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 ON THE MERITS FOR RESPONDENTS

PHILIP J. WEISER
Attorney General
SHANNON WELLS STEVENSON
Solicitor General
HELEN NORTON*
Deputy Solicitor General
**Counsel of Record*
Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Helen.Norton@coag.gov
(720) 508-6000

VIRGINIA R. CARRENO
ABBY CHESTNUT
JANNA K. FISCHER
KOLYA D. GLICK
RADHIKA M. KATTULA
MICHELE K. MULHAUSEN
NICOLE S. RUST
BRIANNA TANCHER
LANE TOWERY
J. GREGORY WHITEHAIR
ANDREW M. WILLIAMS
BRITTANY LIMES ZEHNER

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether *Carson v. Makin* requires the application of strict scrutiny to neutral and generally applicable conditions on public benefits that incidentally burden religious exercise.

2. Whether a state's decision to allow publicly funded preschools to provide specialized services for disabled children and children from low-income families requires the state, as a constitutional matter, to allow religious preschools participating in that same program to exclude children based on their parents' (or their own) protected-class status.

3. Whether the Free Exercise Clause requires strict scrutiny of a state program's statutory equal-opportunity requirements when the program allows no exceptions to those requirements, authorizes no one to grant exceptions to those requirements, and allows no secular conduct that undermines the state's equal-opportunity interests.

PARTIES TO THE PROCEEDING

Petitioner 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.

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

Respondent Lisa Roy is the 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Colorado's universal preschool program ("UPK") stands apart from many states' preschool programs. Rather than limiting participation to public entities, Colorado opened UPK to private preschools, including religious preschools providing religious education. UPK thus differs from the program in *Carson v. Makin*, 596 U.S. 767 (2022), which funded only schools providing a secular education.

From the start, Colorado has encouraged Petitioners and other faith-based preschools to join UPK. Participating religious preschools may continue to teach and shape their curricula according to their faith. No surprise then that many religious preschools, including Catholic preschools, participate. Pet.App.62a, 116a. Yet Petitioners claim that they have been "excluded" from UPK "solely on account of their religious exercise." Br.1. Not so. Petitioners remain welcome to participate in UPK, subject to the same equal-opportunity requirements that apply to all other publicly funded preschools—public and private, secular and religious.

All participating preschools must meet neutral, generally applicable quality standards, including health, safety, training, and teacher qualification requirements. These standards include the requirement that each preschool "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." Colo. Rev. Stat. ("C.R.S.") § 26.5-4-205(2)(b). These conditions apply to every UPK provider. C.R.S. § 26.5-4-205(1)(b)(I).

Petitioners want to receive public funding without complying with those conditions—by, for example, excluding preschoolers based on their parents' sexual orientation. But as this Court recently reaffirmed, "the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable." *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025) (citing *Emp. Div. v. Smith*, 494 U.S. 872, 878-79 (1990)).

Because UPK's equal-opportunity requirements are neutral and generally applicable, Petitioners' challenge fails under existing precedent. Indeed, after a full trial, the district court found no evidence of non-neutrality, refusing to "assume [or] manufacture facts" or "infer the existence of hostility where there is none." Pet.App.110a; *see also* Pet.App.108a-16a.

Petitioners nevertheless seek to transform *Carson*'s rule against religious discrimination into a new rule that would trigger strict scrutiny whenever public-benefits conditions incidentally burden religiously motivated conduct. This Court should not chart that path. The facts of this case supply no basis to adopt a novel rule that departs from this Court's precedent, which protects religious exercise by empowering courts to strike down laws—both overt and covert—that are "specifically directed at . . . religious practice." *Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507, 526 (2022) (quoting *Smith*, 494 U.S. at 878).

UPK's equal-opportunity requirements are also generally applicable. Neither UPK's statute nor its regulations allow any exceptions from those requirements. Participating preschools—religious and secular alike—may maintain curricular requirements and other enrollment criteria *so long as* those criteria do not deny equal opportunity based on protected-class status. The Colorado Department of Early Childhood ("CDEC") has no authority to waive compliance with the equal-opportunity requirements.

Petitioners insist that UPK has created exceptions to the equal-opportunity requirements by allowing public school districts and Head Start preschools to provide specialized services to children with disabilities and children living in poverty. Br.38-39. But Petitioners misinterpret UPK's statute, which expressly prioritizes specialized services for these children, and reflects legislatures' and courts' longstanding awareness that ensuring equal opportunity for these children often requires providing them with additional support. UPK does not allow any secular conduct that undermines Colorado's equal-opportunity interests when it allows the participation of preschools that provide those children with that support.

Whatever a family's publicly funded preschool options—however many or few—Colorado seeks to ensure those options are not limited by that family's protected-class status. Petitioners urge this Court to authorize them to receive public funds on terms different from every other participating preschool—terms that would allow them to exclude families based on protected-class status. The Constitution does not support that result.

STATEMENT OF THE CASE

I. Colorado's universal preschool program.

Thanks to UPK, Colorado now has one of the nation's highest rates of preschool enrollment.[1] UPK offers every four-year-old Coloradan up to 15 hours of free preschool each week. *See* C.R.S. § 26.5-4-204(1)(a), (3)(a)(I); Pet.App.51a. The statute also requires the program to include, and provide specialized services to, children with disabilities and children from low-income families. C.R.S. §§ 26.5-4-202(1)(a)(V), (4); 26.5-4-204(1)-(4). The statute additionally makes clear that those children may receive additional hours of free preschool each week (on top of the 15 hours offered to all preschoolers). C.R.S. § 26.5-4-204(1)(b), (3)(a)(V), (4)(a)(II).

A. UPK's "quality standards" are central to achieving the program's purpose.

Because high-quality preschool can boost children's literacy, improve their performance on standardized tests, and increase their chance of graduating from high school, the UPK statute requires participating preschools to adhere to specific "quality standards." C.R.S. §§ 26.5-4-202(1)(a)(III); 26.5-4-205. These quality standards ensure that UPK's publicly funded preschools deliver high-quality early childhood education by, for example, capping classroom sizes and student-teacher ratios; setting minimums for the number of hours children spend directly with teachers

---

[1] Allison H. Friedman-Krauss et al., *The State of Preschool 2025,* Nat'l Inst. for Early Educ. Rsch. 14-15, 47 (2026), https://coag.gov/app/uploads/2026/08/2025-nieer-yearbook.pdf (Colorado ranks third in the nation for preschool enrollment).

during instruction; and providing families with voluntary vision, dental, and health screenings. C.R.S. § 26.5-4-205(2)(a), (c), (k).

The statute's quality standards also include equal-opportunity requirements ensuring that each participating preschool provide "eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family." C.R.S. § 26.5-4-205(2)(b). Given the critical importance of equal opportunity in ensuring access to high-quality, publicly funded preschool education, the statute allows no exceptions from that provision. C.R.S. § 26.5-4-205(1)(b).

UPK is voluntary: No family or preschool is required to participate. But those preschools that choose to participate must adhere to the law's quality standards. C.R.S. § 26.5-4-205(1)(b).

B. Colorado has encouraged faith-based providers to participate in UPK from its start.

Historically, many states (including Colorado) funded only public preschools. JA262-63; Pet.App.59a-60a. The UPK statute changed the state's early childhood education framework, opening the program to public and private preschools—including religious schools—in what is called a "mixed-delivery" system. C.R.S. §§ 26.5-4-202(1)(a)(VI); 26.5-4-203(12).

From UPK's inception, CDEC (the agency charged with implementing the program) sought to include religious providers. It convened an interfaith working group to solicit and respond to religious preschools' questions and suggestions regarding UPK. Pet.App.60a; JA233-34. Petitioner St. Mary Catholic Parish was an "early and lasting" participant, along with other faith-based providers. Pet.App.74a; JA233-34. In response to that group's feedback, CDEC promulgated a "congregation preference" that enabled religious providers to prioritize "members of the community that the faith-based provider serves as the faith-based provider defines that community." Pet.App.69a-70a.

Neither the UPK statute nor CDEC regulates or restricts preschools' religious curricula or worship: Participating faith-based preschools remain free to teach their faith while receiving public funding. JA306-07; Pet.App.64a. In concrete terms, this means that Catholic schools participating in UPK may teach their religious views on sex, marriage, gender, family, and any other topic. But UPK does not allow any publicly funded preschool to exclude children who wish to enroll in the school simply because their parents are gay (to take one example).

CDEC's efforts to include religious preschools have succeeded. More than forty faith-based providers—including six Catholic Charities preschools that are part of the Archdiocese of Denver—participated in UPK's inaugural year. Pet.App.115a; Supp.App.2a.

II. UPK preserves and expands preschool services for children with disabilities and children from low-income families.

UPK built on the state's pre-existing framework that provided publicly funded preschool services to low-income families and children at risk of not being prepared for kindergarten (including children with disabilities). C.R.S. § 26.5-4-202(1)(a)(I)-(II), (4); JA265-67. The UPK statute recognized that the success of Colorado's move to a universal program requires the continuing participation of the school districts and Head Start preschools that provide specialized services to children with disabilities and children living in poverty. C.R.S. § 26.5-4-202(1)(a)(II), (1)(a)(IV), (3)(a)(II), (4); JA267.

A. UPK preserves and expands preschool services for children with disabilities.

By enacting the Individuals with Disabilities Education Act ("IDEA") in 1975, Congress responded to the reality that millions of children with disabilities were excluded from public schools, denied the opportunity to learn alongside their peers, and deprived of the appropriate educational services they needed for equal educational opportunity. 20 U.S.C. § 1400(c)(2), (c)(7). To address those problems, IDEA gives federal funding to states that develop programs to provide eligible children with disabilities free appropriate public education that includes special education and related services. 20 U.S.C. §§ 1400(d)(1)(A), 1411, 1412, 1419.

