

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 FOR GLBTQ LEGAL ADVOCATES &
DEFENDERS AND LAMBDA LEGAL
DEFENSE AND EDUCATION FUND, INC. AS
AMICI CURIAE SUPPORTING RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

GLBTQ Legal Advocates & Defenders (“GLAD Law”) is New England’s leading public interest legal organization dedicated to creating a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD Law’s federal court litigation to advance the rights of LGBTQ people and people living with HIV includes *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Bragdon v. Abbott*, 524 U.S. 624 (1998). GLAD Law also advocates for strong, safe, and positive school environments to advance student learning and well-being. *See, e.g., St. Dominic Acad. v. Makin*, 181 F.4th 11 (1st Cir. 2026); *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336 (1st Cir. 2025); *Doe v. Hopkinton Pub. Sch.*, 19 F.4th 493 (1st Cir. 2021); and *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the nation’s oldest and largest legal organization working for the full civil rights of lesbian, gay, bisexual, and transgender people and everyone living with HIV through impact litigation, education, and policy advocacy. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644; *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal has long worked to ensure students are not

¹ No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

deprived of equal educational opportunity because of their sexual orientation or transgender status, *see, e.g., W. Virginia v. B.P.J. by Jackson*, 146 S.Ct. 2356 (2026); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), and participated in cases addressing whether nondiscrimination requirements, including for recipients of government money, infringe First Amendment rights, *see, e.g., 303 Creative, LLC v. Elenis*, 600 U.S. 570 (2023); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, 584 U.S. 617 (2018).

Amici curiae have a strong interest in robust and consistent application of nondiscrimination protections to ensure that children of LGBTQ parents and LGBTQ students can learn freely and equally in publicly funded educational settings. This includes when taxpayer dollars fund private schools to fulfill the state’s educational promises. *Amici* offer their expertise to underscore the neutrality and importance of ensuring nondiscrimination in education, highlighting the vulnerability of students with LGBTQ parents and LGBTQ students to discrimination and harassment.

SUMMARY OF ARGUMENT

Colorado established its universal preschool (“UPK”) program to open doors to the state’s earliest learners, facilitating the beginning of their educational journeys. In doing so, the state committed to ensuring those doors were open to everyone, obligating all schools that accept state funding—public or private—to comply with a nondiscrimination requirement mandating they provide all students with an equal opportunity to enroll “regardless of race,

ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.” Colo. Rev. Stat. § 26.5-4-205(2)(b).

Petitioners’ claim that this nondiscrimination requirement unconstitutionally excludes them from participation in the program misses the mark, doctrinally and factually. The settled framework established in *Employment Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990), and explicated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993), applies here, making clear that Colorado’s neutral, generally applicable nondiscrimination requirement need only survive rational basis review.

Petitioners and their amici seek to effectively overrule *Smith* by treating it as a residual rule rather than the applicable overarching doctrine. They ask the Court to apply *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464 (2020), and *Carson v. Makin*, 596 U.S. 767 (2022), in a way that renders the *Smith* framework irrelevant. But Petitioners have this backwards. *Smith* remains the governing framework for free-exercise claims, which *Trinity Lutheran*, *Espinoza*, and *Carson* faithfully applied, requiring strict scrutiny because the law failed to satisfy *Smith*’s neutrality requirement. *Smith* illustrated how prior cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981), fit within its framework, and subsequent cases in no way support a bespoke test for government-benefit cases.

Under *Smith/Lukumi*, Petitioners fail to demonstrate non-neutrality in the UPK Program. Faith-

based schools do participate, and, given that Petitioners' own policies permit admission of children with same-sex parents who agree to their teachings and the miniscule likelihood of gender-diverse preschoolers seeking to enroll, nothing suggests Petitioners would have been excluded.

Petitioners attempt to transform *any* state policy that imposes *any* burden on a school's religious practices into targeting of the school solely because it is religious. But *Carson* requires no such conclusion and adopting it would eviscerate the *Smith/Lukumi* framework. Colorado has conditioned the use of public money by any school in the UPK Program on an obligation not to discriminate against students seeking admission. This is plainly a neutral objective.

