No. 25-581

In the Supreme Court of the United States

ST. MARY CATHOLIC PARISH, LITTLETON, COLORADO, *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

BRIEF *AMICI CURIAE* OF PROFESSORS DOUGLAS LAYCOCK, THOMAS BERG, AND CHRISTOPHER LUND AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF 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.

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INTERESTS OF *AMICI CURIAE*[1]

The individual amici are scholars interested in that the First Amendment's religion provisions, including the Free Exercise Clause, be interpreted to achieve their historic purpose of securing religious freedom for all Americans. These *amici* are:

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Christian Legal Society (CLS) is an association of Christian attorneys, law students, and law professors. CLS has provided this Court with briefs amici curiae in virtually every religious freedom case before it (and in support of many petitions for writ of certiorari) in the past four decades.

SUMMARY OF ARGUMENT

Colorado created a universal preschool program (UPK, for "Universal Pre-K") paying for 15 hours of school weekly for one year before a child enters

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[1] This brief was prepared and funded entirely by *amici* and their counsel. No other person contributed financially or otherwise.

kindergarten. Through an online matching system, families can choose from a wide range of providers, public and private. As a result, "roughly 1,900 preschool providers" participated in the program in the 2023–24 school year. App. 61a.

But Petitioners' Catholic preschools have been unable to participate in the UPK. That is because, for sincere religious reasons, they "admit[ ] only families that support Catholic teachings, including on sex and gender." Pet. 3. The state's Department of Early Childhood says that this violates the UPK statute's nondiscrimination mandate, which requires that providers give "equal opportunity" to receive services "regardless of . . . sexual orientation [or] gender identity," as well as several other suspect characteristics: race, ethnicity, religious affiliation, disability, and income level. Colo. Rev. Stat. § 26.5-4-205(2)(b). But the Department, by regulations, has adopted a "preference" system that allows providers to consider many such characteristics in their admissions decisions. Providers may favor disabled students or low-income students. The Department also has a "catch-all" preference that its director testified allows providers to favor students who are gender-nonconforming, LGBTQ, or "historically underserved" children of color.

Although the Department allows consideration of all these statutorily suspect characteristics, it denied Petitioners' request for a religious exemption that would allow them to follow their sincere religious beliefs. The result is "no surprise": "the only preschools the [non-discrimination] Mandate excludes in practice . . . are those with traditional religious beliefs about marriage." Petitioners' Cert. Repl. Br. 7.

Colorado's actions violate the Free Exercise Clause. It permits providers to participate in UPK while preferring some applicants and disadvantaging others based on suspect or protected characteristics. But it has denied a religious exemption to Petitioners that would allow them to participate in UPK while following their religious beliefs. Therefore, the state has burdened religious exercise by a set of rules that is not neutral and generally applicable. The state's exclusion of Petitioners' schools from UPK must satisfy strict scrutiny, and it cannot.

I. The exclusion of Petitioners violated the free exercise requirement of general applicability. The Court has interpreted that requirement stringently, and it should continue to do so. The free exercise of religion, as a constitutional right, should be taken seriously. Refusing to protect it while protecting other interests devalues religious exercise, placing it among the interests to which government gives lesser value.

A. The Department's actions fail general applicability because it has adopted categorical protections for the interests of disabled and low-income children but has denied comparable protection for the religious interest of Petitioners. Laws fail general applicability "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (emphasis in original).

The interests the state has accommodated are "comparable" to Petitioners' religious exercise, judged—as this Court has directed—"against the asserted government interest that justifies" the state's actions. *Id.* If the interest justifying the nondiscrimination rule is preventing UPK-funded

providers from considering any characteristics listed in the mandate, whether for or against the admission of any child, the disability and low-income preferences undercut that interest. The court of appeals justified treating disability and income level differently from other protected classes on the ground that bringing such children into preschool programs required distinctive treatment to meet their distinctive needs. But Petitioners' rule requiring parents in their schools to support Catholic teachings likewise maintains a program meeting the distinctive needs of some children—specifically, Catholic children.

If "[a]ll discrimination is not the same," in the court of appeals' words, the state must treat Petitioners' sincere tenets as among the permitted categories of discrimination.

B. The Department further undercut the general applicability of its rules by adopting a "catch-all" preference for children who are "part of a specific community." The Department's director testified that this provision would permit preferences for gender-non-conforming children, the LGBTQ community, and underserved children of color. Catholics are "part of a specific community" and have suffered historical discrimination. But the Department refused to create an exemption for Petitioners' preschools.

The catch-all preference thus creates a mechanism for individualized exemptions from the nondiscrimination mandate. The preference invites the government to decide which reasons for departing from strict nondiscrimination are worthy of solicitude. The state's rule therefore fails general applicability, and the state must extend an exemption for

Petitioners' interests unless it can satisfy strict scrutiny.

