.S. at 537-538; *FCA*, 82 F.4th at 687 (*Fulton* not limited to “unfettered’ discretion”). Here, the buck stops with Odean, who oversees the UPK program. J.A.260. It doesn’t matter whether she talks to one person or ten before deciding whether the Department will authorize an exemption.

The Tenth Circuit’s analysis also reveals an obvious double standard. While the court *accepted* Colorado’s interpretation of the mandate as protecting only children with disabilities and low-income families, Pet.App.35a-37a, it *rejected* Colorado’s similar interpretation of the mandate (articulated by Odean) as permitting differential treatment in favor of histori-

cally disadvantaged communities generally—suddenly concluding that the mandate’s text is a “hard limit.” Pet.App.31a-32a.

The mandate cannot simultaneously be a flexible standard and a hard limit depending on whatever result is necessary to find a law generally applicable. “That kind of double standard is enough to trigger at least a more searching (strict scrutiny) review.” *Does 1-3 v. Mills*, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting, joined by Thomas & Alito, JJ.); see also *Carson*, 596 U.S. at 784-785 (governments may not “manipulate[.]” “the definition of a particular program” to get around the First Amendment’s requirements (citation omitted)).

#### **IV. The mandate does not survive strict scrutiny.**

Having triggered strict scrutiny, Colorado must prove that excluding Petitioners’ preschools “serve[s] a compelling interest and [is] narrowly tailored to that end.” *Kennedy*, 597 U.S. at 532. Colorado does not come close to meeting this “demanding standard.” *Brown v. Entertainment Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

1. At the outset, Colorado’s interest is not compelling. “[O]nly the gravest abuses, endangering paramount interest[s],” can “give occasion for [a] permissible limitation” on free exercise. *Sherbert*, 374 U.S. at 406. To decide compellingness, a court must assess “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 [mandate] generally, but whether it has such an interest in denying an exception to [Petitioners].” *Ibid.*

Colorado's asserted interest is in ensuring equal access for all families to UPK preschools regardless of any protected characteristic. *Supra* 37-38; Resp.C.A.Br.45 (asserting compelling interest "in removing discriminatory barriers so that all eligible children have equal opportunity, regardless of protected-class status, to enroll in the publicly-funded preschools that best meet their needs"). This asserted interest is not compelling as applied to Petitioners.

First, Colorado hasn't treated its interest as compelling. As this Court explained in *Fulton*, the "creation of a system of exceptions \* \* \* undermines [the government's] contention that its non-discrimination policies can brook no departures." *Fulton*, 593 U.S. at 542. Here, Colorado has granted (and has discretion to grant) broad secular exemptions from the equal-opportunity mandate. *Supra* 7-11. By "fail[ing] to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort," Colorado has demonstrated that "the interest given in justification of the [exclusion of Petitioners] is not compelling." *Lukumi*, 508 U.S. at 546-547; see *Espinoza*, 591 U.S. at 486 ("A law does not advance 'an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.>"). Or at minimum, even assuming the interest were compelling generally, Colorado's "robust 'system of exceptions'" undermines any assertion that rigidly excluding Petitioners "is necessary to serve" it. *Mahmoud*, 606 U.S. at 566-567.

Second, Colorado has identified neither an "actual problem' in need of solving," *Brown*, 564 U.S. at 799, nor any actual harm that would result from granting Petitioners an accommodation, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418,

431-432 (2006); see also *Fulton*, 593 U.S. at 542 (“[S]peculation is insufficient to satisfy strict scrutiny[.]”). The record is devoid of a single instance of an LGBTQ family’s seeking admission to any one of Petitioners’ preschools. Colorado has admitted that the “possibility” this would happen is “speculative.” Dist. Ct. Mot. Dismiss (ECF.38) at 11. And, as Colorado also concedes, the Department has never received a single complaint alleging LGBTQ discrimination at any of Petitioners’ preschools, even though they have been state-licensed for decades. J.A.335-336; see also J.A.158, 498. And if such a family did seek admission to one of Petitioners’ preschools (either through UPK’s matching process or otherwise), the preschool would easily be able to refer these families to any number of nearby preschools of comparable quality. The lack of harm to Colorado’s interests further confirms that Colorado has no compelling reason to exclude Archdiocesan preschools.