Moreover, it is an objective that would survive even strict scrutiny were the Court to deem such review warranted. The UPK Program furthers multiple compelling governmental interests, ensuring equal educational opportunity for students with LGBTQ families or identities, and furthering Colorado's constitutional obligation not to fund or aid discrimination against a class of children due to their parentage or identities. Requiring compliance with the nondiscrimination requirement is the most narrowly tailored means of advancing these interests.

Colorado's interest in ensuring students' equal opportunity to enroll at schools participating in the UPK Program, regardless of their parents' or their own LGBTQ identities, is particularly compelling considering these students' well-documented vulnerability to discrimination and harassment. Significant research highlights the harms of this discrimination, including both structural and interpersonal

stigmatization and exclusion at the hands of other students and school staff alike. These experiences of discrimination result in innumerable negative impacts on students' psychosocial development and deprive them of equal educational opportunity.

The UPK nondiscrimination requirement was adopted against this backdrop. While preschool-aged children do not typically assert clear LGBTQ identities, they explore gender and relationships in a developmentally appropriate way and cross-gender preferences may arise even at that young age. Colorado has a compelling interest in protecting all students—including those with LGBTQ parents, who are gender-diverse, or who may be perceived as LGBTQ—from the harms of discrimination in educational settings.

Additionally, Colorado has a compelling interest in avoiding financial support for or complicity in invidious discrimination. Equal-protection principles constrain the state from giving effect to the biases of private parties, *see Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), particularly where doing so would punish children due to the families they happened to be born into. The UPK Program's requirements ensure that taxpayer dollars are not funding discrimination.

Finally, that the exclusion barred by these requirements happens to coincide with the tenets of Petitioners' religion does not undermine the compelling nature of Colorado's interest or transform it into an improper subject for legislation. Colorado's commitment is to equal educational opportunity for all children—an independent and valid governmental purpose.

ARGUMENT

I. THE COURT SHOULD APPLY ITS SETTLED DOCTRINAL TOOLS IN *SMITH* AND *LUKUMI* TO DECIDE THIS CASE.

Although the Court denied review of Petitioners’ third Question Presented, i.e., “Whether *Employment Division v. Smith* should be overruled,” Order List, 608 U.S. (Apr. 20, 2026), Petitioners—and many of their amici—argue this case as if they can effectively overrule *Smith* by sleight of hand.

As their lead point, Petitioners maintain that “[i]n this Court, at least, *Smith* has functioned more as a residual rule than as a primary rule of decision” while lower courts—like the Tenth Circuit here—have relied on *Smith* “as the overarching rule of decision to the exclusion of other lines of this Court’s Free Exercise Clause precedent.” Pet.Br.18; *see also id.* at 27 (“[U]nlike this Court, lower courts typically rely first and foremost on *Smith* in analyzing Free Exercise Clause claims.”). What that means—as Petitioners see it—is that “the trilogy of *Trinity Lutheran*, *Espinoza*, and *Carson*” controls and that the “ill-fitting *Smith* framework” disappears. *Id.* at 19.

However, this is all simply wrong. First, this Court has repeatedly made clear that *Smith* is the current governing framework for analyzing free-exercise claims. Second, the trilogy of *Trinity Lutheran*, *Espinoza*, and *Carson* are each faithful applications of *Smith* and do not represent a separate “line of ... Free Exercise Clause precedent” with a distinct doctrinal analysis. And the same is true of Petitioners’ attempt to rely on *Sherbert* and *Thomas*. Those cases are also entirely consistent with *Smith*—as *Smith* itself

explains. *See Smith*, 494 U.S. at 882-84; *contra* Pet.Br.19, 28-29, 33-34.

The settled precedent from *Smith* and its progeny applies here. The alternative—overruling *Smith* sub silentio or distorting its central holding by misapplying *Sherbert* and *Thomas*—would cause disruption in countless areas of law. *See Smith*, 494 U.S. at 888-89; *cf. Fulton*, 593 U.S. at 543-44 (Barrett, J., concurring).