Public school districts (and their contracted partners[2]) with qualified staff—including teachers, special-education coordinators, and aides—may provide

[2] IDEA assigns public educational agencies responsibility for ensuring that eligible children receive the special education and related services to which they are entitled. *See* 20 U.S.C. §§ 1412(a)(1), 1413(a)(1). Those agencies may provide services directly or, where appropriate, arrange for a child to receive them

special education under IDEA.[3] *See* 20 U.S.C. §§ 1412(a)(1), 1412(a)(10)(B), 1412(a)(14), 1413(a)(1); JA293-94. IDEA requires school districts to develop an individualized education program ("IEP") for each eligible child with a disability that identifies the special education and related services required to support that child's unique educational needs. 20 U.S.C. § 1414(d)(1)(A), (d)(2)(A); *accord* C.R.S. § 22-20-103(15). That child's "IEP Team" (made up of educators along with the child's parents) then identifies the school where the child will receive these specialized services, known as the child's placement. 20 U.S.C. § 1414(d)(1)(B); 1 Colo. Code Regs. ("CCR") 301-8 § 4.03(8)(a). An IEP therefore determines where a child will receive the services they need in the least restrictive environment, which must be "as close as possible to the child's home." 34 C.F.R. § 300.116(b)(3).

UPK requires that children with disabilities receive a seat and services at a school that can meet their individual and diverse needs, and thus anticipates that school districts will participate in UPK. C.R.S. §§ 26.5-4-204(3)(a)(II), 26.5-4-203(14). Accordingly, an open seat at "any" school is not interchangeable with an open seat at a school specifically

---

in a private school or facility, but the public agency remains responsible for ensuring compliance with IDEA. *See* 20 U.S.C. § 1412(a)(10)(B); 34 C.F.R. §§ 300.145-.147; JA293-294.

[3] These schools provide more than half of Colorado's UPK-funded slots. Colo. Dep't of Early Childhood, *UPK Program Year 2024-25 Annual Report* 17, 33 (Jan. 2026), https://coag.gov/app/uploads/2026/08/colorado-UPK-2024-25-annual-report.pdf.

determined to be an appropriate placement for a disabled child to receive their necessary, specialized services. If IDEA-funded preschools had to turn away children with IEPs to enroll children who do not need specialized services (and who thus could be served effectively elsewhere), many children with disabilities would be forced into inappropriate placements, contravening both IDEA's and UPK's statutory objectives and requirements. C.R.S. §§ 26.5-4-202(4), 26.5-4-204(3)(a)(II), (3)(b); 20 U.S.C. § 1412(a)(1)(A).

B. UPK preserves and expands preschool services for children from low-income families.

The federal Head Start program promotes "the school readiness of low-income children" by providing those children with educational, health, and family support services. *See* 42 U.S.C. § 9831. Head Start funding is available to public and private nonprofit agencies that dedicate nearly all of their services to children and families who are at or below the poverty line, receive public assistance, are homeless, or are in foster care. *See* 42 U.S.C. §§ 9836(a)(1), 9840(a)(1)-(2); 45 C.F.R. § 1302.12.

In enacting the program, Congress responded to evidence that particularized support helps ensure equal opportunity for children from low-income families. *Recommendations for a Head Start Program*, U.S. Dep't of Health, Educ., and Welfare, Office of Child Dev. 2 (1965), https://coag.gov/app/uploads/2026/08/cooke-report.pdf (explaining that special programs for four- and five-year-olds in poverty improve their opportunities for success); *id.* at 4 (recognizing that children from poor families "have not had the kinds of experiences and opportunities, which are available to more economically, advantaged families”). Based on this evidence, Head Start agencies provide a broad package of services, including curricula that specifically foster children’s skills in language, literacy, mathematics, science, and creative arts, along with their social, emotional, and physical skills. 42 U.S.C. §§ 9835(o), 9836a(a)(1)(B). Head Start programs also support parents’ full partnership in their children’s education through family literacy instruction, parenting skills training, substance abuse counseling, and related programming. 42 U.S.C. § 9837(b)(3)-(5).

Recognizing the importance of these services for children living in poverty, the UPK statute specifically anticipates that Head Start preschools will participate in UPK. C.R.S. §§ 26.5-4-202(1)(a)(II), (3)(a)(I)-(III); 26.5-4-203(12), (14)(e). UPK adds state funding to Head Start schools’ existing federal funding (and other resources) to help improve and expand their broader educational, health, and family-support services. *See* C.R.S. § 26.5-4-204(3)(a)(V) (providing for additional UPK services for low-income students); 45 C.F.R. § 1303.4 (federal regulation capping federal funding for Head Start grant recipients at eighty percent of the total program costs); *see also* 42 U.S.C. § 9836a(a)(1) (Head Start curriculum requirements); 45 C.F.R. §§ 1302.40 (Head Start health services requirements), 1302.50 (Head Start family engagement requirements). Filling the seats at a Head Start preschool without regard to those children’s Head Start eligibility—which largely turns on their families’ low income—would deprive children living in poverty of

Head Start's specialized services and thus of equal educational opportunity.

III. UPK's system for matching children with preschools allows no exceptions to the statute's equal-opportunity requirements.

Operationalizing the UPK statute was no easy task. In its inaugural year, CDEC worked to create an enrollment system to help approximately 40,000 children and their parents identify, among the nearly 2,000 UPK providers across the state, the preschools that best meet their needs. *See* JA285, 302, 309. CDEC obtained software that provides families an online portal to rank up to five preschools; the software's algorithm then matches those families with one of their ranked choices. Pet.App.64a-65a; JA237-38. The algorithm also enables families to select additional preschools if none of their initial choices are available. Pet.App.64a.

Based on feedback from providers across Colorado, CDEC realized that—absent adjustment—this software's technical limits would create substantial logistical problems by simply defaulting into a first-come, first-served system. Pet.App.65a; JA286-91. Preschools warned CDEC that such a system would create unintended consequences like separating siblings, displacing children from the schools in which they were already enrolled, and preventing school districts from serving children who live within their geographic boundaries. Pet.App.7a, 65a-66a; JA235, 286-

308. These concerns illustrate the sorts of enrollment challenges commonly faced by many schools.[4]

To address these concerns, CDEC adopted a regulation allowing adjustments (known as "preferences") to the matching algorithm so that providers could give priority to families meeting their enrollment criteria—so long as those preferences complied with the equal-opportunity requirements. 8 CCR 1404-1 § 4.109(A)-(B); JA286-98, 302-04. The regulation does not authorize CDEC to approve (or disapprove) preschools' enrollment criteria; it instead authorizes CDEC to approve adjustments to the matching algorithm to facilitate preschools' ability to match with families that satisfy their enrollment criteria—again, so long as those adjustments do not allow a preschool to deny equal opportunity in violation of the statute. 8 CCR 1404-1 § 4.109(A)-(B); JA286-98, 302-04.

[4] For example, public schools in Colorado often make decisions about which students to admit based on a variety of enrollment criteria. *See* C.R.S. § 22-36-101(2)(a), (3)(c) (identifying such criteria to include age, course prerequisites, and academic performance); *School Admission Priorities*, Denver Pub. Schs. School Choice, https://perma.cc/PT86-AATC (last visited Aug. 16, 2026) (identifying such criteria to include geographic boundary and sibling priority). Medical residency and fellowship programs offer another illustration, using an algorithm to pair applicants with hospital placements. *See Intro to the Match: How the Matching Algorithm Works*, National Residency Matching Program, https://perma.cc/5GNT-5Q7T (last visited Aug. 16, 2026); *see also* 15 U.S.C. § 37b(a)(1)(B) (noting that, prior to the establishment of medical residency "matching" algorithms, the "situation was inefficient, chaotic, and unfair and it often led to placements that did not serve the interests of either medical students or residency programs").

This regulation allowed adjustments that refined the software's blunt, first-come, first-served algorithm to implement the enrollment criteria commonly used by UPK providers. These algorithmic adjustments specifically enabled cooperative preschools to match with children whose families volunteer their time to the school; school districts to match with children who live within the district; children with IEPs and children from low-income families to match with the school district and Head Start preschools that provide specialized services for those children; preschools to match with their employees' children, continuing students, and those students' siblings; and dual-language programs to match with children who speak the program's languages. 8 CCR 1404-1 § 4.109(A)(1)-(8); JA291-98. The regulation makes clear that none of these adjustments can be used to allow preschools to depart from the equal-opportunity requirements. 8 CCR 1404-1 § 4.109(B); JA235, 237-38, 292-98. More than 1,000 preschools have utilized these specific adjustments, which are available to both secular and religious preschools on the same basis. Pet.App.69a.

When it learned that those specific adjustments still might not account for every provider's needs, CDEC added a final regulatory provision (sometimes called the "programmatic preference") that allows preschools—secular and religious alike—to request a specific adjustment to the algorithm to facilitate matching with students who meet their enrollment criteria (again, so long as those criteria do not violate the equal-opportunity requirements). 8 CCR 1404-1 § 4.109(A)(9), (B); Pet.App.73a-74a; JA302-04, 828-30. The regulation itself lists examples of "approved preferences" to illustrate the sorts of adjustments consistent with the equal-opportunity requirements, like an employer that operates an on-site preschool prioritizing the children of that employer's employees, and schools prioritizing families within a specified geographic area. 8 CCR 1404-1 § 4.109(A)(9). In UPK's inaugural year, CDEC approved 17 requests for adjustments under this provision. Dist.Ct. Pls.' Trial Ex. 34 (CA10.Aplt.App.VII at 1729-34). None depart from the equal-opportunity requirements. *See* Pet.App.32a, 72a-74a; *see also* Pet.App.122a.

