

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 OF AMICI CURIAE NAACP LEGAL
DEFENSE AND EDUCATIONAL FUND, INC.
AND THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE IN
SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation’s first and foremost civil rights organization. Since its founding in 1940, LDF has fought to secure equal justice under the law for all Americans, and to break down barriers that prevent Black Americans from realizing their basic civil and human rights.

Through litigation, advocacy, and public education, LDF strives to enforce the United States Constitution’s promise of equal protection and due process for all, and to eliminate barriers that prevent Black people in America from realizing their basic civil and human rights. LDF has participated as counsel of record in numerous significant cases before this Court involving various forms of racial discrimination. *See, e.g., Allen v. Milligan*, 599 U.S. 1 (2023); *Buck v. Davis*, 580 U.S. 100 (2017); *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014); *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). Consistent with its opposition to all forms of discrimination, LDF has participated as amicus curiae in many cases in this Court addressing the rights and dignity of lesbian, gay, bisexual, transgender and queer (LGBTQIA+) people. *See, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018); *Obergefell v. Hodges*, 576 U.S. 644

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

(2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996).

LDF was counsel of record in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), and filed an amicus brief in *Bob Jones University v. United States*, 461 U.S. 574 (1983), landmark cases that solidified the power of public accommodations laws to eradicate discrimination—including discrimination purportedly compelled by religious justification. At the same time, LDF has participated as counsel of record or amicus curiae to vindicate the rights of victims of religious discrimination. *See, e.g., Trump v. Hawaii*, 585 U.S. 667 (2018); *Clay v. United States*, 403 U.S. 698 (1971); *O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973); *Reid v. Memphis Publ'g Co.*, 468 F.2d 346 (6th Cir. 1972).

LDF is committed to ensuring the fair application of laws that ensure all students enjoy the right to an education free from discrimination, including the nondiscrimination mandate that applies to Colorado's universal preschool program.

The National Association for the Advancement of Colored People (“NAACP”) is the nation's oldest organization dedicated to the advancement of civil rights in the United States. Founded in 1909 by pioneers of racial justice, the NAACP's core mission is to achieve equity, political rights, and social inclusion by advancing policies and practices that expand human and civil rights, eliminate discrimination, and accelerate the well-being, education, and economic security of Black people and all persons of color. The NAACP's work is rooted in racial equity, civic engagement, and supportive policies and institutions for all marginalized people. The NAACP openly and forcefully supports the LGBTQ+ community, fights discrimination against the LGBTQ+ community and

welcomes members of the LGBTQ+ community as full and active members of its units. The NAACP believes that denying the humanity and rights of LGBTQ+ individuals perpetuates systemic discrimination, exacerbates health and economic disparities, and hinders the pursuit of equity and justice for all.

Amici Curiae have a strong interest in the fair application of the United States Constitution and federal and state antidiscrimination laws, and submit that their experience and knowledge will assist the Court in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Brown v. Board of Education of Topeka roundly rejected race-based exclusion from public educational benefits as incompatible with the Constitution’s requirement of equal protection under the law. 347 U.S. 483, 493 (1954). In reaching that decision, the Court recognized that “[e]ducation is perhaps the most important function of state and local governments.” *Id.* Serving as “the very foundation of good citizenship” and “a principal instrument in awakening [a] child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” *Id.* Where a state undertakes to provide the opportunity of an education, “it[] is a right which must be made available to all on equal terms.” *Id.*

That is precisely what Colorado sought to do when it established its state-subsidized universal pre-kindergarten (UPK) program. *See* JA 890–91. Colorado created the UPK program to “provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation,

gender identity, lack of housing, income level, or disability.” JA 1042; *see also* Colo. Rev. Stat. § 26.5-4-204(2)(b) (2025). To advance this stated goal and ensure no child served by a state-funded UPK program is denied the educational benefits of pre-kindergarten on the basis of a protected characteristic, Colorado restricted its award of UPK funds to those programs operated on a nondiscriminatory basis.

Petitioners seek to carve out a broad exemption from Colorado’s nondiscrimination mandate to permit Petitioners and others to bar students from enrolling in their UPK programs based on sexual orientation or gender identity. Petitioners admit that these restrictions are discriminatory. But because the views that animate the restrictive policies are religious, Petitioners assert that their requested exemption is both permitted and required by the First Amendment’s Free Exercise Clause. Not so.

Religion has long been used as a purported justification for invidious discrimination of all types, including racial discrimination. *See Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). But this Court has repeatedly recognized that the government can restrict unlawful discrimination even if that discrimination comes cloaked in religious garb. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). Religious justifications “do not allow business owners and other actors in the economy and society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 584 U.S. 617, 631 (2018). And rightfully so.

Antidiscrimination laws play a critical role in ensuring all segments of society enjoy equal and open

access to education and other public goods and benefits made broadly available by government. Here, permitting discrimination would needlessly deny children of disfavored groups the benefits of UPK based on prejudice, stereotypes, or other irrelevant factors beyond their control. It would also stigmatize families with the imprimatur of the government. Such discrimination is harmful under any circumstances. But it is especially noxious when those most burdened and stigmatized are children. Petitioners propose to impose these harms on a particularly vulnerable group of children—three- and four-year olds in formative stages of their development who are experiencing “school” for the very first time. Given their young age, the preschoolers excluded from petitioners’ UPK programs would likely be denied access not because of *their* gender identity or sexual orientation but because of their *parent’s*.