A. The *Smith* (and *Lukumi*) Doctrinal Framework Governs This Case.

As recently as 2021, this Court acknowledged the governing *Smith* framework and applied it, noting: “*Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.” *Fulton*, 593 U.S. at 533 (majority opinion); *see also, e.g., Trinity Lutheran*, 582 U.S. at 460 (“In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.”).²

In *Fulton*, the Court found the City policies in issue failed the general applicability requirement, citing *Lukumi*, 508 U.S. at 531-32, which itself

² The Court also recognized *Smith* as the default in *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025), only applying strict scrutiny because it implicated “the same” harm that “the Court identified in *Yoder*,” *id.* at 554. *Smith* itself identified *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as a narrow exception to *Smith*’s rule given the involvement of other constitutional rights. *Smith*, 494 U.S. at 881.

explicated *Smith*, *id.* In *Trinity Lutheran*, the statute in issue was not neutral. 582 U.S. at 463 (“The express discrimination against religious exercise here is ... the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.”)

The *Smith/Lukumi* framework remains applicable as evidenced by the Court’s unwillingness to accept Petitioners’ request to consider overruling *Smith*.

B. The Trilogy of *Trinity Lutheran*, *Espinoza*, and *Carson* Faithfully Applied *Smith* and *Lukumi*.

Trinity Lutheran was an express application of *Smith* in as clear terms as possible. *See, e.g., Trinity Lutheran*, 582 U.S. at 462 (“This conclusion [of a violation of free exercise] is unremarkable in light of our prior decisions,” after describing *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988), *Smith*, and *Lukumi*); *id.* at 465 (“The rule is simple: No churches need apply.”); *id.* at 465 n.3 (“This case involves express discrimination based on religious identity....”).

In *Espinoza*, the Court repeatedly referenced *Trinity Lutheran*’s reliance on *Lukumi*, and it explained how *Trinity Lutheran* applied to the facts in *Espinoza* and dictated the result. *See, e.g.,* 591 U.S. at 475-79, 483-85. Bottom line, the Montana statutory no-aid provision was not neutral because it “discriminate[d] against schools and parents based on the religious character of the school” and thus strict scrutiny was required. *Id.* at 484.

Lastly, in *Carson*, the Court explained its decisions in *Trinity Lutheran* and *Espinoza*, confirmed

that *Trinity Lutheran* rested on *Lukumi*, and stated that “[t]he ‘unremarkable’ principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case.” 596 U.S. at 778-80, 790. As noted, each case involved disqualification of schools from a generally available benefit “solely because of their religious character.” *Id.* at 779-80.

In sum, each of the decisions in the *Trinity Lutheran-Espinoza-Carson* trilogy was framed around the failure to satisfy the neutrality requirement of *Smith*. See, e.g., *Carson*, 596 U.S. at 781 (“[T]here is nothing neutral about Maine’s program.”).

C. *Sherbert* and *Thomas* Are Not Exceptions to the *Smith* Framework.

As noted above, Petitioners suggest that *Carson*’s citation to *Sherbert* and *Thomas* somehow indicates that all government-benefit cases fall outside the reach of *Smith* and creates a wholly new line of doctrinal development. But this cannot be.

First, *Sherbert* and *Thomas* fall comfortably under the doctrinal analysis of *Smith*:

Smith later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the “good cause” standard permitted the government to grant exemptions based on the circumstances underlying each application.... *Smith* went on to hold that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”

Fulton, 593 U.S. at 534 (citations omitted); see also *id.* at 544 (Barrett, J., concurring) (“A long-standing

tenet of our free exercise jurisprudence—one that predates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives governmental officials discretion to grant individualized exemptions,” citing *Smith* citing *Sherbert*).

Second, *Smith* itself was an unemployment-benefits case, clearly indicating that government-benefit cases would be governed by *Smith*’s doctrinal framework and not seen as some independent line of precedent.