IV. Petitioners decline to join UPK.

On January 14, 2023, the Archdiocese of Denver instructed its preschools not to register with UPK because there were "elements of [UPK's] non-discrimination requirements" that ran counter to the Archdiocese's prior guidance "with respect to issues of sexual and gender identity."[5] Pet.App.280a-82a; *see* Pet.App.12a, 79a-80a.

---

[5] The Archdiocese's instruction was a departure from its prior practice, where it allowed its preschools to agree to nondiscrimination requirements in other publicly funded early childhood programs, like the Colorado Child Care Assistance Program ("CCCAP") and the Denver Preschool Program ("DPP"). *See* Dist.Ct.Dkt.72 at 12-13 & n.4; JA836 (CCCAP contract requiring participating providers to "[a]ccept referrals for child care without discrimination with regard to race, color, national origin, age, sex, religion, marital status, sexual orientation or physical, intellectual or mental health disability"); JA849, 890-91 (DPP provision requiring participating preschools not to discriminate based on "race, color, religion, national origin, gender, age, . . . military status, sexual orientation, gender variance, marital status, or physical or mental disability"). There is no record evidence that any of the Archdiocese's preschools refused to provide childcare

On February 17, 2023, a group of schools and educational institutions (that included the Archdiocese) wrote the state, asserting that "certain requirements under UPK will severely restrict the ability of faith-based providers to participate in the program without compromising their sincerely held religious beliefs." Pet.App.283a. Citing the statute, the letter expressed the group's opposition to the UPK's equal-opportunity requirements, but it provided no detail identifying which of the specific requirements the group found objectionable. Pet.App.283a-87a. Nor did the letter identify any particular provider or specify the precise exemption it sought. *Id.*

On February 28, 2023, CDEC Executive Director Dr. Lisa Roy responded to the letter. Pet.App.288a-90a. She explained that C.R.S. § 26.5-4-205(2)(b) requires UPK's equal-opportunity requirements and that she does "not have the authority to create an exemption that excludes faith-based providers from the . . . statute." Pet.App.289a. At the same time, Dr. Roy reiterated that "faith-based providers can, and are encouraged to, participate in the UPK program," and she pointed to the "interfaith working group, which meets weekly, to problem solve issues as they arise from within the faith-based community and facilitate participation." Pet.App.289a.

---

based on a child's or family's protected-class status, and CDEC did not anticipate objections to UPK's equal-opportunity provisions. *See* JA225-26.

V. Proceedings below.

Petitioners St. Mary Catholic Parish and St. Bernadette Catholic Parish filed their complaint shortly after the start of UPK's first school year.[6] St. Mary operates, and St. Bernadette operated, preschools together with their K-8 schools.[7] They asserted financial burden based on their decision, grounded in their religious beliefs, not to participate in UPK because of its equal-opportunity requirements. Dist.Ct.Dkt.32-14, ¶ 47, *St. Mary Catholic Parish v. Roy*, No. 1:23-cv-02079 (D. Colo. Sep. 13, 2023); Dist.Ct.Dkt.32-16, ¶ 32.

Petitioners Daniel and Lisa Sheley are parents with a child who was attending St. Mary preschool at the time of trial. JA185-86. St. Mary's decision, grounded in its religious beliefs, not to participate in UPK because of its equal-opportunity requirements

---

[6] The district court dismissed the Archdiocese (also listed as a plaintiff on the original complaint) for lack of standing, Dist.Ct.Dkt.99 at 3. Because the Archdiocese did not present the question of its standing for this Court's review, it is not properly a party before this Court.

[7] St. Bernadette's K-8 school (which included a preschool) closed December 20, 2024, and its claim is moot. Notwithstanding Petitioners' suggestion to the contrary, Br.18, no record evidence indicates any link between UPK and any school's financial struggles. The Superintendent of Catholic Schools for the Archdiocese of Denver testified that Archdiocesan preschools had not experienced "a major hit on enrollment" because of UPK and that their enrollment numbers were "probably still holding steady." Supp.App.91a. St. Bernadette's Principal and Head of School testified that its K-8 school (which included a preschool along with nine other grades) had experienced declining enrollment for several years following divisions among faculty and staff and reports of a "toxic culture." JA62-63, 20, 27.

meant that the Sheleys paid tuition for their child's attendance there. Dist.Ct.Dkt.32-18, ¶ 6; *see also* Dist.Ct.Dkt.30, ¶ 91 (amended complaint adding Sheleys as plaintiffs).

Petitioners asked the district court to "[d]eclare that the religious affiliation, sexual orientation, and gender identity nondiscrimination requirements of [C.R.S.] § 26.5-4-205(2)(b) violate the First Amendment to the United States Constitution as applied to Plaintiffs' religious exercise." Dist.Ct.Dkt.30 at 35. In other words, Petitioners sought exemptions from those three provisions of the equal-opportunity requirements.

Petitioners' witnesses testified that their schools would refuse to enroll the children of same-sex parents. JA141-43; *see* Pet.App.77a-78a, 272a-75a; JA198-200 (St. Bernadette denied enrollment to a fifth-grade child of same-sex parents). Petitioners also testified that if a currently enrolled child later identified as gender-diverse, that child's continued enrollment would "not be possible." JA143-45; *see* Pet.App.78a, 251a-55a (providing that enrollment or re-enrollment of a gender-nonconforming child "would not be appropriate"). Petitioners' request for relief makes clear that they seek the legal right to receive UPK funding while excluding families based on their sexual orientation, gender identity, and religious affiliation. Dist.Ct.Dkt.30 at 35-36.

A. The district court's decision.

After a three-day trial, the district court determined that the UPK statute's sexual orientation and gender identity provisions are neutral and generally applicable, and it therefore applied rational-basis review. Pet.App.108a-16a, 133a-35a, 137a. Concluding that the provisions satisfied that review, it denied Petitioners' request for a permanent injunction exempting them from those provisions. Pet.App.166a, 171a-72a.

The district court determined, in the alternative, that strict scrutiny "would be satisfied" even if it applied. Pet.App.137a-38a. It held that CDEC's refusal to grant Petitioners an exemption was narrowly tailored to achieve Colorado's compelling equal-opportunity interest "in deciding that children may not be denied [publicly funded, quality preschool] based on specified discriminatory factors." Pet.App.146a; *see also id.* (if children and families are denied access to quality preschool due to protected-class status, "they may be denied the opportunity to achieve their maximum potential, to the detriment of all").

The procedural history of Petitioners' request for an exemption from the equal-opportunity requirements' religious affiliation provision is different. The district court determined that the "congregation preference" reflected CDEC's "attempts to include and accommodate faith-based providers," Pet.App.151a, but nevertheless violated the statute by allowing participating preschools to make enrollment decisions based on religious affiliation. Pet.App.135a-37a, 151a-52a. The district court enjoined CDEC from enforcing the religious-affiliation provision against Petitioners for as long as the congregation preference remained in place. Pet.App.171a-72a. To comply with the statute, CDEC completed a rulemaking process to remove the congregation preference. CA10.Dkt.125-1, 125-2.

B. The Tenth Circuit's decision.

A unanimous Tenth Circuit panel affirmed, holding that Petitioners failed to meet their burden to show that UPK's equal-opportunity requirements are not neutral and generally applicable. Pet.App.5a, 28a, 32a-43a, 47a.[8]

First, the panel agreed with CDEC's interpretation of the statute, concluding that the "preferences for IEPs and Head Start are not exceptions to the nondiscrimination requirement." Pet.App.38a. "Even assuming, arguendo," that the preferences allowing publicly funded preschools to prioritize those children could somehow be understood as exceptions from the statute, the panel also concluded that "[n]othing about the IEP preference or the Head Start preference undermines the government's asserted interest in ensuring equal access to preschools." Pet.App.38a-39a. Yet, it concluded, the same could not be said of "[a]llowing some schools to ignore the nondiscrimination requirement with respect to sexual orientation and gender identity[.]" Pet.App.39a.

Second, the panel rejected Petitioners' claim that UPK allowed any discretionary exceptions from the

---

[8] As the Tenth Circuit observed, "[CDEC] added [the congregation] preference to accommodate faith-based providers. However, once the district court determined that this preference was incompatible with the nondiscrimination requirement, it was removed. [CDEC] has tried repeatedly to accommodate faith-based providers, but when it comes to the nondiscrimination provision, it can make no exceptions because the provision is required by statute." Pet.App.32a-33a; *see also* Pet.App.36a n.16 ("[T]he congregation preference no longer exists, and thus cannot undermine the law's general applicability.").

equal-opportunity requirements. It affirmed the district court's factual findings that CDEC had no discretion to grant exemptions and that CDEC's witnesses understood that they had no such authority. Pet.App.29a-30a, 32a.

Third, it rejected Petitioners' argument that the UPK statute's temporary-waiver provision allows CDEC to grant exceptions from UPK's equal-opportunity requirements, interpreting the statute to foreclose such discretion. Pet.App.33a-35a.

The panel also distinguished *Carson*, holding that it did not require strict scrutiny of programs—like UPK—that do not single out religious schools for disfavor and are thus neutral toward religion. Pet.App.21a-22a.

The Tenth Circuit then applied rational-basis review and held that UPK satisfied this scrutiny. Pet.App.47a.

SUMMARY OF THE ARGUMENT

UPK welcomes faith-based preschools regardless of whether they are religious, whether they teach religion, or whether they deliver their services through a religious worldview. UPK does not discriminate against religious actors or the religious use of its funds. Instead, it requires all preschools—secular and religious alike—to deliver publicly-funded services without excluding families based on protected-class status.