C. Colorado's exclusion of Petitioners' preschools fails strict scrutiny. If the state's interest is in ensuring that all students have preschool access, allowing Petitioners' schools access still leaves a myriad of options for LGBTQ families—while excluding Petitioners removes a key option for Catholic families. Moreover, Colorado can show no compelling reason for denying Petitioners a religious exception from its nondiscrimination mandate while allowing multiple exceptions and preferences for other interests.

II. The general applicability requirement applies to government actions denying positive benefits such as UPK funding.

A. This Court's precedents apply the general applicability rule stringently to conditions on government benefits. See, e.g., *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Sherbert v. Verner*, 374 U.S. 398 (1963).

B. Strong protection against burdens from funding laws is necessary to serve the purposes of the Religion Clauses. Their basic purpose is to ensure that individuals and groups can make choices about religious matters without governmental pressure either to practice religion or to forego practicing it. Preserving neutrality of government incentives in religious matters requires stringent enforcement of the general-applicability requirement with respect to conditions on government funding that conflict with religious practice. Such conditions place "unmistakable" "pressure . . . to forego that practice."

Sherbert, 374 U.S. at 404. Protection from religiously burdensome funding conditions is essential to religious freedom in the modern state.

III. Enforcing general applicability against denials of government benefits has a final corollary: The Court should disavow its footnote dismissing free exercise rights in *Christian Legal Society v. Martinez*, 561 U.S. 661, 697 n.27 (2010). *Martinez* held that the First Amendment was not violated when a state law school excluded a student religious group because it required leaders to affirm and observe Christian teaching. This footnote has been thoroughly undercut for two reasons.

First, *Martinez* rested on the premise that the school followed an across-the-board "all-comers policy" for leaders and members—and subsequent litigation has shown that such a premise seldom if ever matches reality. Because of *Martinez*, college administrators frequently claim to have an "all-comers policy" when they do not—to the detriment of religious students. Second, *Martinez* has been undercut by this Court's decisions holding that even generally applicable laws may not interfere with religious organizations' governance decisions "affect[ing] the faith and mission of the [organization] itself." See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

ARGUMENT

I. The Exclusion of Petitioners Violated the Free Exercise Clause Requirement of General Applicability.

This Court has given strong content to the First Amendment's Free Exercise Clause. In large areas of government action, the imposition of a significant governmental burden on religious exercise is enough to invalidate that action or subject it to strict scrutiny. See *Hosanna-Tabor*, 565 U.S. 171 (ministerial exception from nondiscrimination laws); *Mahmoud v. Taylor*, 606 U.S. 522 (2025) (interference with parents' religious upbringing of children).

Other areas are controlled by this Court's holding, in *Employment Division v. Smith*, that government may burden religious exercise pursuant to a "valid and neutral law of general applicability." 494 U.S. 872, 879 (1990). "No matter how severely such a law burdens the exercise of religion, it presents no free-exercise issue." Douglas Laycock and Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020–21 Cato Sup. Ct. Rev. 33, 33–34. But that rule has its religion-protective converse. "A law failing to satisfy [neutrality or general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). This case involves *Smith*'s protective rule. This brief focuses particularly on the requirement that a law be generally applicable or else satisfy strict scrutiny.

Smith's critics have argued that the decision departs from original meaning and insufficiently

protects a fundamental right. The critics include justices from *Smith* to today: Justices O'Connor and Blackmun in *Smith*; Justice Souter in *Lukumi*; and Justices Alito, Gorsuch, and Thomas in *Fulton v. City of Philadelphia*, 593 U.S. 522, 545–614 (2021). The historical and doctrinal critiques also come from a range of commentators.[2] But the Court has declined opportunities to reconsider *Smith*.

Instead, the Court has rigorously enforced *Smith*'s requirement that government actions burdening religious exercise be generally applicable. The requirement of general applicability imposes two stringent limits, both of which are relevant in this case.

First, 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. Laws fail general applicability "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (emphasis in original). "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.* When a law regulates some activities but exempts or favors others, the government "must place religious

[2] See, e.g., Stephanie Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev. 55 (2020); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1; Christopher C. Lund, *Second-Best Free Exercise*, 91 Fordham L. Rev. 843 (2022); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990).

organizations in the favored or exempt category" rather than "the disfavored or non-exempt category," unless it "provides a sufficient justification otherwise." *Calvary Chapel Dayton v. Sisolak*, 591 U.S. 1042, 1055 (2020) (Kavanaugh, J., dissenting). "[T]his Court's precedents grant 'something analogous to most-favored nation status' to religious organizations." *Id.* (quoting Laycock, *Remnants*, *supra*, at 49–50).

Second, "[a] law is not generally applicable 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 (brackets in original) (quoting *Smith*, 494 U.S. at 884). This rule is likewise stringent. *Fulton* held that it applied even when government had not granted any individualized exceptions. "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 537.