Recognizing a First Amendment exception that permits this sort of exclusion would contravene precedent and frustrate Colorado’s important interest in guarding against discrimination on the basis of sexual orientation and gender identity. That interest coheres with federal prohibitions of discrimination against lesbian, gay, and transgender individuals, which this Court has recognized. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 683 (2020) (holding that employment discrimination against gay and transgender individuals violates Title VII); *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015) (holding that states violate the Fourteenth Amendment when they “bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex” or “refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character”); *United States v. Windsor*, 570 U.S.

744, 774–75 (2013) (holding that the federal government’s refusal to recognize “same-sex marriages made lawful by the State” violates the Fifth Amendment’s Due Process Clause). If allowed, Petitioner’s requested exception also threatens to unleash an array of other forms of discrimination, including racial discrimination, in education. For these reasons, we urge this Court to reject Petitioners’ claims and affirm the decision below.

ARGUMENT

The relationship between civil rights and religion is a long and complex one. Religion has, in many instances, inspired the quest for equality.² In other instances, however, it has been abused to promote enslavement, justify segregation, and uphold subordination.³

Religion does not provide a lawful basis for discrimination. This Court has repeatedly rejected religious justifications for differential treatment, particularly in the provision of education and other public goods and services. And for good reason: allowing individuals or entities to claim exemptions from generally applicable laws on the basis of their

² See, e.g., Allison Calhoun-Brown, *Upon This Rock: The Black Church, Nonviolence, and the Civil Rights Movement*, 33 PS: Pol. Sci. & Pol. 168, 169–73 (2000) (recounting the role of Black churches in supporting the Civil Rights Movement); Charles Marsh, *Unfinished Business: John Perkins and the Radical Roots of Faith-Based Community Building*, in *The Beloved Community: How Faith Shapes Social Justice from the Civil Rights Movement to Today* 153–188 (2006) (describing the role of John Perkins in galvanizing people of faith to support the Civil Rights Movement in Jackson, Mississippi).

³ See *infra* Part I.

religious beliefs would enable each person to effectively “become a law unto [themselves].” *Reynolds v. United States*, 98 U.S. 145, 167 (1878). Such a scheme is legally indefensible and practically unworkable because it risks subjecting some of the most vulnerable members of society to unlawful discrimination and stigmatization.⁴ This outcome contravenes the clear will of Congress and countless local legislatures and states, like Colorado, that have adopted generally applicable antidiscrimination laws.⁵ It also violates this Court’s precedent.⁶ Because nothing in Petitioners’ case warrants departing from that precedent, Petitioners’ Free Exercise claims must be rejected.

I. Religious Beliefs Have Historically Been Used to Justify Racial and Other Forms of Overt Discrimination, Including in Schools.

Individuals and institutions have long used religion to justify discrimination of various kinds. Theology figured prominently in the rationale for racial segregation and discrimination in education and other areas.

After the passage of the Fourteenth Amendment and in the decades before *Brown*, governments, courts, and private supporters of de jure segregation cited religious beliefs to justify overt discrimination.⁷

⁴ See *infra* Sections II.B. and III.

⁵ See *infra* Section II.A.

⁶ See *infra* Section II.

⁷ See, e.g., Darrell Walsh, *The Role of Christianity in Reinforcing Racial Hierarchies in the United States*, 15 J. of Soc.

In defense of segregated schools, the Kentucky Supreme Court held that “separation of the human family into races, distinguished . . . by color . . . is as certain as anything in nature” and segregation “is divinely ordered.” *Berea Coll. v. Kentucky*, 94 S.W. 623, 626 (Ky. 1906), *aff’d*, 211 U.S. 45 (1908). And, in *Kinney v. Virginia*, the Virginia Supreme Court opined that Divine Will required that the races “should be kept distinct and separate.” 71 Va. (30 Gratt.) 858, 869 (1878); *see also Scott v. Georgia*, 39 Ga. 321, 326 (1869) (rejecting the notion that there is “equality between the different races” because “[t]he God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it”); *West Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 209, 213 (1867) (justifying segregation based on the belief that “the Creator” made two races and “He intends that they shall not overstep the natural boundaries He has assigned to them”).