Third, in *Smith*, the Court noted: “In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.” *Smith*, 494 U.S. at 833 (citing, among other cases, *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986) (requiring benefit applicants to provide a Social Security number contrary to their religious beliefs)).³

In sum, based on *Smith*—and cases pre- and post-*Smith*—no logical or reasoned justification exists for creating a unique Free Exercise Clause test for public-benefits programs. *Smith* has proven more than adequate for handling public-benefits cases.⁴

³ The *Smith* majority cites *Sherbert* and *Thomas* side-by-side throughout the opinion. See *Smith*, 494 U.S. at 875, 876, 883, 884.

⁴ The Court has carefully explained any exceptions made to the *Smith* framework. See, e.g., *Trinity Lutheran*, 582 U.S. at 461 n.2 (contrasting *Smith*’s concern with “government regulation of physical acts” with the ministerial exception, which “concerns government interference with an internal church decision that affects the faith and mission of the church itself.”) (cleaned up). The present government-benefits case turns on the regulation of physical acts.

D. The *Smith/Lukumi* Framework Provides No “Special Dispensations” from Neutral, Generally Applicable Laws, But Does Protect Against Non-Neutral “Special Disabilities.”

1. The Legal Framework.

As the Court stated in *Trinity Lutheran*,

[*Smith*] held that the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. At the same time, we again made clear that the Free Exercise Clause *did* guard against the government’s imposition of “special disabilities on the basis of religious views or religious status.”

Trinity Lutheran, 582 U.S. at 460-61 (citations omitted).

Indeed, “constitutionally required religious exemptions” could be sought “from civic obligations of almost every conceivable kind”; and pre-*Smith* case law had regularly “applied the general laws, despite the claims for religious exemptions.” *Smith*, 494 U.S. at 888-89 & n.5 (collecting cases); *cf. Fulton*, 593 U.S. at 544 (Barrett, J., concurring) (questioning whether “pre-*Smith* cases rejecting free exercise challenges to garden-variety laws [would] come out the same way” if strict scrutiny applied).

Simultaneously, it is an “unremarkable” principle that express, facial discrimination against religious individuals or religious entities, i.e. targeting them solely because they are religious, subjects governmental action to strict scrutiny for imposing a special disability. And that is the case with the *Trinity*

Lutheran-Espinoza-Carson trilogy. The Court found a special disability on the face of the statutory schemes in issue in those cases. *Trinity Lutheran*, 582 U.S. at 462 (operating as a church comes “at the cost of automatic and absolute exclusion from the benefits of a public program for which the [church school] is otherwise fully qualified”); *Espinoza*, 591 U.S. at 484 (“When otherwise eligible recipients are disqualified from a public benefit ‘solely because of their religious character,’ we must apply strict scrutiny”; this is a “rule against express religious discrimination”); *Carson*, 596 U.S. at 780 (“[P]rogram specifically carved out private religious schools from those eligible to receive such funds.”).

While the *Trinity Lutheran-Espinoza-Carson* trilogy addressed express, facial discrimination, simple “[f]acial neutrality is not determinative” of the absence of a free-exercise violation. *Lukumi*, 508 U.S. at 534.

The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause “forbids subtle departures from neutrality,” *Gillette v. United States*, 401 U.S. 437, 452 (1971), and “covert suppression of particular religious beliefs.” *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirements of facial neutrality. The Free Exercise Clause protects against government hostility which is masked as well as overt.

Id. (cleaned up); see also, e.g., *Carson*, 596 U.S. at 785 (*Espinoza* “turned on the substance of free exercise

protections, not on the presence or absence of magic words.”).

In sum, the government can craft a law or policy, including public-benefit programs, in facially neutral language and still have, in effect, enacted a law or policy that is not neutral toward religious status or practice and that creates a special disability. But the plaintiff must carry the burden of proving a free-exercise violation, which can be met by showing non-neutrality, i.e., the creation of a special disability or religious gerrymander. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022).