Because the Court has declined here to revisit *Smith*, it is vital that it continue to enforce the requirement of general applicability vigorously. At least two reasons support and explain the Court's stringent approach to general applicability.

First, the free exercise of religion is a fundamental constitutional right; it should be taken seriously. That constitutional status necessarily places a high value on a person's interest in voluntary religious exercise. Refusing to protect it while protecting other interests reduces religious exercise from that high value,

placing it among the interests to which government gives lesser value. That is, it devalues religious exercise. See Douglas Laycock and Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 23–24 (2016).

This Court has been clear that the general-applicability requirement aims to prevent devaluation of religious exercise. In *Lukumi*, the city of Hialeah argued that various secular killings of animals were "necessary" but religious killings were unnecessary. The Court rejected that argument: "'[T]he ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons.'" *Lukumi*, 508 U.S. at 537–38. "Necessity" was a general term that effectively created "a mechanism for individualized" judgments about which reasons for animal killing were "worthy of solicitude." *Fulton*, 593 U.S. at 537. But government can equally devalue religion through categorical provisions that protect secular interests but not religious exercise.

Whether the relevant provisions are categorical or general, protecting comparable secular interests but not religious exercise reflects a "hostile indifference to religion." Laycock, *Remnants*, *supra*, at 50. It shows "that the legislature values the exempted secular activities more highly than the constitutionally protected religious activities. . . . But that is a judgment inconsistent with the constitutional guarantee." *Id.* at 50–51. See also, e.g., *Calvary Chapel*, 591 U.S. at 1058 (Kavanaugh, J., dissenting) (Nevada's COVID rule "'devalues religious reasons' for congregating" compared with casinos and other "for-profit assemblies"); *Fraternal Order of Police v.*

Newark, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) (requiring religious exemption from police department's no-beard rule because "the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not").

Second, vigorous enforcement of the rule of general applicability "provides vicarious political protection for religious minorities." Laycock and Collis, *supra*, at 24. As Justice Robert Jackson famously observed, "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). But "[i]f secular interest groups burdened by the regulation get themselves exempted, they have no reason to oppose the regulation, and religious minorities are left standing alone." Laycock and Collis, *supra*, at 25.

Both rationales for vigorous enforcement of the general applicability requirement are relevant here. As we will show, the Department's actions are permeated by devaluation of religious exercise compared to secular interests. And by protecting multiple secular interests, the preference system removes vicarious protection for traditional Catholic views on sex, gender, and marriage—views that, as this Court well knows, are unpopular among Colorado authorities. See *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Masterpiece Cakeshop v. Colo. Civil Rts. Comm'n*, 584 U.S. 617 (2018).

A. The Categorical Exceptions for Disabled and Low-Income Students Render the Nondiscrimination Rule Not Generally Applicable.

First, the Department's actions fail general applicability because the Department has adopted categorical protections for the interests of disabled and low-income children but has denied comparable protection for the religious interest of Petitioners. Laws fail general applicability "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis in original). And "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." *Id.*

While the UPK espouses equal opportunity regardless of protected characteristics, Colo. Rev. Stat. § 26.5-4-205(2)(b), the Department has adopted two categorical preferences involving characteristics that fall within the statutory nondiscrimination mandate. First, providers may "reserv[e] placements" for students with disabilities. App. 8a (¶4). Indeed, "some UPK providers only serve children with certain disabilities." App. 347a. Second, providers, through Head Start programs, may prefer students from low-income families. App. 8a (¶5).

These categorical preferences mean that "[d]isability and income level are treated differently from other protected classes" listed in the nondiscrimination mandate. App. 36a. When Petitioners sought an exemption from parts of the nondiscrimination mandate that "run counter to their

sincerely held [religious] beliefs," the Department refused. App. 285a–286a. Because Petitioners were refused permission to depart from the nondiscrimination mandate concerning sexual orientation and gender identity, their preschools could not follow their sincere religious belief of "admit[ting] only families who agree with the Catholic Church's teachings, including on gender and sexuality." Pet. 10.

By permitting the disability and low-income exceptions but denying Petitioners an exception for their religion-based policy, the Department violated the requirement of general applicability. It "treat[ed] comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The denial of a religious exception must satisfy strict scrutiny.[3]

The interests the state has accommodated are "comparable" to Petitioners' religious exercise as "judged against the asserted government interest that justifies" the state's actions. *Tandon*, 593 U.S. at 62. This is so however one characterizes Colorado's interest. That interest might be in preventing UPK-funded providers from considering any features listed in the mandate, whether for or against the admission of any child. If that is the interest, the disability and low-income preferences undercut it. The Department says that a child's disability or a family's low income may be considered favorably in admissions decisions.

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[3] Respondents claim that the statute authorizes these preferences as means of ensuring "equal opportunity" for such children. BIO 17–21. That does not help Respondents. It is irrelevant whether the exceptions were created by the legislature or by the agency. Either way, the exceptions were created by the state.