After *Brown*, religion continued to be used to foment resistance to integration. Judges and state officials openly relied on religion to justify school segregation. In his infamous 1963 “Segregation Now, Segregation Forever” inaugural address, Alabama Governor George Wallace declared that the federal government’s effort to enforce desegregation “is a

& Christianity 52, 58–61 (2025) (documenting the history of religious justifications for racial segregation and white supremacy in the United States); *see also* G.T. Gillespie, *A Christian View on Segregation*, Pamphlets & Broadsides 7–13 (1954), https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1000&context=citizens_pamph (defending racial segregation on religious grounds).

system that is the very opposite of Christ.”⁸ And, a year after *Brown*, Florida Supreme Court justices issued a concurring opinion that criticized school integration and noted, in support, that “when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man.” *Florida ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20, 28 (Fla. 1955) (Terrell, J., concurring). The concurrence described *Brown* as “advis[ing] that God’s plan was in error and must be reversed.” *Id.*

Many White southern religious leaders likewise resisted integration by arguing “that segregation was biblical.”⁹ For example, a week after *Brown*, Reverend Carey Daniel, an ardent segregationist and pastor of a prominent Baptist church in Texas, delivered a sermon entitled “God the Original Segregationist.”¹⁰ Reverend Daniel published the sermon as a pamphlet in 1955.¹¹ The pamphlet was “widely distributed” by

⁸ Ala. Governor George Wallace, *Inaugural Address (1963): The “Segregation Now, Segregation Forever” Speech* (Jan. 14, 1963), <https://digital.archives.alabama.gov/digital/collection/voices/id/2952/>.

⁹ See, e.g., Mark Newman, *Getting Right with God: Southern Baptists and Desegregation, 1945-1995* 88–89 (2001).

¹⁰ See Andrew M. Manis, *Southern Civil Religions in Conflict: Civil Rights and the Culture Wars* 136–37 (Mercer Univ. Press 2002).

¹¹ Carey Daniel, *God the Original Segregationist* (1955), https://usm.access.preservica.com/uncategorized/IO_92ab5478-69b5-4763-ade2-a6a016b5d70c/.

Daniel.¹² The pamphlet was also published in prominent southern newspapers like the Dallas Morning News,¹³ and it was replicated by other clergy.¹⁴ More than a million copies of the pamphlet sold in the decade after *Brown*.¹⁵

Theological justifications for segregation also fueled the opening and public financing of “segregation academies.” These were private schools that educated only White students and that proliferated across the South in defiance of *Brown*’s directive to integrate.¹⁶ 347 U.S. at 495. Private schools “exploded during the 1960s and 1970s,” such that “total enrollment in private schools increased from 25,000 students in 1966 to 535,000 by 1972.”¹⁷ This Court enjoined efforts by Arkansas, Louisiana, and Mississippi to finance private (both sectarian and

¹² Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 Vt. L. Rev. 237, 262 (2016).

¹³ See Edward H. Miller, *Nut Country: Right-Wing Dallas and the Birth of the Southern Strategy* 71–74, 176 (Univ. of Chicago Press 2015).

¹⁴ See, e.g., Gillespie, *supra* note 7, at 8–13. Gillespie originally gave this address less than six months after Daniels delivered his sermon. See *id.* at 1.

¹⁵ Carl R. Weinberg, *Red Dynamite: Creationism, Culture Wars, and Anticommunism in America* 163 (Cornell Univ. Press 2021).

¹⁶ Vania Blaiklock, *The Unintended Consequences of the Court’s Religious Freedom Revolution: A History of White Supremacy and Private Christian Church Schools*, 117 Nw. U. L. Rev. Online 46, 55 (2022).

¹⁷ *Id.* (citing Jerome C. Hafter & Peter M. Hoffman, Note, *Segregation Academies and State Action*, 82 Yale L.J. 1436, 1441 (1973)).

nonsectarian) segregation academies that were designed to avoid *Brown*. See, e.g., *Norwood v. Harrison*, 413 U.S. 455, 469–70 (1973); *Poindexter v. La. Fin. Assistance Comm’n*, 296 F. Supp. 686 (E.D. La. 1968), *aff’d sub nom La. Educ. Comm’n for Needy Child. v. Poindexter*, 393 U.S. 17 (1968) (mem.); *Aaron v. McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959), *aff’d sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959) (mem.). Reflecting on injunctions against Arkansas and Louisiana’s attempts to thwart integration, Justice Douglas emphasized that “[w]here the governmental activity is the financing of the private school, the various limitations or restraints imposed by the Constitution or state governments come into play.” *Lemon v. Kurtzman*, 403 U.S. 602, 632 (1971) (Douglas, J., concurring), *abrogated on other grounds by Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534–36 (2022). Segregation academies often used the First Amendment to attempt to justify racial discrimination without the constraints of government oversight.¹⁸ See *Norwood*, 413 U.S. at 468–70 (rejecting the claim that religious schools receiving public funds can engage in racial discrimination because “[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protection”).

Religious explanations were likewise offered to legitimize racial discrimination in public accommodations and other areas. In *Newman v. Piggie Park Enters.*, this Court rejected a restaurant owner’s religious justification for refusing to serve Black patrons. 390 U.S. 400, 402 n.5 (1968). And, in *Loving v. Virginia*, this Court struck down anti-

¹⁸ Blaiklock, *supra* note 16, at 51.

miscegenation laws despite the Virginia court's assertion that such laws recognized that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix." 388 U.S. 1, 3 (1967) (internal quotation marks omitted).