Third, excluding Catholic preschools from UPK undermines Colorado’s stated interest. As this Court observed in *Fulton*, “[m]aximizing the number of foster families” is an “important goal[,]” but “[i]f anything, including” a Catholic provider “seem[ed] likely to increase, not reduce, the number of available foster parents.” *Fulton*, 593 U.S. at 541-542. The same is true here: including Catholic preschools in UPK will only increase access to UPK. And even assuming Colorado’s interest were limited to increasing UPK access for LGBTQ families specifically, excluding Catholic preschools does not advance this contrived interest. Indeed, artificially deflating the total number of UPK seats available—while simultaneously incentivizing families to leave Catholic preschools so they can receive the UPK benefit—makes it harder for LGBTQ

families to access UPK because *more* families are competing for *fewer* seats. It is thus unsurprising that Colorado’s witnesses did not speak “directly to whether Plaintiff Preschools’ participation in the UPK Program would increase or decrease the ability of LGBTQ+ families to access preschool services.” Pet.App.94a.<sup>8</sup>

2. Nor has Colorado used the least restrictive means available to further its interests. “[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *Holt v. Hobbs*, 574 U.S. 352, 365 (2015). Colorado says it wants to ensure access to UPK preschools, but it ignores less restrictive alternatives that could remove barriers to access just as well or better than excluding Catholic preschools.

The Department’s online portal provides detailed information about individual providers, including about their admissions policies. See, e.g., S.J.A.2-8 (various admissions restrictions). Colorado includes this information “[s]o that families understand” and can “mak[e] an informed choice about the provider[s]” they select. J.A.335. Additionally, the portal allows the Department to ask families questions to determine whether they meet a provider’s enrollment requirements. J.A.247-248.

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<sup>8</sup> The district court evaded this by recasting Colorado’s alleged compelling interest as an interest in forcing Petitioners’ preschools *specifically* to enroll LGBTQ families, ostensibly because they provide an excellent academic education. Pet.App.145a-146a. But even assuming there are “unique” educational benefits available only at Catholic preschools, that “hardly means a State may coopt” these schools into violating their beliefs. *303 Creative LLC v. Elenis*, 600 U.S. 570, 592 (2023).

Colorado could use these built-in features to help families find the preschool that best meets their needs and ensure families are aware that Petitioners' preschools ask families to support their religious mission as a condition of enrollment. And even if Colorado were specifically concerned with helping LGBTQ families find UPK preschools that don't share the Archdiocese's beliefs about marriage and sexuality, Colorado could proactively designate such preschools, as the federal government has for foster-care families. 89 Fed. Reg. 34,818, 34,829 (Apr. 30, 2024) (designated placements must "[c]ommit to establish an environment that supports the child's LGBTQI+ status or identity").

Colorado rejected these less restrictive alternatives out of hand, offering no evidence demonstrating why they wouldn't similarly advance the State's interest. This evidentiary failure alone confirms it cannot satisfy strict scrutiny. *Ramirez v. Collier*, 595 U.S. 411, 429 (2022) ("conclusory defense of the policy's tailoring" insufficient); *McCullen v. Coakley*, 573 U.S. 464, 494 (2014) (Massachusetts failed to "show[] that it considered different methods" or "seriously undertook to address the problem with less intrusive tools readily available to it."); *Yellowbear v. Lampert*, 741 F.3d 48, 63 (10th Cir. 2014) (Gorsuch, J.) ("[T]he government's burden here isn't to *null* the claimant's proposed alternatives, it is to *demonstrate* the claimant's alternatives are ineffective.").

\* \* \*

Today, over 2,000 secular and religious preschools participate in UPK, and Colorado asserts that every single one, by agreeing to the equal-opportunity mandate, admits and accommodates LGBTQ families and

children. Unsurprisingly, then, Colorado offers no evidence that even a single LGBTQ family in Colorado has been unable to access UPK-funded preschool. Yet since 2023, thousands of families have been shut out of UPK—for no other reason than their commitment to a Catholic preschool education. Colorado isn't just failing to advance its stated interest: It is actively undermining its stated interests and costing thousands of children the very benefits the State elsewhere touts as critical. Pet.App.187a-188a (long-term benefits of universal preschool access). Colorado's exclusion of Catholic preschools defies both the Constitution and common sense.

### CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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