The court of appeals accepted a different description of the state's interest. The statute, the court said, aimed to permit preschool programs that bring in more disabled or low-income children. App. 36a–37a. Bringing in those children, the court said, required distinctive treatment to meet their distinctive needs. "[T]he Department implemented the IEP [disability] preference to try and ensure those children were accommodated. Likewise, low-income families may need to rely on Head Start to provide their children a preschool education." *Id.* 39a n.18.

Thus, the court accepted the state's claim that distinctive treatment of children with disabilities or low income allows their equal participation in substance. The children's distinctive features require distinctive programs.

But Petitioners' rule requiring parents to support Catholic teachings likewise maintains a program meeting the distinctive needs of some children—specifically, Catholic children. As Petitioners explain, an "alignment between what the school teaches and what parents want for their children is 'vital.'" Pet. 7 (quoting App. 235a). "Archdiocesan 'schools do not function in [their] mission to help bring children to Jesus Christ if not for bringing them to Jesus Christ through your family.'" *Id.* (brackets in original). "If a family actively opposes the teachings of the Catholic Church and lives as 'a counter-witness to Catholic doctrine or morals,' their participation in the school community would directly impair the ability of the school to form its students in the faith." *Id.* (citing App. 240a, 272a–275a, 316a–317a).

Petitioners' interest in maintaining a program for children from families following Catholic moral norms

is "comparable" to other schools' interests in maintaining programs for children with disabilities and children from low-income families. "Religious affiliation," no less than disability or income level, is a ground on which the state must provide "equal opportunity" to participate in the UPK. See *supra* p. 2.

Colorado's actions devalue religious exercise, committing the wrong that the general-applicability requirement aims to prevent. See *supra* pp. 9–11. The state allows preschools to consider disability and income level in admissions because it values programs responsive to such distinctive needs. But the state does not value programs responsive to distinctive Catholic religious needs. Colorado "devalues religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537–38.

The state says that "all discrimination is not the same." App. 39a. If that is so, it must treat a religious organization's sincere tenets as a strong or "favored" reason for engaging in statutory discrimination, not a weak or "disfavored" reason, unless it "provides a sufficient justification otherwise." *Calvary Chapel*, 591 U.S. at 1055 (Kavanaugh, J.).

The court of appeals ruled that the permitted secular interests and the rejected religious interest were not "comparable." App. 38a–41a. But the court's reasoning conflicted repeatedly with this Court's explication of the general-applicability requirement.

1. The court of appeals said that "nothing in the preference system here allows a backdoor for discrimination based on sexual orientation or gender

identity on secular grounds." App. 41a. The apparent premise is that the preference system fails general applicability only if it denies a religious exception from the identical rule for which it granted secular exceptions. See Pet. i (first Question Presented).

But failures of general applicability are not limited to differential treatment of the identical conduct. In *Lukumi*, one reason the city gave for prohibiting Santeria animal sacrifices was that "public health" was "threatened by the disposal of animal carcasses in open public places." 508 U.S. at 544. But a county health official had testified that "the same public health hazards result from improper disposal of garbage by restaurants," which the ordinances did not regulate. *Id.* at 544–45 ("Improper disposal is a general problem that causes substantial health risks, but which [respondents] address only when it results from religious exercise.")

Restaurants are hardly identical to ritual sacrifice. But the Court treated restaurants as analogous secular conduct because they affected the city's asserted health interests. See Laycock and Collis, *supra*, at 24.

Likewise, in cases about COVID-era restrictions on religious gatherings, the permitted secular activities that triggered presumptive protection for religion were not all direct secular analogs of worship. The activities treated more favorably included "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants"—all of which were allowed "to bring together more than three households at a time." *Tandon*, 593 U.S. at 63; see also *Roman Cath. Diocese v. Cuomo*, 592 U.S. 14, 17 (2020)

("acupuncture facilities, campgrounds, garages, as well as . . . all plants manufacturing chemicals and microelectronics and all transportation facilities"). All these differ greatly from religious meetings. But they were analogous because the asserted interest in each was avoiding transmission of disease. See *Tandon*, 593 U.S. at 63; *Roman Cath. Diocese*, 592 U.S. at 17–18.

The COVID rulings also show that governments violate general applicability by any form of regulation that "treat[s] [a] comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The violation does not have to take the form of an explicit secular exception without a religious exception. The COVID cases involved multiple layers and forms of restrictions on different activities. For example, California's rules triggered strict scrutiny because "hair salons" and "personal services" were not subject to the three-household limit appliable to in-home religious gatherings (*id.*). Instead, those secular activities were subject to "extensive safety protocols" including masking, symptom testing, "ventilation, cleaning, and disinfecting." *Tandon v. Newsom*, 992 F.3d 916, 925–26 (9th Cir. 2020). These gatherings could proceed with precautions; in-home religious events with more than three families could not. The state treated personal services "more favorably" than religious in-home gatherings; that triggered strict scrutiny.