This Court again confronted this issue in *Bob Jones University v. United States*, 461 U.S. 574, 605 (1983). There, Bob Jones University, which denied admission to students in interracial marriages, and Goldsboro Christian School, which refused to admit any non-White students, challenged the lawfulness of the Internal Revenue Service's revocation of their tax-exempt status. *Id.* at 580–83. Although both schools advanced religious justifications for their discriminatory policies, this Court held that those justifications did not exempt them from the antidiscrimination mandate. *Id.* at 580–81. Rather, "decisions of this Court firmly establish[ed] that discrimination on the basis of racial affiliation and association is a form of racial discrimination," so the Court upheld application of the nondiscrimination policy, which "extend[ed] to all private schools, including religious schools." *Id.* at 605 & n.32.

The religious justifications for discrimination originally espoused by private schools focused on racial exclusion. Over time, however, they have encompassed exclusion on other grounds like sexual orientation and gender identity. These forms of discrimination in education threaten significant harm to children belonging to a disfavored class. The increase in private religious schools means that permitting unfettered discrimination will pose a unique threat to access to a quality education for all children. This underscores the need for this Court to

find a careful balance between honoring First Amendment protections for religion, protecting the children of disfavored groups, and respecting the government's interest in banning discrimination. An appropriate balance is particularly important where, as here, government funds are at stake. Public money cannot finance private discrimination. *See id.* at 605; *Norwood*, 413 U.S. at 469–70.

II. Neutral and Generally Applicable Nondiscrimination Laws Do Not, and Should Not, Permit a First Amendment Exception.

In *Employment Division v. Smith*, the Court held that generally applicable laws do not accord a First Amendment free exercise exception. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990). And for good reason: “[t]o permit this [exception] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” *Id.* at 879 (quoting *Reynolds*, 98 U.S. at 166–67); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring) (“The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens reportedly fall disproportionately on a protected class.*” (emphasis in original)). Disregarding this warning, Petitioners invite the Court to formulate a new exception to neutral and generally applicable nondiscrimination laws that would permit those professing religious beliefs at odds with even basic civil rights protections to completely evade compliance. That proposed framework contravenes this Court’s precedents and sweeps far too broadly.

**A. This Court Has Repeatedly
Rejected Religious Justifications
for Discrimination in Education,
Foreclosing Petitioners' Claims.**

Across decades and in numerous contexts, this Court has consistently held that religion does not—and cannot—justify violations of antidiscrimination measures. This Court correctly held, for instance, that religious justifications could not cure anti-miscegenation laws that were otherwise unconstitutional. *Loving*, 388 U.S. at 12 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”). Nor did it accept religious rationales as a basis for insulating segregated public accommodations from challenge. *Piggie Park Enters.*, 390 U.S. at 401–03. The Court has since clarified the general precept undergirding these holdings: “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give it effect.” *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). “The Constitution cannot control such prejudices but neither can it tolerate them.” *Id.* That individuals or entities might invoke religious beliefs to justify private biases does not change this precept.

Private schools—both religious and non-religious—likewise must comply with antidiscrimination laws. Schools are not relieved of that obligation simply because they can point to a religious justification for otherwise prohibited discrimination.

The Court’s recognition in *Bob Jones* that antidiscrimination laws may properly be applied to *private religious* schools expanded upon decades of precedent that refused to insulate religiously motivated conduct from the reach of the law.

Antidiscrimination protections are among those “governmental interests” that this Court holds are “so compelling as to allow even regulations prohibiting religiously based conduct.” *Bob Jones*, 461 U.S. at 603. For example, this Court has applied a neutral and generally applicable child labor law “to prohibit children from dispensing religious literature.” *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 169–70 (1944)). It has held people criminally liable for actions taken because of sincerely held religious beliefs. *See Reynolds*, 98 U.S. at 161–63. And this Court rejected religious exemptions from social security taxes, *United States v. Lee*, 455 U.S. 252, 257–58, 260 (1982), and for a conscientious objector who specifically sought to avoid participation in the Vietnam War, *Gillette v. United States*, 401 U.S. 437, 461–62 (1971).

Similarly, the Court has long recognized that private schools are subject to non-discrimination laws. *See, e.g., Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 232–34 (1964) (thwarting state officials’ attempt to close public schools and collude with all-White private schools to circumvent a desegregation order). And in *Runyon v. McCrary*, this Court held that federal civil rights laws can be used to sue private schools. 427 U.S. 160, 178–79 (1976). Although the Court “assumed that parents have a First Amendment right to send their children to educational institutions that promote the *belief* that racial segregation is desirable, and that the children have an equal right to attend such institutions,” it declined to conclude “that the [*p*]ractice of excluding racial minorities from such institutions is also protected by the same principle.” *Id.* at 176 (emphasis added). Thus, “while parents have a right to send their children to private schools and a constitutional right to select schools that offer specialized instruction,”

including religious instruction, parents “have no constitutional right to provide their children with private school education unfettered by reasonable government regulations.” *Id.* at 178; *see also id.* (collecting authorities).

More recent cases affirm the view that sincerely held religious views cannot justify discrimination otherwise proscribed by generally applicable nondiscrimination rules. In *Christian Legal Society Chapter of the University of California v. Martinez*, an on-campus religious organization sought to limit its membership to those students who embraced the view “that sexual activity should not occur outside of marriage between a man and a woman”—effectively excluding LGBTQIA+ students. 561 U.S. 661, 672 (2010). The organization challenged the University’s refusal to exempt the organization from the “all-comers” policy, which required student groups to admit “any student . . . regardless of [her] status or beliefs.” *Id.* at 671 (internal citation omitted). Rejecting the organization’s assertion that the University’s failure to provide the requested exception violated the First Amendment, the Court concluded that the University “may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.” *Id.* at 694.