Smith remains the governing rule for neutral and generally applicable laws like UPK. *Carson* didn't displace that rule for public benefit programs: It instead applied the settled principle that government may not target religion for disfavored treatment. Petitioners now ask this Court to adopt a sweeping new rule requiring strict scrutiny of any burden on religious conduct arising from neutral, generally applicable public-benefits conditions. No precedent supports that approach, and Petitioners offer no workable boundary for it. This Court need not, and should not, redesign Free Exercise doctrine to decide this case, which involves impartial and uniform conditions on providers of publicly funded services.

Petitioners also argue that UPK's inclusion of preschools providing specialized services to children with disabilities and children living in poverty creates an exception to the equal-opportunity requirements—and that this purported exception establishes a constitutional right to exclude other children based on their parents' (or their) sexual orientation, gender identity, or religious affiliation. Petitioners are mistaken. They misinterpret UPK's requirement that publicly funded preschools ensure "equal opportunity . . . regardless of . . . income level, or disability," as required by UPK's statute. C.R.S. § 26.5-4-205(2)(b). The statute expressly prioritizes services for children with disabilities and children from low-income families, and requires participation by school districts and Head Start preschools that provide such specialized services. Reading the statutory equal-opportunity requirements as ensuring equal opportunity regardless of having a disability or low income sensibly reconciles these directives and aligns with longstanding statutory practice. And allowing publicly funded preschools to provide specialized services neither devalues religion nor undermines UPK's general applicability.

Petitioners also argue that CDEC's discretion to make algorithmic adjustments to facilitate providers' ability to match with families meeting specified enrollment criteria shows that CDEC may grant exceptions to the equal-opportunity requirements. But departures from the algorithm unrelated to the characteristics protected by the equal-opportunity requirements, by definition, are not exceptions from those requirements. The statute, its implementing regulations, the program's actual operation, and the agency witnesses' "unwavering" testimony, Pet.App.72a-73a, all confirm that CDEC may authorize adjustments to the matching algorithm only when those adjustments do not violate the equal-opportunity requirements.

UPK's equal-opportunity requirements satisfy any level of scrutiny. They ensure that all Colorado parents—Catholic, Jewish, Muslim, gay, or straight—can trust that their four-year-olds will not be turned away from publicly funded preschools because of religion, sexual orientation, gender identity, or other protected characteristic.

ARGUMENT

I. This Court has applied *Smith*'s framework for more than thirty-five years.

Pursuant to *Smith* and its progeny, neutral and generally applicable laws that incidentally burden religious conduct receive rational-basis review, while laws that are not neutral or not generally applicable receive strict scrutiny. *See Smith*, 494 U.S. at 878-79, 885-86; *Fulton v. City of Philadelphia*, 593 U.S. 522, 533-34 (2021).

Under *Smith*'s framework, the Court first assesses the "neutrality" of the challenged law. *See*

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). A law is not neutral—and thus receives strict scrutiny—if its "object . . . is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. Laws that "target" religious practice are not neutral regardless of whether their impermissible object is "masked" or "overt." *Id.* at 534. And a law that singles out religious conduct for disfavored treatment is not neutral regardless of whether it was motivated by the government's religious hostility, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617, 634 (2018), or instead the state's antiestablishment interests, *Carson*, 596 U.S. at 781.

A law is also subject to strict scrutiny if it is not generally applicable. *Fulton*, 593 U.S. at 533-34. A law is not generally applicable if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it incorporates a mechanism for individualized exemptions. *Id.*; *see Kennedy*, 597 U.S. at 526.

Petitioners' brief, Br.21, demonstrates *Smith*'s continued utility by citing numerous decisions in which this Court applied *Smith*'s framework to adjudicate Free Exercise Clause challenges. *See Kennedy*, 597 U.S. at 525-27 (government action was neither neutral nor generally applicable); *Carson*, 596 U.S. at 781 (law was not neutral because it singled out religious education for exclusion); *Fulton*, 593 U.S. at 540 (government action was not generally applicable); *Tandon v. Newsom*, 593 U.S. 61, 63-64 (2021) (government action was not generally applicable); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16-

18 (2020) (government action was neither neutral nor generally applicable); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 476-77, 487 (2020) (law was not neutral because it singled out religious schools for exclusion); *Masterpiece Cakeshop,* 584 U.S. at 638-39 (government action was not neutral because motivated by religious hostility); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017) (law was not neutral because it singled out religious entities for exclusion); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 n.27 (2010) (public university's policy was generally applicable); *Lukumi,* 508 U.S. at 542-46 (ordinance was neither neutral nor generally applicable).[9]

The fact that challengers prevailed in many of these cases does not weaken *Smith*'s value in protecting religious exercise. Far from it: The decisions Petitioners cite show that *Smith* continues to exert meaningful force—not that this Court has abandoned it.

---

[9] Petitioners also invoke post-*Smith* decisions that are inapposite because they involved combined Establishment and Free Exercise questions that implicate distinct doctrines—questions absent from many Free Exercise cases, including this one. *See Locke v. Davey*, 540 U.S. 712, 719-25 (2004); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020); *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 247-48 (2025). Petitioners also cite a decision that did not address the merits of the Free Exercise claim, so had no reason to engage *Smith*'s framework. *Sause v. Bauer,* 585 U.S. 957, 960 (2018).

This Court has reaffirmed the now-familiar *Smith* framework for more than thirty-five years. *See, e.g.*, *Mahmoud*, 606 U.S. at 564 (citing *Smith*, 494 U.S. at 878-79) ("Under our precedents, the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable."); *Kennedy*, 597 U.S. at 525 (citing *Smith*, 494 U.S. at 879-91). It has also repeatedly declined invitations to overturn *Smith*, including in this case.

II. UPK's equal-opportunity requirements do not discriminate against religion, unlike the law at issue in *Carson*.

Carson prohibited states from disqualifying private schools from public funding based solely on whether those schools provided religious education—the very activity for which the challengers sought public funding. *Carson*, 596 U.S. at 780-81. UPK does not bar participating schools from providing religious education, teaching religious doctrine, selecting religious curricula, or integrating worship into the school day. UPK instead regulates a different feature of the publicly funded transaction: whether families may be turned away from that education based on protected-class status. Petitioners' contrary rule would treat any neutral and generally applicable condition on publicly funded services as religious discrimination whenever a provider has a religious reason for noncompliance. *Carson* neither addressed nor adopted that rule.

A. *Carson* applies strict scrutiny when government singles out religious status or religious use for disfavored treatment.

Petitioners claim that *Carson* displaces *Smith'*s framework whenever the challenged law concerns public benefits. But *Carson* did not depart from *Smith*; it aligned with it. *Carson* reaffirmed that the government is not neutral toward religion when it targets religious use or religious status for disfavored treatment. *Carson*, 596 U.S. at 780-81. And that principle remains true whether the government's targeting of religion is explicit or surreptitious. *Lukumi,* 508 U.S. at 534; *see Kennedy*, 597 U.S. at 526 (governmental actions are not neutral when they are "specifically directed at . . . religious practice") (quoting *Smith*, 494 U.S. at 878). UPK does not single out religious use or status for disfavored treatment—overtly or covertly—and that reality ends the neutrality inquiry.

In *Carson,* this Court considered a Free Exercise Clause challenge to Maine's program that provided tuition assistance for enrollment in "nonsectarian" private schools, but excluded "sectarian" schools (i.e., those that offered a religious education). 596 U.S. at 775. Acknowledging that it had "decline[d] to fund explicitly religious uses of public funds," Maine argued that strict scrutiny did not apply because its exclusion was motivated not by religious hostility but by its antiestablishment interests. Brief of Respondent at 37, 41, *Carson v. Makin*, 596 U.S. 767 (2022) (No. 20-1088).

Rejecting Maine's argument, *Carson* invoked the "unremarkable" principle that strict scrutiny applies when government "expressly discriminate[s] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." 596 U.S. at 779 (quoting *Trinity Lutheran*, 582 U.S. at 462); *accord Espinoza,* 591 U.S. at 477-78. This Court used *Smith's* "neutrality" vocabulary: "[T]here is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious." *Carson,* 596 U.S. at 781. Consistent with *Smith's* framework that distinguishes neutral and generally applicable laws from laws that discriminate against religion, Maine's law warranted strict scrutiny because it "specifically carved out private religious schools from those eligible to receive" public funding. *Id.* at 780.

Maine made education's religious content the basis for exclusion. In stark contrast, UPK includes religious education and religious use, while its equal-opportunity requirements regulate only whether a family can be denied that education on protected grounds.

Petitioners' invocation of *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238, 248-49 (2025), is inapposite. Br.32. The state programs at issue in that case defined eligible entities in terms "explicitly differentiating between religions based on theological practices." *Cath. Charities,* 605 U.S. at 250. UPK draws no such distinctions. For the same reason, Petitioners' claim that UPK picks "religious 'winners and losers,'" Br.32, is unsupported: UPK imposes the same neutral and generally applicable conditions on all who receive the public's funds. UPK does not "tilt the religious playing field," Br.32, when it uniformly prohibits participating providers from excluding preschoolers based on protected-class status regardless of that conduct's religious or secular motivation.[10]

B. This Court's precedent confirms no special "public-benefits" rule for Free Exercise challenges.

Petitioners claim that *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1981)—both decided before *Smith*—established that strict scrutiny applies to the government's neutral and generally applicable conditions on public benefits, Br.33-34. But as *Smith* explained, the unemployment compensation programs in those cases allowed secular exemptions from those programs' general rule denying benefits to those refusing suitable work—while declining such exemptions to those refusing suitable work for religious reasons. *Sherbert*, 374 U.S. at 400-01; *Thomas*, 450 U.S. at 711-12. *Smith* distinguished those programs from the Oregon law before it not because public benefits were at stake (indeed, *Smith* itself involved unemployment benefits), but instead

[10] Contrary to Petitioners' selective quotation of *Locke*, the "baseline" that Colorado offers through its UPK program is both neutral and "generally available" as to religion. *See* Br.30-31 (quoting 540 U.S. at 726-27 (Scalia, J., dissenting)). This fact distinguishes UPK from the scholarship program in *Locke* that excluded theology majors. Indeed, Justice Scalia's dissent invoked the language of non-neutrality later applied in *Carson*, as he objected to a public funding program that "carved out a solitary course of study [theology] for exclusion," observing that "[n]o field of study but religion is singled out for disfavor[.]" *Locke*, 540 U.S. at 727.

because the earlier laws allowed "individualized governmental assessment" of a claimant's reasons for refusing suitable work. 494 U.S. at 884. That discretionary, case-by-case approach meant that those laws were not generally applicable. *Id.* at 882-84; *see Fulton,* 593 U.S. at 533-34 (reaffirming that understanding of *Sherbert*).