2. The court of appeals suggested it was enough that the UPK statute emphasizes the needs of disabled and low-income students and not of other groups. See App. 36a (relying on the "General Assembly's substantive goals in implementing UPK").

But that is no defense. The statute simply says what the state values. But the First Amendment says that the state cannot value religion less than comparable activities.

In their talk about goals, what the state and the court of appeals really mean is that there are good reasons for the disability and low-income exceptions—that those exceptions are justified. That argument does not go to general applicability; it goes to justification once a law is held not to be generally applicable. And that alleged justification must justify, under strict scrutiny, the differential treatment of religious and secular activities. A law that burdens religious exercise and is not generally applicable "must be justified by a compelling governmental interest." *Lukumi*, 508 U.S. at 531. And "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884.

> [C]onsideration of the reasons for secular exceptions goes at the end of the case, subject to strict scrutiny under the compelling-interest test. That is very different from comparing reasons at the beginning of the case under a much more deferential standard of review . . . and holding that a rule riddled with exceptions is really generally applicable if there appear to be plausible reasons for the secular exceptions.

Laycock and Collis, *supra*, at 16. In the current case, the court of appeals did not specify a standard of review for whether the state's actions were generally applicable, but its analysis of the question was highly

deferential, accepting the state's rationalizations at every turn.

3. Finally, the court of appeals suggested that the ordinances in *Lukumi* failed general applicability only because they "permitted essentially every kind of animal slaughter except for the sacrifices central to the plaintiffs' religion." App. 41a. The Court has rejected precisely that narrow reading of *Lukumi* by saying that laws fail general applicability if they "treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis in original). *Lukumi* itself said that the ordinances there fell "well below the minimum standard necessary to protect First Amendment rights." 508 U.S. at 543. And *Smith* affirmed the result in *Sherbert* because the state recognized "at least some" acceptable reasons for turning down a job and still claiming unemployment compensation. *Smith*, 494 U.S. at 884. The court of appeals' reasoning all but shrinks the general-applicability requirement to a prohibition on targeting religion—directly contradicting this Court's vigorous, protective approach.

B. The "Catch-All" Exception for Schools Serving a "Specific Community" Renders the Nondiscrimination Rule Not Generally Applicable.

The Department further undercut the general applicability of its rules by adopting a "catch-all" preference for children based, in relevant part, "on the child and/or family being a part of a specific community." App. 9a (¶10). Of course, Catholic families seeking a Catholic education are also "part of a specific community."

At trial, the Department's director testified that the catch-all provision would permit a preschool to be "just for gender-nonconforming children." App. 353a. She also testified that the catch-all would allow preschools to prioritize admitting "children of color from historically underserved areas" and "the LGBTQ community." *Id.* 354a–355a.

These preferences all create exceptions to the statute's mandate against discrimination based on gender identity, race, and sexual orientation. App. 31a. But the director testified, repeatedly, that she interpreted the nondiscrimination mandate to permit preferences for those groups that "have historically been discriminated against." App.337a; see also App. 342a (limiting the mandate's purpose "to ensur[ing] that these children and their families who historically have been discriminated against aren't"); App. 354a, 363a (same). She testified that she was unaware "that Catholics have historically been discriminated against." *Id.* 363a.

Thus, in the Department's hands, the "catch-all" preference creates a "mechanism for individualized exemptions" from the nondiscrimination mandate based on the decisionmaker's judgment about which "specific communit[ies]" (App. 9a) have historically suffered discrimination. See *Fulton*, 593 U.S. at 533; *Smith*, 494 U.S. at 884. The preference "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 593 U.S. at 537. This discretion makes the rule fail general applicability. The state can interpret the nondiscrimination mandate this way. But if it does so, it cannot then reject Petitioners' religious reason for

departing from strict nondiscrimination (absent a compelling governmental interest).

Lukumi said that government may not apply a "necessity" standard to allow some reasons for animal killings but reject a religious reason as unnecessary. 508 U.S. at 537. *Sherbert*, as interpreted in *Smith*, said that government may not apply a "good cause" standard to permit some reasons for refusing available work but reject a religious reason. *Smith*, 494 U.S. at 884 (citing *Sherbert*, 374 U.S. at 401 n.4). So too, Colorado may not apply a "historically disadvantaged group" standard to permit consideration of some statutorily suspect features but then reject a religious reason for doing the same.