Nothing here warrants departing from the Court’s acknowledgment, in *Bob Jones* and *Martinez*, that religious justifications cannot substantiate an exemption from generally applicable rules designed to vindicate the vital public policy aims advanced by ensuring nondiscrimination in education. Adherence to this precedent is especially appropriate where, as here, the nondiscrimination provision attaches to “the carrot of subsidy, not . . . the stick of prohibition.” *Id.*

at 683. “That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.” *Norwood*, 413 U.S. at 463.

Here, Colorado adopted a nondiscrimination policy that applies to any institution, religious or not, that accepts state UPK funds. That policy is consistent with other state-law proscriptions on discrimination. *See* Colo. Rev. Stat. § 24-34-402 (2025) (barring discrimination in employment based on protected characteristics, including an individual’s sexual orientation, gender identity, and gender expression); *id.* § 24-34-601(2)(a) (prohibiting discrimination in public accommodations on the basis of protected characteristics, including sexual orientation, gender identity, and gender expression); *see also, e.g.*, JA at 824 (Colorado’s Department of Early Childhood “made every accommodation besides breaking the law” to include a variety of providers, including private religious providers, due to their “commitment to the diverse delivery system”); JA at 826 (Colorado’s Department of Early Childhood “cannot legally allow any providers to knowingly discriminate against children”); JA at 890–91 (noting that, in the 2022–2023 Wellspring Catholic Academy Denver Preschool Program Provider Agreement, the academy agreed it “shall not discriminate against any person on the basis of race, color, religion, . . . sexual orientation, gender variance”). Moreover, it reflects Colorado’s lawful decision not to subsidize with public monies schools that privately discriminate against the very taxpayers who make that public subsidy possible. “A free society . . . need not subsidize” groups that “exclude or mistreat” protected classes of persons. *Christian Legal Society*, 561 U.S. at 703 (Stevens, J., concurring).

The government has a significant interest in preventing public benefits from being used to support activities that “violate established public policy.” See *Bob Jones*, 461 U.S. at 591. This is because all taxpayers can be considered “indirect and vicarious ‘donors’” to such activity. *Id.* Just as the Court concluded in *Bob Jones* that “racial discrimination in education violates a most fundamental national public policy, as well as the rights of individuals,” *id.* at 593, the Court ought to conclude that discriminating on the basis of other immutable protected characteristics in the provision of publicly subsidized UPK programs also violates the federal prohibitions on discrimination against LGBTQIA+ people. See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 683 (2020); *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015).

Federal and state funding entities have long required schools receiving their funds to comply with federal and state antidiscrimination provisions as a condition of funding. See, e.g., 42 U.S.C. § 2000d (prohibiting discrimination on account of race, color, or national origin in “any program or activity receiving Federal financial assistance”); Utah Code Ann. § 53E-3-401(8)(b)(ii) (West 2026) (authorizing the state board to “temporarily or permanently withhold state funds from [an] educational entity” that violates the state’s public education code, including its antidiscrimination protections, *id.* § 53E-2-301 (incorporating antidiscrimination protections by reference of *id.* § 53H-1-504)); Wash Rev. Code § 28A.642.050 (2010) (granting the superintendent authority to force school districts to comply with state antidiscrimination provisions, including by “terminat[ing] . . . all or part of state apportionment or categorical moneys to the offending school

district”). Even when applied to private religious schools, these conditions do not unconstitutionally constrain religious exercise. “[A] private school only becomes subject to non-discrimination when it voluntarily seeks to participate in the program.”¹⁹ Put differently, “private schools remain free to exercise religion and only forego that freedom in the narrow context of a government program in which they have no obligation to engage.”²⁰ If a private entity wishes to operate unbound by state or federal antidiscrimination laws, then it need only forgo the state or federal dollars to which these antidiscrimination protections attach.

Petitioners’ view “mistake[s] a man’s conscience for his money.” *Barnes v. First Par. in Falmouth*, 6 Mass. 401, 408 (1810). There are two rights at issue here: the “liberty of conscience in religious opinions and worship, and the right of appropriating money by the state.” *Id.* at 409. “The former is an unalienable right[, but] the latter is surrendered to the state, as the price of protection.” *Id.* Colorado exercised that latter right to appropriate funds in a way that ensures all of the state’s children and families—including those belonging to the LGBTQIA+ community—enjoy full and equal access to the public benefit of state-subsidized UPK. Its decision is supported by the Constitution and by precedent and should not be disturbed.

¹⁹ Derek W. Black, *Religion, Discrimination, and the Future of Public Education*, 13 U.C. Irvine L. Rev. 805, 831 (2023) (citing *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2260–61 (2020)).