Carson did not describe those cases as applying strict scrutiny to neutral and generally applicable public-benefits programs. It instead emphasized the vulnerability of government programs that are *not* neutral and generally applicable, pairing its citation to *Sherbert* (invalidating a program that credited secular but not religious reasons for refusing suitable work), with *Everson v. Board of Education*, 330 U.S. 1 (1947) (rejecting challengers' effort to exclude students attending religious schools from a program that funded families' school transportation). *Carson*, 596 U.S. at 778. Indeed, if this Court had recognized a special public-benefits exception to *Smith* regardless of whether a funding condition was neutral and generally applicable, then it could have disposed of each of the cases in the *Carson* trilogy with a single paragraph, rather than interrogating the neutrality of those states' funding conditions. *See Carson*, 596 U.S. at 780-89; *Espinoza*, 591 U.S. at 476-83; *Trinity Lutheran*, 582 U.S. at 462-65.

Also unavailing is Petitioners' claim that a selective quotation from *Mahmoud* supports their proposed public-benefits rule, Br.34.[11] Petitioners isolate a quotation about conditioning governmental benefits in exchange for surrendering religious status while unmooring that quotation from its context: a discussion of government's *non-neutral* actions toward religion. *Mahmoud* quoted *Trinity Lutheran*'s discussion of policies that "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Trinity Lutheran*, 582 U.S. at 462. *Trinity Lutheran*, in turn, quoted *McDaniel v. Paty*'s discussion of a state law that disqualified clergy from serving as constitutional convention delegates solely because of

---

[11] *Mahmoud* expressly recognized an exception from *Smith* whereby strict scrutiny applies to neutral and generally applicable government action that imposes on parents a burden "of the same character" as in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), including an "educational requirement or curricular feature" that substantially interferes with parents' ability to direct their child's religious upbringing. 606 U.S. at 550, 565. Petitioners do not argue that the *Mahmoud* exception controls this case. Nor could they. *Mahmoud* recognized a free exercise right for parents to opt out of a specific curricular component that substantially interfered with their ability to control their children's religious development. *Id.* at 550, 568. The preschools here claim a far broader right to receive public funding while excluding families seeking to receive the curriculum Petitioners choose to provide. *See* Br.29-30. To the extent the United States advances a new theory that *Mahmoud*'s parental-rights rule should extend to religious institutions themselves, U.S.Br.32-34, this Court should summarily reject that argument as outside the scope of the questions presented. *See, e.g., Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.14 (1995) (rejecting suggestion of United States as amicus that was "neither made in the lower courts nor presented here"); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 140 (1998) (declining to consider matter that "lies outside the questions presented for certiorari").

their ministerial calling. *Trinity Lutheran,* 582 U.S. at 459, 462 (citing *McDaniel v. Paty*, 435 U.S. 618, 626-27 (1978)). In contrast, UPK is neutral toward religion: It affirmatively includes religious preschools regardless of their religious status, and without regard to their religious use of UPK funds.

C. *Smith*'s framework applies in both civil and criminal settings.

The Solicitor General's contention that *Smith* applies only to criminal laws, U.S.Br.27-28, has no basis in precedent. *Smith* drew a bright line not between civil and criminal laws, but between laws that are neutral and generally applicable "across the board," and those that are not. *Smith*, 494 U.S. at 884. *Smith* itself made clear that this line applies not only to criminal laws, but also to civil enforcement frameworks like minimum wage and overtime provisions, tax collection rules, and equal-opportunity laws. *Id*. at 889 (collecting cases).

Nor have this Court's subsequent decisions drawn any civil-criminal divide, instead applying *Smith* in a variety of non-criminal contexts. *See, e.g.*, *Kennedy*, 597 U.S. at 525 (public employer's discipline of employee); *Fulton*, 593 U.S. at 534-36 (government contracting for foster care services); *Martinez*, 561 U.S. at 697 n.27 (public university's limited public forum). Tellingly, the Solicitor General cites no decision by any court that has limited *Smith* to the criminal context. *See* U.S.Br.27-29.

The Solicitor General's attempted reinvention of *Smith* also defies common sense. Requiring states to satisfy a more demanding standard when they adopt milder forms of regulation would paradoxically provide *less* protection to religious conduct when the stakes are highest: when life and liberty are on the line in a criminal prosecution.

D. This Court should decline to adopt Petitioners' sweeping new public-benefits exception.

Petitioners ask this Court (Br.25-26) to adopt a categorical "public benefits" exception—without engaging the very serious questions that would follow, including consequences regarding administrability, separation of powers, and fairness. *Fulton* declined to adopt such a categorical rule. 593 U.S. at 541; *see id.* at 543-44 (Barrett, J., concurring) (noting questions raised by, *inter alia,* a categorical rule's failure to attend to the differences between direct and indirect religious burdens and between institutional and individual claimants); *see also Thomas*, 450 U.S. at 720 (Rehnquist, J., dissenting) (discussing the "muddied waters" of Free Exercise jurisprudence). This Court can resolve this case by applying its existing Free Exercise precedents, without adopting a far-reaching new "public benefits" exception to the *Smith* framework.

Indeed, Petitioners offer no limiting principle for determining which laws provide a "public benefit" and which do not. They thus leave open questions about their proposal's application to a wide range of government actions, including drivers' licenses; professional and other occupational licenses; compassionate release programs for inmates; parole decisions; trademark registration; public transportation; public education; public employment; public entities' speech forums; and access to government property.

At minimum, Petitioners' rule would apply to the funding conditions routinely attached to ensure safe, healthy, and high-quality publicly funded education. Not only would commonplace equal-opportunity requirements like UPK's become suspect under Petitioners' rule, but so would laws prohibiting corporal punishment in schools, *see, e.g.*, Wis. Stat. § 118.31(2); or requiring that teachers are drug-free at school, *see, e.g.*, Ala. Code § 16-1-24.1(a), (b)(1).

Petitioners' proposal would also extend to countless public-benefits programs addressing health care, land use, childcare, job training, food and nutrition, victim services, legal aid, reentry programs, and more. Each of these programs commonly feature multiple conditions governing provider qualifications, recordkeeping, oversight (such as home studies, inspections, audits, background checks), and required or prohibited conduct. For just a handful of the myriad examples, *see* N.C. Gen. Stat. § 108A-29(d), (h) (imposing work requirements on recipients of public assistance benefits); Tenn. Code Ann. § 37-2-414(b)(4)(B) (requiring foster care parents to facilitate a child's counseling or therapy); Ohio Rev. Code Ann. § 3113.36(A)(5) (requiring publicly funded domestic violence shelters to keep information about victims confidential from their spouses and others); Me. Rev. Stat. Ann. tit. 27, § 505(2)(D)(3), (7) (conditioning historic preservation grants on recipients' willingness to open their building to the public). Under Petitioners' proposal, any sincere religious objection to any of these conditions would automatically trigger claimant-specific strict scrutiny.

Petitioners may reply that strict scrutiny would not automatically require exemptions from every benefits condition. But strict scrutiny is deliberately demanding,[12] and Petitioners' proposal would constitutionalize individualized litigation over innumerable program conditions, requiring program-by-program and claimant-by-claimant evaluations of whether each condition must yield to religious objections. *See Smith*, 494 U.S. at 885. States, in turn, would face sprawling administrative challenges in managing patchworks of exceptions. And these significant burdens could pressure states to restrict their public funding programs only to public entities—an outcome all parties want to avoid, and one that would sharply curtail opportunities for religious and other private providers.

Petitioners' proposed redesign of Free Exercise doctrine would also deprive state and local officials of the power to adopt sensible, uniform conditions for governing publicly funded services. *Smith* left politically accountable actors to decide when religious exemptions from neutral, generally applicable laws are warranted—and when to ensure uniform application to all. *Smith*, 494 U.S. at 890. Legislatures make these choices when enacting, or declining to enact, Religious

[12] *See Smith,* 494 U.S. at 888 ("[I]f 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test."). The destabilizing consequences of applying strict scrutiny in all these cases could lead courts to water down that scrutiny in ways ultimately detrimental to the robust protection of core constitutional rights. *See Free Speech Coal.*, *Inc. v. Paxton*, 606 U.S. 461, 485 (2025) (observing that strict scrutiny's demanding standard is "ill suited for such nuanced work").

Freedom Restoration Acts. So too do states, like Colorado, exercise this choice when they sometimes exempt religious conduct from neutral and generally applicable statutes[13]—and sometimes, as in UPK, conclude instead that a statute's protections brook no departure. Established precedent leaves that decision with "the people" of Colorado and other states. *See City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring).

Petitioners' proposal would also authorize religious actors to obtain public funding and other public benefits on terms unavailable to all others, *Smith*, 494 U.S. at 885.

Petitioners do not acknowledge—much less seek to justify—the consequences of such a dramatic departure from precedent. This Court should decline to adopt their rule. It need only apply the rule *Smith* established, and that this Court has repeatedly used.