Again, the Department devalued religious exercise by rejecting Petitioners' requested exemption. The Department values increased preschool opportunities for "historically disadvantaged" communities enough to allow departures from nondiscrimination. But the Department treats a religious reason for doing so as "of lesser import than [those] nonreligious reasons." *Lukumi*, 508 U.S. at 537–38. Even worse, the less favorable treatment of Petitioners' religious claim may well rest on the director's failure to know or admit the well-established fact that Catholics have historically suffered discrimination in America. See, e.g., Mark S. Massa, *Anti-Catholicism in America: The Last Acceptable Prejudice* (2005); Philip Jenkins, *The New Anti-Catholicism: The Last Acceptable Prejudice* (2003); *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion).

The court of appeals disregarded the director's statements on the ground that she elsewhere said these preferences would be given "only 'as long as

there wasn't discrimination that was aligned to [i.e., fell within] the antidiscrimination provision.'" App. 31a (quoting Aplt. App. IV at 71 (App. 354a)) (parenthetical added). See *id.* 32a (suggesting that the director conceded that the antidiscrimination provision "is a hard limit").

But the director never conceded that the statutory antidiscrimination provision would affect the Department's preferences for groups suffering historical discrimination. She testified that "the antidiscrimination provision prioritizes families who have historically been discriminated against" (App. 337a): that is, she claimed that the preferences did not violate the statute. That is no concession at all.

Such "double-speak" by administrators (App. 31a) fails to show general applicability. "[I]f governments can write vague rules, . . . and courts then ignore both the extratextual understandings and the actual and intended exercise of discretion, government is completely free to treat religious and secular practices unequally." Laycock and Collis, *supra*, at 19. The Free Exercise Clause should not "protect only against unsophisticated governments that explicitly state what they are doing and make no effort to conceal it." *Id.*[4]

[4] The court of appeals claimed that the Department treated the statutory nondiscrimination mandate as a "hard limit" when it eliminated the preference it had adopted for religious providers preferring members of their congregation. App. 32a–33a. But eliminating a different religious exception while maintaining secular exceptions scarcely provides a counter to the charge that the state devalues religion.

C. The State's Differential Treatment Fails Strict Scrutiny.

"A law burdening religious practice that is . . . not of general application must undergo the most rigorous of scrutiny": it "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546; accord *Fulton*, 593 U.S. at 541. The state's asserted interests fail on both counts. See Petitioners' Br. 48–53.

1. Under strict scrutiny, the state cannot rely on generalized interests but must show the "harm of granting specific exemptions to particular religious claimants"—here, to Petitioners' Catholic preschools. *Fulton*, 593 U.S. at 541. If the state's interest is in ensuring that all students have preschool access, "[a]llowing [Petitioners'] preschools to participate [in UPK] would not take away a single one of th[e] nearly 2,000 [other participating providers] from LGBTQ families." Petitioners' Ct. App. Opening Br. 40.

2. Indeed, "including [Petitioners] in the program seems likely to increase, not reduce, the number of available" preschool spaces. *Fulton*, 593 U.S. at 542. It would make schools available for a community following Catholic moral norms and would open slots elsewhere as some Catholic families withdraw from non-Catholic preschools.

3. The multiple preferences that Colorado has allowed "undermine[its] contention that its non-discrimination policies can brook no departures." *Id.* (city had "no compelling reason [for] denying an exception to [religious provider] while making them available to others") (citing *Lukumi*, 508 U.S. at 546-47).

II. The Stringent General Applicability Requirement Governs Conditions on Benefits that Conflict with Religiously Motivated Conduct.

Part I assumes that the strong, protective version of the general applicability requirement applies to government actions denying positive benefits such as UPK funding. When government denies benefits based on a condition that conflicts with sincere religiously motivated conduct, the denial must satisfy the stringent version of general applicability, or else it is subject to strict scrutiny. This rule is dictated by this Court's precedents; it also serves the purposes of the Free Exercise Clause.

A. This Court's Precedents Apply General Applicability Stringently to Conditions on Government Benefits.

This Court has long applied the stringent requirement of general applicability to denials of government funding or other positive benefits. The starting point is *Sherbert v. Verner*, 374 U.S. 398 (1963), which held that a Seventh-day Adventist could not be denied unemployment benefits because, for sincere religious reasons, she abstained from working on Saturday. The Court held that the denial of funds placed "unmistakable" "pressure upon her to forego that [Sabbath] practice":

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts

> the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404. The Court refused to diminish Sherbert's free exercise rights just because "unemployment compensation benefits are not appellant's 'right,' but merely a 'privilege.'" *Id.* "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* Nothing in *Smith* questioned or limited this part of *Sherbert*'s holding.

Sherbert applied a protective version of the general applicability requirement that went far beyond prohibiting targeting. On its face, *Sherbert* appeared to apply strict scrutiny simply because the denial of benefits substantially burdened Sherbert's religious exercise. In *Smith*, this Court interpreted *Sherbert* to apply strict scrutiny only because the unemployment compensation statutes set forth a standard— whether the claimant had "good cause" for declining work— that "created a mechanism for individualized exceptions." *Smith*, 494 U.S. at 884. But as Part I-B demonstrates, the "mechanism for individual exceptions" standard is protective. Either way, *Sherbert* requires strong protection.