²⁰ *Id.*

“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.” *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 584 U.S. 617, 631 (2018). Instead, “[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts.” *Id.*; see also *Bostock*, 590 U.S. at 681, 683; *Obergefell*, 576 U.S. at 680–81; *United States v. Windsor*, 570 U.S. 744, 774–75 (2013); *Lawrence v. Texas*, 539 U.S. 558, 575–79 (2003). Make no mistake, “religious and philosophical objections to gay marriage are protected views.” *Masterpiece Cakeshop*, 584 U.S. at 631. But Colorado is under no obligation to provide state support for discriminatory *acts* prompted by such views. See *Norwood*, 413 U.S. at 463 (“[A] State’s special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination.”). In refusing to do so, Colorado correctly prohibits the use of public money in programs with discriminatory practices, not “the subject matter which is taught at any private school.” *Runyon*, 427 U.S. at 177. This approach coheres with the longstanding recognition that, consistent with the Constitution, a state may exercise its power to “reasonably regulate all schools, to inspect, supervise, and examine them, their teachers and pupils.” *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925). Petitioners “remain presumptively free to inculcate [through instruction] whatever values and standards they deem desirable.” *Runyon*, 427 U.S. at 177; see also JA 890–91 (restricting providers’ ability to discriminate in admissions based on protected characteristics but imposing no restrictions on curricular content). This

Court's precedent pertaining to associational rights and the rights of parents "entitle them to no more." *Runyon*, 427 U.S. at 177.

**B. Adopting Petitioners' Proposed Rules
Would Undermine Critical Civil
Rights Protections.**

Petitioners seek to expand the circumstances permitting a First Amendment exception to nondiscrimination laws by narrowing the meaning of general applicability under *Smith*. This proposal would expose broad swaths of civil rights laws to free exercise challenges and must be rejected.

In *Smith*, this Court heard a challenge to an Oregon statute criminalizing peyote use. 494 U.S. at 874. Plaintiffs argued that the law infringed on their free exercise rights to use peyote for a ceremony held by the Native American Church. *Id.* Rejecting that claim, the Court held that states do not have a First Amendment obligation to provide exceptions to their neutral and generally applicable laws for those whose religious actions or inactions would be burdened by those laws. *Id.* at 878–79.

Smith carved out a narrow exception for laws that allow for application based on an "individualized governmental assessment." *See id.* at 884 (emphasizing prior holding that a "good cause" standard created a mechanism for individualized exemptions") (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). But that exception does not apply where a law subjects covered persons or entities to generally applicable standards and does not afford government actors discretion to grant exemptions on a case-by-case basis. *See, e.g., id.* That is precisely the case here.

Given that *Smith*'s exception does not apply, Petitioners urge this Court to adopt a new rule that

categorical exemptions in statutes, not just unfettered discretion to provide individualized exemptions, establish that a law is not generally applicable. But categorical exemptions are different from the “good cause” and “individualized governmental assessment” provisions that this Court has found not generally applicable. *Id.* So long as a statute’s categorical exemptions are based on specific, objective criteria, they do not require individualized government assessment. While “it takes some degree of individualized inquiry to determine whether a person is eligible for even a strictly defined exemption, that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by the *Smith* Court in its discussion of *Sherbert* and related cases.” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). “The ‘mere existence of an exemption procedure,’ absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny.” *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288–89 (2d Cir. 2021) (quoting *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007)), *opinion clarified*, *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 368 (2d Cir. 2021)); *see also id.* at 288 (emphasizing that “rules do not afford unfettered discretion that could lead to religious discrimination because the provisions are tied to particularized, objective criteria”) (quoting *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081–82 (9th Cir. 2015)).

Narrowing the meaning of general applicability in the way Petitioners propose would create an exception that swallows the rule. Exemptions abound in law to accommodate competing interests. In fact,

“*Smith* itself specifically held that a scheme that included a type of medical exemption—by not criminalizing the use of controlled substances when prescribed by a medical practitioner—was nonetheless generally applicable under the Free Exercise Clause.” *We The Patriots USA*, 17 F.4th at 289–90 (citing *Smith*, 494 U.S. at 874). Exposing every law with such an exemption to a free exercise challenge would nullify *Smith* and invite the danger of “every citizen [] becom[ing] a law unto himself.” *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166–67).

The history outlined *supra* Part I demonstrates that this expansion is not a hypothetical threat. *See, e.g., Newman*, 390 U.S. at 400 (rejecting the assertion that religious beliefs can excuse racial discrimination in violation of civil rights laws). “The free exercise of one’s beliefs . . . as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society.” *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 943 (D.S.C. 1966), *rev’d*, 377 F.2d 433 (4th Cir. 1967), *aff’d*, 390 U.S. 400 (1968).