III. UPK's equal-opportunity requirements are generally applicable.

UPK's equal-opportunity requirements are generally applicable because they do not prohibit religious conduct while allowing secular conduct that undermines UPK's asserted interests in a similar way, and

---

[13] *See, e.g.*, C.R.S. §§ 24-34-600.3(1)(b) (excluding, from state public accommodations law, any church, synagogue, mosque, or other place principally used for religious purposes); 8-70-140(1)(a)-(b) (exempting religious employment from state unemployment compensation program); 39-3-106(1) (exempting property "used solely and exclusively for religious purposes" from property tax); *see also Smith*, 494 U.S. at 890 (observing that Colorado had "made an exception to their drug laws for sacramental peyote use").

because they have no mechanism for individualized exceptions. *See Fulton*, 593 U.S. at 533-34.

First, allowing publicly funded preschools to deliver specialized services to children with disabilities and to children living in poverty—as UPK does—advances Colorado's interests in ensuring that protected-class status does not deny families equal opportunity to quality, publicly funded preschools. Petitioners' proposed exemption, in contrast, would frustrate Colorado's interests by allowing publicly funded preschools to turn children away from available options because of their, or their parents', protected-class status.

Second, UPK provides no mechanism for granting individualized exceptions from its equal-opportunity requirements. Participating preschools—sectarian and secular alike—may maintain their own curricular approaches and enrollment criteria, but only so long as those criteria do not deny equal opportunity under the statute. CDEC has no authority to excuse any publicly funded preschool from complying with the equal-opportunity requirements.

A. Allowing publicly funded preschools to provide specialized services for children with disabilities and low-income families accords with UPK's statutory equal-opportunity requirements.

The UPK statute does not permit any exceptions to its equal-opportunity requirements. *See* C.R.S. § 26.5-4-205(2)(b). Likewise, CDEC's regulations make clear that providers' requested adjustments to the matching algorithm must comply with the statute's equal-opportunity requirements. *Compare id.*, *with* 8 CCR 1404-1 § 4.109(B).

Petitioners nonetheless argue that UPK's regulations create exceptions from the statutory equal-opportunity requirements by authorizing two algorithmic adjustments that enable publicly funded preschools to prioritize children with IEPs and children from low-income families. Br.36-39. In Petitioners' view, these providers impermissibly deny equal opportunity to children who are wealthy or not disabled. *Id.* And so (Petitioners' argument continues), when CDEC permits such supposed violations against children who are wealthy or nondisabled, then it must also permit Petitioners to deny enrollment based on sexual orientation, gender diversity, and religion. *Id.*

Petitioners misunderstand what it means under the UPK statute for publicly funded preschools to ensure "equal opportunity . . . regardless of . . . income level, or disability." C.R.S. § 26.5-4-205(2)(b). The statute's provisions consistently emphasize the role of specialized services in ensuring that children with disabilities and children living in poverty have a meaningful opportunity to achieve primary school readiness. Recognizing that access to high-quality preschool can improve educational "outcomes . . . for children in low-income families and those who are at risk of entering kindergarten without being prepared to learn," C.R.S. § 26.5-4-202(1)(a)(II), the statute expressly prioritizes services for those children. C.R.S. § 26.5-4-204(1)(b)-(c). The statute also ensures the inclusion of school districts and Head Start agencies that, respectively, implement IEPs for children with disabilities and special programming for families below the poverty line. C.R.S. §§ 26.5-4-203(3) (tying the UPK Act's definition of "children with disabilities" to the definition provided elsewhere in the state Education Code to mean children who require an IEP); 26.5-4-203(14)(c) and (e) (defining eligible "preschool providers" to include public "school district[s]" and "head start program[s]"). And the statute provides those children with free preschool hours beyond those available to other children. C.R.S. § 26.5-4-204(3)(a)(II), (V).

Taken together, these provisions make clear that preschools do not deny equal opportunity based on disability or income level in violation of the statute when they provide specialized services to children with disabilities and children living in poverty. *See* C.R.S. § 2-4-201(1)(b) (declaring state legislature's presumption that "[t]he entire statute is intended to be effective"); *In re W.P.*, 295 P.3d 514, 519 (Colo. 2013) (explaining that state statutory provisions are read "as a whole in order to accord consistent, harmonious, and sensible effect to all their parts").

This interpretation of the statutory language is also consistent with longstanding statutory practice. As this Court has recognized, in some contexts, distinctions based on protected characteristics can advance, rather than undermine, a state's interest in equal opportunity. *See, e.g.*, *West Virginia v. B. P. J.*, 146 S. Ct. 2356, 2367 (2026) (recognizing that "maintain[ing] separate women's and men's sports teams" ensures "equal opportunity for female athletes").

Disability law is such a setting. Legislatures have long recognized that specialized services and modifications are sometimes necessary to provide equal opportunity for those with disabilities. For this reason, statutes like the Americans with Disabilities Act

(“ADA”), Rehabilitation Act, and IDEA “generally limit their protections to individuals who have a ‘disability.’ In that respect, the disability rights laws are very different from the laws that prohibit race and sex discrimination.” Samuel R. Bagenstos, *Disability Rights Law: Cases and Materials* 15 (3d ed. 2021); *see* ADA, 42 U.S.C. § 12101(a)(7) (declaring ADA’s goal to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for “individuals *with* disabilities” (emphasis added)); Rehabilitation Act, 29 U.S.C. § 701(a)(6) (similar); IDEA, 20 U.S.C. § 1400(c)(1) (“Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”).

This Court has embraced similar understandings of equal opportunity when interpreting disability rights statutes. *See Endrew F. v. Douglas Cnty. Sch. Dist.,* 580 U.S. 386, 399-400 (2017) (explaining that providing specialized services for children with disabilities helps achieve IDEA’s “ambitious” goals “in response to Congress’ perception that a majority of handicapped children in the United States were either totally excluded from schools or were sitting idly in regular classrooms awaiting the time when they were old enough to drop out” (citation modified)); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (“[P]references [for individuals with disabilities] will sometimes prove necessary to achieve the [ADA’s] basic equal opportunity goal.”); *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (explaining that federal funding recipients may have to make “reasonable accommodations” in their programs to ensure that those with disabilities have "meaningful access" to their benefits).

So too with laws providing specific benefits or other forms of special assistance to those living in poverty. This Court has long recognized that income-based public assistance can "bring within the reach of the poor the *same* opportunities that are available to others to participate meaningfully in the life of the community." *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (emphasis added); *see Schweiker v. Hogan*, 457 U.S. 569, 590 (1982) ("A decision to allocate medical assistance benefits only to the poor does not itself violate constitutional principles of equality; in terms of their ability to provide for essential medical services, the wealthy and the poor are not similarly situated and need not be treated the same.").

Head Start is a prime example: In funding Head Start programs, Congress expressly recognized the need for specialized services to help children from low-income families achieve equality. *See* S. Rep. No. 109-131, at 2 (2005) ("Children in Head Start enter the program with a number of factors that put them at risk of school failure, such as extreme poverty, family economic and housing instability, and limited family education attainment . . . Research shows that Head Start clearly makes a difference for children living in poverty."); *see also* Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508, 508 (1964) (declaring the Head Start program's objective "to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training"). Federal law recognizes that ensuring equal opportunity for children living in poverty often requires providing them with specialized services, and Colorado's UPK law recognizes this too.

For all these reasons, the Tenth Circuit, like the trial court before it, correctly understood that preschools do not deny equal opportunity in violation of the statute when they provide specialized services to children with disabilities and children living in poverty. Pet.App.37a-38a; *see also* Pet.App.130a (Dist.Ct.) (concluding that "special programming" to serve children with disabilities and those in low-income families "does not violate the equal-opportunity requirement"). This Court generally accords "great deference" to lower federal court interpretation of state statutes. *See Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017); *Frisby v. Schultz*, 487 U.S. 474, 482 (1988). Petitioners have provided no grounds to disturb that deference here.

B. Allowing specialized services for children with disabilities and low-income families advances UPK's equal-opportunity interests.

The UPK statute declares Colorado's interest in ensuring that every four-year-old Coloradan has equal opportunity, regardless of protected-class status, to enroll in and receive high-quality publicly funded preschool services. *See* C.R.S. § 26.5-4-205(2)(b); Br.37. Ensuring that UPK includes preschools that provide specialized services to children with disabilities and children from low-income families—and approving algorithmic adjustments that help match those children with those preschools—helps Colorado achieve these interests.

Those programs rest on the premise that certain children may require specified services if they are to have a reasonable opportunity for a quality education. For instance, a blind child may require Braille textbooks to learn. *See* 34 C.F.R. § 300.324(a)(2)(iii). And a family living in poverty may benefit from Head Start's programs for developing reading readiness and parenting skills. *See* 42 U.S.C. §§ 9836(d)(2)(H)(vi), 9837(b)(3)(A), (4)-(5). Petitioners seek something entirely different: permission to exclude children from publicly funded preschools, based on protected-class status. Their conduct undermines Colorado's equal-opportunity interests by depriving families, based on protected-class status, of otherwise-available publicly funded preschool options.

General applicability analysis, properly conducted, protects religious exercise by screening for government distinctions that prohibit religious conduct yet allow secular conduct that undermines the government's asserted interests in a similar way. *E.g.*, *Tandon*, 593 U.S. at 62. This analysis identifies laws that devalue religious justifications for regulated conduct by treating them as less important than non-religious reasons for conduct that poses similar risks to the government's interests. *See Lukumi*, 508 U.S. at 537-38; *see also Fulton*, 593 U.S. at 534.

Allowing publicly funded preschools to provide specialized services to disabled children and children living in poverty does not treat those children's needs as more important than others'; instead, it recognizes that those children have *different* needs that require different support to achieve equal opportunity.[14] Under this Court's precedent, treating conduct differently based on its different relationship to the state's equal-opportunity interests does not devalue religion, and does not defeat UPK's general applicability. *See Fulton*, 593 U.S. at 534.