In *Fulton*, the Court explicitly applied strict scrutiny to a condition on benefits that was not generally applicable. *Fulton* was (in part) a funding case. The city contracted with Catholic Social Services (CSS) for foster-care services, paying several million dollars a year for costs incurred in providing services and placements for foster children. *Fulton* J.A. 505–06, 615–23 (Article VI: Compensation),

https://becketnewsite.s3.amazonaws.com/Fulton-v.-Philly-Merits-JA-Vol-2.pdf.

The city in *Fulton* "argue[d] that governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public." 593 U.S. at 535. But the Court rejected the argument. It said that "'principles of neutrality and general applicability still constrain the government in its capacity as manager.'" *Id*. at 536 (quotation omitted). That logic applied to the contract's funding element as well as its management element. The Court concluded that because "[t]he contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable, . . . CSS has demonstrated that the City's actions are subject to 'the most rigorous of scrutiny' under [the Court's] precedents." *Id.* at 540–41.

Three other decisions make clear that government cannot deny otherwise available funding because a recipient has a religious identity or will use the funds for religious purposes. *Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464 (2020); *Trinity Lutheran Church v. Comer*, 582 U.S. 449 (2017). The court of appeals said that these decisions apply only where the government singles out religious status or religious uses of funds for exclusion. App. 21a–22a. But all three decisions state the principle that government cannot discriminate against religion when setting conditions on benefits. And all this flows from the basic theory of general applicability: when a religious organization loses government money because of a government rule that is not generally applicable, the government is

treating religion worse than comparable secular interests.

Simple application of the Court's precedents dictates that Colorado's exclusion of Petitioners from the UPK's benefits must satisfy the stringent version of general applicability or else satisfy strict scrutiny. As Part I demonstrates, the state cannot make either showing.

B. The Free Exercise Clause's Purposes Require Stringent Protection Against Conditions on Benefits That Are Less Than Generally Applicable.

Strong protection against burdens from funding laws is necessary to serve the purposes of the Free Exercise and Religion Clauses more generally. Their basic purpose is to ensure that individuals and groups can make their choices about religious matters without governmental pressure either to practice religion or to forego practicing it. The Establishment and Free Exercise Clauses work together to achieve that purpose. Put differently, the goal of the clauses is that religion in America should flourish or decline "according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Government can pressure people into foregoing religious exercise through regulations that impose punishment or fines. But government can also impose such pressure by denying benefits based on one's religious identity or religiously motivated practice. As *Sherbert* said, forcing believers to choose between surrendering their conscience or surrendering a significant government benefit "puts the same kind of

burden upon the free exercise of religion as would a fine imposed" through direct regulation. 374 U.S. at 404.

We can describe the point in terms of the incentives that government action places upon religious exercise. In its Establishment Clause cases, the Court has held that government need not exclude religious institutions from "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). Such a program creates "no financial incentives that skew the program toward religious [recipients]"; government funds "reach religious institutions only by way of the deliberate choices of numerous individual recipients." *Id.* at 653, 652 (cleaned up).

These principles of incentive neutrality and private choice are fundamental to both Religion Clauses. They explain the Court's rulings that exclusion of religious recipients from aid is not required by the Establishment Clause. They also explain the Court's holdings that such exclusion is forbidden by the Free Exercise Clause. *Fulton*, 593 U.S. 522; *Carson*, 596 U.S. 767; *Espinoza*, 591 U.S. 464; *Trinity Lutheran*, 582 U.S. 449. In short, when the question is whether religious providers should have basic access to funding, nondiscrimination and general applicability is the proper principle. Equal access to funds for religious and nonreligious providers promotes both neutral government incentives and private religious choice.

These principles are fully applicable here. Disqualifying Catholic preschools because of their

religious practice "discourage[s] adherence to a religious practice by making loss of funds the price of that adherence." Thomas C. Berg and Douglas Laycock, Espinoza*, Government Funding, and Religious Choice*, 35 J.L. & Relig. 361, 377 (2020). The condition places "unmistakable" "pressure . . . to forego that practice." *Sherbert*, 374 U.S. at 404. See Petitioners' Br. 18 (describing effects on schools and parents here).

Protection from religiously burdensome funding conditions is essential to religious freedom in the modern state. "Governments spend enormous amounts of money; they would have extraordinary power to buy up constitutional rights if they were allowed to withhold government contracts or social-welfare benefits from those who persist in exercising their religion." Berg and Laycock, *supra,* at 378. In a proper case, the Court should reconsider *Employment Division v. Smith* to provide unambiguous protection against such burdens. But the Court is not reconsidering *Smith* here. That makes it even more important that the Court rigorously enforce the general-applicability requirement.