The Court should again affirm that principle here. *Smith* recognizes that some religious acts must give way to the collective good without depriving those with valid free exercise claims of the opportunity for redress. Plaintiffs making claims under the Free Exercise Clause, like plaintiffs in racial discrimination cases and freedom of speech cases, can obtain redress by providing evidence of the state’s discriminatory intent. *See Smith*, 494 U.S. at 886 n.3 (citing *Washington v. Davis*, 426 U.S. 229 (1976); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969)); *cf. Stormans*, 794 F.3d at 1082 (quoting *Lighthouse Inst. for Evangelism*, 510 F.3d at 276)

(“What makes a system of individualized exemptions suspicious is the possibility that certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons.”). No such evidence exists here. Colorado’s nondiscrimination provision does not include *any* exemptions from its prohibition of discrimination on account of sexual orientation and gender identity. *See* Colo. Rev. Stat. § 26.5-4-205(2)(b) (2025) (requiring “each preschool provider” to “provide eligible children an equal opportunity to enroll and receive preschool services regardless of . . . sexual orientation” or “gender identity” “as such characteristics and circumstances apply to the child or the child’s family”). UPK programs that discriminate on these bases violate the nondiscrimination provision, regardless of whether the sponsoring institutions are secular or religious.

III. Allowing Private Religious Schools to Receive Public Funds While Violating Generally Applicable Antidiscrimination Laws Risks Sweeping Negative Consequences.

The threat of enabling religious private schools to claim entitlement to public funds while simultaneously opting out of generally applicable antidiscrimination laws is hardly theoretical. In the United States, millions of students currently attend private religious schools.²¹ Authorizing these schools

²¹ *See, e.g.*, Nat’l Ctr. for Educ. Stat., *Private School Enrollment* (2024), <https://nces.ed.gov/programs/coe/indicator/cgc/private-school-enrollment> (finding that in 2021, the latest year for which data is available, 4.7 million

to accept state funds without adhering to state antidiscrimination laws means that students connected to historically disfavored groups risk exclusion—and the stigma that accompanies it—without any opportunity for redress.

A. Excluding Children and Families from the UPK Program on the Basis of Sexual Orientation and Gender Identity Communicates Inferiority and Imposes Psychological, Dignitary, and Social Harms that Mirror Those Previously Recognized by the Court.

As this Court first observed in *Brown*, excluding children otherwise similarly situated to their peers from educational opportunity solely on the basis of a protected characteristic “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” 347 U.S. at 494. Although *Brown* addressed these psychological and dignitary harms in the context of race discrimination, excluding children from educational opportunities—here, a high-quality, free Pre-K program that promotes equal opportunity—on account of their or their parents’ sexual orientation or gender identity occasions similar harm. This exclusion sends the message to children denied access that they are not as worthy as cisgender children or children of heterosexual families. The feelings of inferiority that this message engenders not

children in kindergarten through twelfth grade attended a private school, with approximately 3.7 attending religious private schools).

only wreak psychological damage but also “affect[] the motivation of a child to learn.” *Id.*

The consequences of these harms are substantial. The Court recognized in *Brown* that schools do more than impart academic knowledge. *Id.* at 493. Schools prepare students to become productive members of our democratic society who know how to interact and build relationships with the people around them, including those with different identities, backgrounds, and perspectives. *See id.* (noting the foundational role that education plays in preparing students to become “good citizens[]” and “adjust normally to [their] environment”). But educational segregation deprives children of the opportunity to develop these social benefits, which learning together as equal members of a community promotes. *See id.*

Here, providing an exemption that allows private religious schools to exclude children on account of their or their parents’ sexual orientation or gender identity would replicate similar harms. Children in Colorado subjected to that exclusion would be denied unfettered access to *all* UPK programs, which all other children would be afforded. This inequity creates two groups of children, one of which—preschoolers from LGBTQIA+ families—is treated as second-class. The mere fact that a preschooler from an LGBTQIA+ family has access to *some* UPK programs does not cure the harm of this branding. *See id.* at 493–94. Nor does it cure the practical harms that come from a diminished range of educational options. Some LGBTQIA+ families may have to forgo the UPK Program entirely due to a lack of suitable alternatives. For other families, the more limited range of options may increase transportation burdens due to geographic mismatch or impair access to

teachers and special educational resources associated with particular private religious schools.

Denying LGBTQIA+ parents and children the full constellation of UPK benefits enjoyed by other families in the state because of their membership in or association with a historically disfavored group is inconsistent with the constitutional principles embodied in this Court's precedents. In *Obergefell*, the Court held that denying couples the "constellation of benefits that the States have linked to marriage" solely on account of their same-sex status violates the Constitution. 576 U.S. at 670; *see also id.* at 680. Denying same-sex couples these benefits not only harmed the couples themselves but also impaired their ability "to protect their children." *Id.* at 678; *see id.* at 668 ("Without the recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser."). Petitioners' proposed exemption would open the door to similar discrimination but would impose an even more direct burden on the children of same-sex couples and other members of the LGBTQIA+ community. Affected parents would be left unable to protect their children from the resulting harm, including categorical denial of access to certain UPK programs. The Constitution does not permit states to exclude gay and lesbian couples "from one of civilization's oldest institutions," marriage. *Id.* at 681. Neither does it authorize excluding their children or the children of other LGBTQIA+ parents from another of this country's oldest and most foundational institutions, the schoolhouse.