2. The Record Before the Court Lacks Any Indicia of Non-neutrality.

The record establishes the UPK Program’s goal of recruiting providers of all types: “school districts, center-based, home-based, faith-based, that could provide a safe, nurturing, inclusive, nondiscriminatory environment for children.” Pet.App.60a. The Department of Early Childhood conducted outreach to encourage participation and organized working groups with faith-based providers.⁵ *Id.*

For the 2023-2024 school year, enrollment in the UPK Program included “over 900 preschoolers” in “forty faith-based preschools.” *Id.* at 62a. Among participating faith-based schools were “several preschools affiliated with Catholic Charities and aimed at low-income families.” *Id.* at 12a. This “substantiates that Defendants have not excluded Catholic providers.” *Id.* at 116a. Indeed, “the Department made every effort to

⁵ Petitioner St. Mary Catholic Parish participated in the faith-based working group. *Id.* at 12a.

encourage faith-based preschools to participate (short of violating state law by granting exceptions to the nondiscrimination requirement).” *Id.* at 28a. In fact, it was the Archdiocese of Denver that “instructed its [non-Catholic Charities] preschools not to register with UPK.” *Id.* at 12a.

For these reasons, among others, both the district court and the Court of Appeals correctly held that the UPK Program was neutral. *Id.* at 115a-116a; 28a.

Additionally, both lower courts rejected Petitioners’ arguments that the Respondents had engaged in religious hostility, whether in the UPK Program’s enactment and implementation or in this litigation. *See id.* at 24a-28a; 108a-116a. Petitioners do not pursue any religious hostility arguments in this Court. *See generally* Pet.Br.18-20.

3. There Is No Reason to Believe that Petitioners Would Be in Violation of the UPK Program Nondiscrimination Requirement if They Joined the Program.

As noted above, the Archdiocese unilaterally removed its preschools (other than the Catholic Charities schools) from participation in the UPK Program. On the record before the Court, there is no reason to believe that these Catholic preschools would have been excluded if they had applied.

In their opening brief, Petitioners center their claims around two issues:

They [the Catholic preschools] are excluded solely because of their religious exercise — namely, their religious practice of ensuring that all enrolling families are supportive of

the Catholic Church's teachings on sex and marriage and of treating four-year-olds in accordance with their biological sex.

Pet.Br.29-30.

As to the first issue of ensuring enrolled families are supportive of Church teaching, the Catholic preschools, like other Catholic schools, already welcomes for enrollment "all families" who "agree with" the requirements of the Church's Statement of Community Beliefs and Commitments ("SCBC"), including on sex and marriage. *Id.* at 13; *see* Pet.App.216a-241a (SCBC). Petitioners' policies state that they will not categorically exclude children with same-sex parents from enrolling. Pet.App.274a. Because nothing in Colorado's law governing the UPK Program forbids religious schools from having a mission-supportive enrollment requirement, Petitioners' first reason for unilaterally removing its preschools from the UPK Program was based on a misinterpretation of the program's requirements.

Whether Catholic or non-Catholic, all families must "understand and display a positive and supportive attitude toward the Catholic Church, her teachings, her work, and the mission of the Catholic school." Pet.Br.12; Pet.App.240a; *see* Pet.App.236a ("Even families who do not share our religious faith are important members of our community and are called to lives of virtue and truth."). Although "this does not mean members of our community are expected to be perfect and sinless," families must "refrain from public promotion or approval of any conduct" that would "be considered a counter-witness to Catholic doctrine or morals." Pet.Br.13; Pet.App.240a.

The Statement provides examples of how to accommodate enrollment of a family whose beliefs are not fully aligned with Church teachings. For example, the Statement notes that the schools “will be fully pro-life institutions, not merely recognizing the sanctity of human life from conception to natural death, but unabashedly defending it and forming students in the knowledge of [that] truth.” Pet.App.238a. Therefore, for example, school parents who approve of the death penalty are obligated to refrain from any public witness against the Church’s doctrinal view to the contrary. Those families remain welcome if they have a supportive attitude toward the Church and avoid public counter-witness against Church doctrine.