The Free Exercise Clause has never forced legislatures to choose between providing specialized services for children with disabilities and children living in poverty to ensure their equal opportunity, on one hand, and protecting children from exclusion from publicly-funded services based on protected-class status, on the other. This Court should not interpret the Constitution to require that choice now.

---

[14] Contrast UPK with the very different school district policy invoked by Petitioners, Br.39, citing *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664 (9th Cir. 2023) (en banc) ("*FCA*"). That policy required student groups to use non-discriminatory criteria for membership decisions, where both parties agreed that the board had discretion to grant exceptions. *FCA*, 82 F.4th at 678-88. And not only had the board exercised discretion to allow secular student groups to limit membership based on sex and ethnicity, but those exceptions posed risks to the schools' asserted equal-opportunity interests indistinguishable from those posed by the requested religious exception. *Id.* at 689-90. That case involved secular exceptions entirely absent here and thus had no need to consider the relationship between equal opportunity and specialized services for children with disabilities or from low-income families.

C. CDEC has no authority to create or grant exceptions from the equal-opportunity requirements.

The UPK statute, its implementing regulations, the program's actual operation, and the agency witnesses' testimony all confirm that CDEC may authorize adjustments (i.e., programmatic preferences) to the matching algorithm only so long as those adjustments are not used to violate the equal-opportunity requirements. 8 CCR 1404-1 § 4.109(A)(9)(b), 4.109(B). While CDEC has authority to determine whether the adjustments would comply with the statute, the agency has no authority to excuse publicly funded preschools from compliance.

1. UPK's statute and regulations foreclose individualized exceptions from the equal-opportunity requirements.

To the extent Petitioners believe the statute, C.R.S. § 26.5-4-205(2)(b), empowered CDEC to grant individualized exceptions to the equal-opportunity requirements, they are wrong: "[T]he statute does not say anything like that." *See Carson*, 596 U.S. at 782.

Nor do UPK's implementing regulations allow any exceptions—discretionary or otherwise—from the equal-opportunity requirements. 8 CCR 1404-1 §§ 4.110(B), 4.109(B).

Petitioners and the Solicitor General assert, incorrectly, that CDEC's discretion to adjust the matching algorithm shows that the agency has discretion to grant exceptions to the equal-opportunity requirements. Br.43; U.S.Br.23-24. But an adjustment to the algorithm unrelated to the characteristics protected by the equal-opportunity requirements is not an exception to those requirements. UPK therefore stands in stark contrast with the contractual provision in *Fulton* that expressly empowered city officials to grant discretionary exceptions to the city's antidiscrimination requirement. *See Fulton*, 593 U.S. at 535.

2. Prioritizing families receiving public-assistance benefits neither violates UPK's equal-opportunity requirements nor undermines Colorado's equal-opportunity interests.

UPK's operation conforms to its statutory and regulatory text. After a full trial, the district court determined that none of the algorithmic adjustments approved by CDEC under the programmatic preference allow a provider to deny equal opportunity in violation of the statute. Pet.App.122a-23a; *see* Pet.App.32a (court of appeals) (reviewing trial record and reaching the same conclusion).

Petitioners nevertheless argue that the regulation's illustrative example of a permissible adjustment—an adjustment to prioritize "families who are receiving a specific public assistance benefit(s) such as housing assistance"—shows CDEC's willingness to authorize a provider to deny equal opportunity based on "income level" in violation of the statute. Br.44. Petitioners are mistaken.

Even if preschools used families' receipt of certain public-assistance benefits as a proxy for low income, prioritizing low-income families does not deny equal opportunity in violation of the statute, as explained *supra* at IIIA. Nor, for the same reasons, does that preference undermine Colorado's equal-opportunity interests; instead, it advances those interests. *See supra* at IIIB.

Along the same lines, Petitioners argue that allowing preschools to prioritize families receiving housing assistance amounts to denying equal opportunity based on a "lack of housing," incorrectly assuming that individuals experiencing homelessness would be ineligible for such benefits. Br.44.[15] But allowing providers to prioritize families receiving public housing assistance would not authorize the exclusion of any family because they lack housing. Rather, those benefits serve families who lack housing by providing public housing, financial support for private housing, and other housing-related services. *E.g.*, 42 U.S.C. §§ 11301-11435 (codifying federal homeless housing assistance programs); C.R.S. § 24-32-721(2)(d)(VI)(A), (A.5), (D) (establishing state fund to pay for "[r]ental assistance and tenancy support service programs" for individuals experiencing homelessness).

Moreover, Petitioners assume that a family's receipt of public-assistance benefits is necessarily a proxy for its low income. But the regulation does not so limit the term "public assistance benefits" and, indeed, some such benefits are not tied to income at all. *E.g.,* C.R.S. §§ 26-7-102(8), -105, -106 (state program providing families with financial assistance—under certain circumstances that are not tied to income—when adopting a child); 39-3-203(1) (exempting fifty

---

[15] Petitioners raised this argument for the first time in their opening brief before this Court, and the record contains no evidence about how providers might prioritize families receiving housing assistance. This Court should decline to consider this argument.

percent of the first $200,000 of a home's value from property tax for older homeowners regardless of income).

3. UPK gives no one the authority to excuse participating preschools from complying with the equal-opportunity requirements.

UPK's regulations empower CDEC to approve preschools' requests for algorithmic adjustments so long as those adjustments do not allow a publicly funded preschool to deny equal opportunity in violation of the statute. 8 CCR 1404-1 §§ 4.109(B), 4.110(B). The authority to assess a request's compliance with the statute is not the authority to *waive* compliance with the statute. And an official's mistaken view about whether hypothetical conduct would violate a statute is not the power to excuse conduct that violates the statute.

Dr. Roy, CDEC's Executive Director and the agency's top official, ultimately decides whether to approve such requests, after consulting with other CDEC staff, including members of CDEC's legal team. C.R.S. §§ 26.5-1-104, 26.5-1-105(1)(a); JA252, 348, 820-21. Dr. Roy's deposition testimony confirmed that she "cannot grant an accommodation to a nondiscrimination statute statement," that CDEC "cannot legally allow any participant to knowingly discriminate against children," and that she "cannot provide an exemption against what the law says." JA821, 826-27; *see also* Pet.App.288a-90a (Dr. Roy's letter explaining reasons for denying requested exemption); JA235-36, 252 (testimony from Early Childhood Transition Director Mary Michael Cooke confirming that Dr. Roy did not have authority to grant an exemption that violated the statute).

Petitioners nevertheless assert that UPK Director Dawn Odean's testimony shows that CDEC felt authorized to grant individualized exemptions from the equal-opportunity requirements. Br.10-11, 44-47. But Ms. Odean's response to hypothetical scenarios addressed only whether certain conduct would violate the equal-opportunity requirements; she did not claim any authority to waive those requirements—and, in fact, she repeatedly disclaimed such authority. JA347-49. Again, neither UPK's statute nor its regulations allow exceptions to the equal-opportunity requirements—and a witness's testimony cannot alter the meaning of a statute or regulation. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403 (2024) ("Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences.").

Put simply, CDEC has no authority to approve a preschool's request for an adjustment to the program's matching algorithm if that request violates the equal-opportunity requirements. 8 CCR 1404-1 §§ 4.109(B), 4.110(B). If any action by CDEC were to depart from the statute's equal-opportunity requirements, the appropriate recourse would be to declare that action invalid. *See, e.g.*, *Hanlen v. Gessler*, 333 P.3d 41, 49 (Colo. 2014) ("A rule that conflicts with a statute is void."); C.R.S. § 24-4-103(8)(a) ("No rule shall be issued except within the power delegated to the agency and as authorized by law.").

Even if Ms. Odean's testimony were relevant to the statute's legal meaning, Petitioners misconstrue that testimony, which repudiated the possibility of any discretion to create exemptions from the statute. JA281-82, 301, 316-17, 347, 349-50. Ms. Odean was mistaken when she speculated that Petitioners' hypothetical preferences—prioritizing "children of color," "gender-nonconforming children," or "members of the LGBTQ community"—scenarios she had never previously considered or encountered—would not violate the equal-opportunity requirements. JA347-49. But mistakenly predicting what hypothetical conduct might violate the statute does not claim any power to waive that statute's requirements.

What matters instead for UPK's general applicability is that she—and CDEC's other witnesses—were "unwavering" in their insistence that the agency cannot and does not approve any preferences that would violate the statute. Pet.App.72a-73a; JA235-36, 252 (Cooke trial testimony), 281-82, 301, 316-17, 347, 349-50 (Odean trial testimony), 821, 826-27 (Roy deposition testimony). After a full trial on the merits, the district court properly declined to find that CDEC had the authority to grant exceptions "based merely on hypotheticals and speculation when nothing in the UPK Statute or official documents from [CDEC] supports that it does." Pet.App.134a. Petitioners provide no basis to reverse that conclusion.

4. The statute's temporary-waiver provision does not allow exceptions from the equal-opportunity requirements.

In a two-sentence footnote, Petitioners also argue that the statutory provision allowing for temporary waivers from UPK's quality standards creates a mechanism for CDEC's discretionary waiver of the equal-opportunity requirements. Br.44 n.6. It does not, for two reasons.

First, the statute allows a waiver only "for a limited time while working toward compliance with the quality standards" and only when "necessary to ensure the availability of a mixed delivery system within a community." C.R.S. § 26.5-4-205(1)(b)(II). A preschool seeking continuing permission to disregard the equal-opportunity requirements is not working toward compliance with those standards. As both courts below correctly interpreted the statute, the temporary-waiver provision does not allow "even a temporary exception to the nondiscrimination requirement." Pet.App.34a, 117a-21a.