Because "education has a fundamental role in maintaining the fabric of our society," "[w]e cannot ignore the significant social costs borne by our Nation

when select groups are denied the means to absorb the value and skills upon which our social order rests.” *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Requiring Colorado to subsidize Petitioners’ proposed discriminatory practices would undermine the social advantages of ensuring broad access to public education benefits and give state endorsement to the status-based messages of rejection and inferiority that accompany that discrimination. That cannot be so. If *Brown* and *Obergefell* warn us of anything, it is the danger of government regulating public benefits in ways that create and maintain caste-like distinctions. See *Brown*, 347 U.S. at 494 (observing that the stigmatic injury from racially segregated schools was “greater” because it “ha[d] the sanction of law”); *Obergefell*, 576 U.S. at 670, 675 (noting that denying same-sex couples the “constellation of benefits” associated with marriage that opposite-sex couples enjoy “serves to disrespect and subordinate them”). Because Petitioners’ requested exemption would do just that, we urge this Court to affirm.

B. The LGBTQIA+ Community Threatened by Petitioners’ Proposed Exemption Includes Black Americans Who Will Face Harmful Intersectional Discrimination.

Adopting the First Amendment exception to general nondiscrimination laws that Petitioners seek threatens significant harm in this case and beyond. Such an exception would uniquely harm Black members of the LGBTQIA+ community who face

intersectional discrimination because of their race and sexual orientation.²²

Black members of the LGBTQIA+ community face “double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex.”²³ This intersectional discrimination is not merely the sum of anti-Black racial discrimination and anti-LGBTQIA+ discrimination but instead a unique and synergistic harm that the Black LGBTQIA+ community faces.

Sixty-four percent (64%) of Black LGBTQIA+ adults report experiencing at least one form of discrimination and 54% of Black LGBTQIA+ adults experience discrimination because of their race.²⁴ Forty-two percent (42%) of Black LGBTQIA+ adults who experience discrimination report feeling depressed, anxious, or lonely.²⁵ Eighty-three percent (83%) of Black LGBTQIA+ adults report

²² See generally Soon Kyu Choi, Bianca D.M. Wilson & Christy Mallory, UCLA Sch. L. Williams Inst., *Black LGBTQ Adults in the U.S.: LGBTQ Well-Being at the Intersection of Race* (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf>.

²³ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 149 (1989).

²⁴ Alex Montero et al., *LGBT Adults Experiences with Discrimination and Health Care Disparities: Findings from the KFF Survey of Racism, Discrimination, and Health* (Apr. 2, 2024), <https://www.kff.org/racial-equity-and-health-policy/lgbt-adults-experiences-with-discrimination-and-health-care-disparities-findings-from-the-kff-survey-of-racism-discrimination-and-health/>.

²⁵ *Id.*

discrimination adversely affecting their physical wellbeing, and 95% of Black LGBTQIA+ adults report discrimination adversely affecting their psychological well-being.²⁶ In general, Black LGBTQIA+ adults are over 40% more likely to have made a suicide attempt in their lifetime than white LGBTQIA+ adults.²⁷

The experiences of Black LGBTQIA+ youth are similarly concerning. For example, in 2025, 39% of Black LGBTQIA+ youth reported experiencing discrimination because of their gender identity, 36% reported discrimination due to their sexual orientation, and 49% experienced discrimination because of their race.²⁸ Twenty-one percent (21%) of Black LGBTQIA+ youth who experience anti-LGBTQIA+ discrimination, or roughly one in five,

²⁶ Lindsay Mahowald, *Black LGBTQ Individuals Experience Heightened Levels of Discrimination*, Ctr. for American Progress (July 13, 2021), <https://www.americanprogress.org/article/black-lgbtq-individuals-experience-heightened-levels-discrimination/>.

²⁷ *Cornell University Study on Impact of Discrimination on LGBTQ of Color*, Wash. Blade (July 15, 2021), <https://www.washingtonblade.com/2021/07/15/cornell-university-study-on-impact-of-discrimination-on-lgbtq-of-color/>; see also Myeshia Price-Feeney, Amy Green & Samuel Dorison, Trevor Project, *All Black Lives Matter: Mental Health of Black LGBTQ Youth* (2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/10/All-Black-Lives-Matter-Mental-Health-of-Black-LGBTQ-Youth.pdf>.

²⁸ R. Nath et al., *2025 U.S. National Survey on the Mental Health of LGBTQ+ Young People*, Trevor Project (2026), <https://doi.org/10.70226/EKGT3197>.

have reported a suicide attempt.²⁹ And Black transgender and nonbinary youth who experienced discrimination because of their sexual orientation or gender identity had “nearly two times the odds of reporting a suicide attempt in the past year” compared to Black transgender and nonbinary youth who did not experience discrimination because of their identity.³⁰

Antidiscrimination laws that guard against exclusion on the basis of race and sexual orientation and gender identity provide protections that are vital to ensuring that members of this uniquely vulnerable LGBTQIA+ community can participate fully and equally in every aspect of society. Colorado determined that the public good is served by guaranteeing this measure of participation and its determination should not be cast aside.

CONCLUSION

The decision below should be affirmed.

²⁹ Trevor Project, *Discrimination Among Black LGBTQ+ Young People and Suicide Risk* (2024), <https://storage.googleapis.com/trevor-web-public/2024/02/Discrimination-among-Black-LGBTQ-Young-People-and-Suicide-Risk.pdf>.

³⁰ *Id.*

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