III. The Court Should Overrule the Free Exercise Holding in *Christian Legal Society v. Martinez.*

Enforcing general applicability stringently against denials of government benefits has one more corollary. The Court should disavow its footnote dismissing free exercise rights in *Christian Legal Society v. Martinez*, 561 U.S. 661, 697 n.27 (2010). *Martinez* held, 5–4, that a public law school could deny a chapter of Christian Legal Society (CLS) status as a recognized student organization, imposing

significant burdens on its activity at the law school, because the group required its leaders and voting members to affirm a statement of Christian faith and commit to standards of behavior drawn from biblical teaching. In the posture of the case, the Court assumed that the law school had an "all-comers policy" that required that all "registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." *Id.* at 675 (emphasis in original). See *id.* ("'Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.'") (quotation omitted). Having characterized the policy in that fashion, the majority found that it violated neither free-speech nor expressive-association rights. *Id.* at 694–95, 680–83.

Martinez also held that the law school had not violated CLS' free exercise rights despite the penalty it had imposed on CLS' standards of religious belief for its leaders. In a brief footnote, the Court said that "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct." 561 U.S. at 697 n.27 (citing *Smith*, 494 U.S. at 878–82). The majority asserted that "[i]n seeking an exemption from Hastings' across-the-board all-comers policy, CLS . . . seeks preferential, not equal, treatment" and thus could not rely on the Free Exercise Clause. *Id.*

Martinez's free exercise footnote has been thoroughly undercut by subsequent rulings. As in other overruled cases, "[d]evelopments since

[*Martinez*], both factual and legal," have "'eroded' the decision's 'underpinnings' and left it an outlier among [the Court's] First Amendment cases." *Janus v. AFSCME*, 585 U.S. 878, 924 (2018) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

First, we now know that the premise of an "across-the-board all-comers policy" seldom, if ever, matches reality. But because of *Martinez*, college administrators frequently claim to have an "all-comers policy" when they do not.[5] Numerous lower-court decisions have found that public universities or high schools allowed nonreligious groups to choose leaders and members based on prohibited characteristics such as ethnicity, sex, or sexual orientation.[6] Those cases are strikingly parallel to this one; schools granted exceptions to their nondiscrimination rules to benefit certain minority groups but refused an exception to permit religious exercise.

Martinez's footnote has become even more untenable now that the Court has made clear that a regulation is not "of general application" if it exempts "*any* comparable secular activity" while burdening religious exercise. *Tandon*, 593 U.S. at 62 (emphasis in original); see Part I-A. If treating one secular

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[5] Benjamin Fleshman, *How Do You Solve a Problem Like* Martinez?, 29 Tex. Rev. L. & Pol. 231, 301–06 (2005).

[6] *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 693 (9th Cir. 2023) (en banc); *Business Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 973-74 (8th Cir. 2021); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006); *Fellowship of Christian Athletes v. District of Columbia*, 732 F. Supp. 3d 73, 88–90 (D.D.C. 2024); *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 798 (E.D. Mich. 2021).

student group better than a religious group triggers strict scrutiny, exclusion of the religious group should seldom if ever stand. *Martinez* almost never dictates the substantive result in a student-group case; there is no reason to adhere to it.

Second, *Martinez* has been undercut by this Court's decisions holding that even generally applicable laws may not interfere with religious organizations' governance decisions "affect[ing] the faith and mission of the [organization] itself." *Hosanna-Tabor*, 565 U.S. at 190. Accord *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 749–50 (2020). *Hosanna-Tabor* and *Our Lady* both involved religious organizations' right to choose their leaders—precisely the right at issue when student religious groups set standards of belief and conduct for their leaders as in *Martinez*. Those cases have not just "eroded," but have swept away, *Martinez*'s "underpinnings."

Martinez continues to cause damage, even though lower courts in more recent cases frequently distinguish it on the ground that the schools in those cases discriminated against religious groups. Proving such discrimination is costly for the organization and burdensome and distracting for the religious students who should be focusing on their studies. See *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 862 (8th Cir. 2021) (noting such effects); *Hearing on First Amendment Protections on Public College and University Campuses Before the Subcomm. on the Const. & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015), at 49, 59, 63, 70, available at https://bit.ly/39Dg1EL (detailing the effects).

Moreover, *Martinez*'s footnote makes it harder to deter officials from unconstitutional behavior. Courts have relied on the footnote to grant qualified immunity on free exercise claims because the applicable law was complex rather than "clearly established." See *Business Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 986 (8th Cir. 2021), aff'g 360 F. Supp. 3d 885, 908 (S.D. Iowa 2019)); see also *Fellowship of Christian Athletes v. District of Columbia*, 2026 WL 275995, at *15 (D.D.C. Feb. 3, 2026).

"This Court has not hesitated to overrule decisions offensive to the First Amendment." *Janus*, 585 U.S. at 917. In this free exercise case, the Court should overrule the free exercise holding in *Martinez*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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