Second, the temporary-waiver provision separately forbids waiver of UPK's "quality standards relating to health and safety," C.R.S. § 26.5-4-205(1)(b)(II). The UPK statute requires CDEC to establish quality standards ensuring safe and healthy learning environments, and it expressly requires those quality standards to include the equal-opportunity requirements. C.R.S. § 26.5-4-205(1)(a); *see also* §§ 26.5-1-109(1), 26.5-1-113(1)(a), 26.5-4-204(1)(d). Because the equal-opportunity requirements help ensure safe and healthy learning environments, they cannot be waived even temporarily. Pet.App.120a ("The equal-opportunity requirement is a quality standard related to health and safety that cannot be waived under the UPK Statute.").

IV. Colorado's equal-opportunity requirements satisfy any level of scrutiny.

Petitioners' argument depends on strict scrutiny; they identify no basis for an exemption under any lesser scrutiny. *See* Pet.App.47a. Because CDEC's equal-opportunity requirements are neutral and generally applicable, they are subject to rational-basis review, and that standard's application defeats Petitioners' challenge. In any event, the equal-opportunity requirements also satisfy strict scrutiny.

A. Colorado's equal-opportunity interest is compelling.

Colorado has compelling interests in ensuring that every four-year-old Coloradan has equal opportunity, regardless of protected characteristics, to enroll in and receive high-quality, publicly funded preschool services. *See Fulton*, 593 U.S. at 542 (government has "weighty" interest in ensuring equal treatment regardless of parents' sexual orientation); *Masterpiece Cakeshop*, 584 U.S. at 631 ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."); Pet.App.47a (recognizing Colorado's "extraordinarily weighty [interest] in protecting equal access to preschool education for Colorado children"); *see also Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) ("In enacting Title VII, Congress clearly asserted a strong government interest in eliminating religious discrimination in employment."); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984) (describing compelling state interests in "prohibiting gender discrimination in places of public accommodation").

Indeed, UPK reflects a commonplace example of government's longstanding interests in forbidding entities from engaging in various forms of discrimination when delivering publicly funded services. *E.g.*, *Lau v. Nichols,* 414 U.S. 563, 569 (1974) (describing Congress's interest in enacting Title VI as ensuring that taxpayer funds not be used to entrench or subsidize racial discrimination); *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 286 (1998) (describing Congress's interest in enacting Title IX as "avoid[ing] the use of federal resources to support discriminatory practices").

Petitioners argue that Colorado's interest "is not compelling as applied to Petitioners." Br.49. Their first point in support of that position simply repeats their mischaracterization of UPK as allowing "broad secular exemptions from the equal-opportunity mandate," when UPK does no such thing. Br.49; *see supra* at III. And their remaining two arguments, Br.49-51, find no grounding in the record.

The record instead demonstrates Colorado's compelling interest in not granting Petitioners an exemption from the equal-opportunity requirements. *Contra* Br.49-50. Colorado's interest is not in ensuring that every child has some publicly funded preschool seat somewhere; it is in ensuring that a family's protected-class status does not deny them the ability to choose among available publicly funded preschools. *See* Pet.App.140a-48a (allowing Petitioners to exclude children based on their family's protected-class status would frustrate Colorado's compelling interests).

The unrebutted expert testimony confirmed that families choose preschools for many reasons, including location, class size, reputation, curriculum, teacher quality, and schedule. Pet.App.91a; JA356, 389-90. Because the nearly 2,000 UPK preschools statewide vary widely across these dimensions, they are not fungible—and families experience harm when they are excluded, based on protected-class status, from otherwise-available publicly funded preschool options.[16]

Parents—including same-sex parents and religious parents—often prefer schools located close to their home, work, or public transportation. SJA11-12, 26-27; JA1045. This is especially important for same-sex parents because they are disproportionately likely to live in poverty. Pet.App.90a.[17] Petitioners' suggestion that they "would easily be able to refer [excluded LGBTQ] families to any number of nearby preschools of comparable quality," Br.50, is thus unsupported by any record citation and contrary to the trial record. In

---

[16] The fact Petitioners have decided not to participate in the new UPK program (and thus have received no complaints about excluding families from protected classes, Br.49-50) cannot be used to negate that harm. *See* Pet.App.141a ("It cannot be assumed that a lack of formal complaints in the past equates to discrimination not having occurred or evinces it is unlikely to occur in the future.").

[17] The district court found the experts' testimony "reliable and persuasive" in supporting Colorado's compelling interests, and that the "[u]ncontroverted testimony at trial" confirmed Colorado's interests as bona fide and "not factitious, hypothesized, or invented post hoc." Pet.App.94a, 139a. Petitioners nevertheless assert, Br.50, that CDEC conceded in its Motion to Dismiss that future harm to LGBTQ *families* is "speculative." *See* Dist.Ct.Dkt.38 at 11. But that Motion instead argued that *the preschools*' asserted injury and threatened enforcement were speculative for purposes of standing and ripeness. Dist.Ct.Dkt.38 at 8-15.

practice, families' ability to enroll in preschool often turns on whether a preschool that will accept them is located close to their home, work, or public transportation.[18] Pet.App.91a. For some families, the only meaningfully accessible option for early childhood education may be a religious provider. Pet.App.91a.

Moreover, LGBTQ parents may seek out religious preschools because they—like any other parents—may draw on religion and faith as a source of solace and sustenance. Pet.App.93a; JA439. Those parents, too, may want the same opportunity to choose to enroll in a publicly funded religious school as is available to straight parents. JA439.

Finally, Petitioners dispute Colorado's compelling interest by mischaracterizing that interest as maximizing the total number of publicly funded preschool seats in the state. Br.50. But in doing so, Petitioners overlook UPK's commitment to the quality, not just quantity, of publicly funded preschools—demonstrated by UPK's quality standards regarding not only equal opportunity, but also caps on class size and student-to-teacher ratios, teacher qualifications, and more. *See* C.R.S. § 26.5-4-205(2)(c)-(d); 8 CCR 1404-1 § 4.110(C)-(D). As the district court recognized, "[s]imply adding to the list of UPK providers" does not address Colorado's interests in ensuring "preschool programs that best fit [a] family's needs" and avoiding

[18] As the district court additionally found, "[f]or LGBTQ+ parents in rural environments, sometimes the only option available for early childhood education is a religious provider." Pet.App.91a. Even in metropolitan areas, these parents experience challenges in accessing early childhood education. JA391-93, SJA13.

the "risk for inadequate outcomes." Pet.App.143a; *see* Pet.App.143a-44a (distinguishing Colorado's interest from that asserted in *Fulton*, which included "maximizing the number of foster parents").

Properly characterized, Colorado has a compelling interest in enforcing the equal-opportunity requirements uniformly as to all UPK participants, including Petitioners.

B. The equal-opportunity requirements are narrowly tailored.

UPK's equal-opportunity requirements are narrowly tailored to Colorado's compelling interests. Those requirements do not restrict publicly funded preschools' religious teaching or curricula, nor do they apply to any services that are not funded by UPK (for example, they do not apply to a religious provider's K-8 school, high school, or soup kitchen). JA306. Conversely, allowing Petitioners to exclude children based on protected-class status would frustrate Colorado's interests in ensuring its families are not disqualified from otherwise-available publicly funded preschool options based on their protected-class status.

And neither of Petitioners' proposed alternatives would effectively advance the state's interests. *See Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (government establishes that it has adopted the least restrictive alternative when it shows that the proposed alternatives would not be as effective in achieving its interest).

Petitioners first propose that CDEC's online portal post information about which publicly funded preschools welcome families regardless of protected-class status, and which do not. Br.51-52. But Colorado's interest is not in preventing families from being *surprised* to learn that some publicly funded providers will exclude them; Colorado's interest instead seeks to *prevent* them from being excluded, based on protected-class status, at all.

Petitioners also propose that Colorado direct parents to publicly funded schools that will not exclude their family based on protected characteristics. *Id.* But requiring parents to travel farther to find a publicly funded preschool that will take them regardless of their sexual orientation, gender identity, or religious affiliation frustrates Colorado's interests in ensuring equal opportunity. As another illustration, parents might prefer a religious school because of its strong teachers and academic reputation. JA145 (discussing "excellent" reputation of Catholic schools), 160-61, 190. If turned away from that school because of their protected-class status, they "would lose out not only on receiving services from their preferred preschool but perhaps would also be forced to forgo 'the best academic experience.'" Pet.App.146a.

Again, Colorado's interest is not in ensuring that every family has access to some UPK preschool somewhere—but instead in ensuring that no family is deprived of an available publicly funded option because of their protected-class status. Allowing Petitioners to exclude families based on religious affiliation, sexual orientation, or gender identity would frustrate this interest. Denying Petitioners permission to exclude families based on protected-class status is the least restrictive means of achieving Colorado's compelling interest, and accordingly, CDEC's action satisfies strict scrutiny.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

SHANNON WELLS STEVENSON
Solicitor General

HELEN NORTON*
Deputy Solicitor General

**Counsel of Record*

Office of the Colorado Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Helen.Norton@coag.gov
(720) 508-6000

ANDREW M. WILLIAMS
Assistant Deputy Attorney General

VIRGINIA R. CARRENO
Second Assistant Attorney General

ABBY CHESTNUT
JANNA K. FISCHER
KOLYA D. GLICK
MICHELE K. MULHAUSEN
J. GREGORY WHITEHAIR
Senior Assistant Attorneys General

NICOLE S. RUST
BRIANNA TANCHER
LANE TOWERY
BRITTANY LIMES ZEHNER
Assistant Attorneys General

RADHIKA M. KATTULA
Assistant Attorney General Fellow

Counsel for Respondents

August 17, 2026