With respect to school enrollment of families headed by a same-sex couple, there is no categorical exclusion of that child from enrollment. Pet.App.274a. The Archdiocese provides “Guidance for Issues Concerning the Human Person and Sexual Identity,” *id.* at 242a-279a, including a section addressing enrollment of a child with gay or lesbian parents, *id.* at 272a-275a. If “a child raised by a same-sex couple is enrolled,” *id.*, then:

the school should make clear that it can recognize a couple that is a mother and a father for the child, but cannot recognize “two mothers” or “two fathers” as a family structure. For purposes of registration, school directories, or other forms a same-sex couple should be instructed to list one mother (or one father). The other adult may be noted elsewhere as an additional emergency contact, but not listed as another parent. The school should seek a commitment from the couple that they will respect

the identity and mission of [the] school by avoiding public displays of affection at school functions and exercising discretion about their living situation. The school also should be clear that parents whose objective living situation contradicts the teachings of the faith might face some limitations on their involvement in the school.

Id. at 274a.⁶ Clearly, Petitioners have already charted a path forward for including families headed by same-sex couples.

As to the second issue, Petitioners are concerned about their intention to treat four-year-olds in accordance with their birth sex.⁷ But as Petitioners note in their cert petition, 35 Archdiocesan schools, including the two Petitioner schools, have held childcare licenses for “decades” and not one—as stated by Colorado’s Director of the UPK Program—“has any history of a complaint from an LGBTQ family or other person alleging LGBTQ-based discrimination.” Pet. at 7 n.2; Pet.App.306a.

Moreover, it is difficult to imagine anything other than an extremely minute possibility that Petitioners would find themselves at odds with the nondiscrimination requirement. The incidence of preschool

⁶ The Guidance also directs the school to “make every effort to ensure that the child is not bullied, or teased because of his or her family situation. The Catholic school has an important opportunity to convey the truth about human dignity and God’s love by ensuring an atmosphere of respect and charity.” Pet.App.274a.

⁷ Petitioners make no mention of sexual orientation, presumably because it is a non-issue with respect to four-year-olds.

children who have transitioned socially is rare. One study of transgender children focused on 3- to 5-year children in the context of a larger project.⁸ In pursuit of those “rare” children, “the research team traveled extensively” across the United States—including nine months of flying and driving—“to meet with families from seventeen states.”⁹ The authors found “[t]hirty-six 3- to 5-year old transgender children” who participated in the study: 28 transgender girls (natal males); and 8 transgender boys (natal females).¹⁰ Of that sample, children who socially transitioned “skewed toward the older age of this range, with two 3-year-olds, thirteen 4-year-olds, and twenty-one 5-year-olds” given that “social transition often occurs later in development.”¹¹

In another first-of-its-kind study approved by the Cedars-Sinai Medical Center, researchers sought the mean earliest age at which adult transgender men and women first experienced gender dysphoria.¹² The 55 transgender men in the study reported the “mean age of [Gender Dysphoria] onset was 6.7 years, with a

⁸ Anne Fast et al., *Gender Development in Transgender Preschool Children*, 89 Child Dev. 620 (2018), <https://doi.org/10.1111/cdev.12758>.

⁹ *Id.* at 624.

¹⁰ *Id.* at 625.

¹¹ *Id.* at 624-25.

¹² Michael Zaliznyak et al., *How Early in Life Do Transgender Adults Begin to Experience Gender Dysphoria? Why This Matters for Patients, Providers, and for Our Healthcare System*, 9 Sex. Med. 1, 1-2 (2021), <https://doi.org/10.1016/j.esxm.2021.100448>.

mode and median of 5 years.”¹³ The 155 transgender women reported the “mean age of the first onset of [Gender Dysphoria] was 6.71 years with a mode and median of 5.”¹⁴ The researcher found their data to align “with *gender identity* research, which has found that most children understand gender permanence (i.e., fixed identity as a ‘girl’ or ‘boy’) between 5 and 7 years of age.”¹⁵

Simultaneously—and totally unrelated to gender identity or gender dysphoria—children commonly engage in gender-atypical behavior (“boys behaving like girls and having interests generally regarded as feminine and *vice versa*”).¹⁶ One study found that about 2.2% of a population of boys and girls aged 3.5 years showed “gender-atypical behavior to an extreme degree.”¹⁷ Most of these children are not transgender.¹⁸ Presumably, Petitioners have experience dealing with gender-atypical behavior in their preschoolers. And, however they handle it (whether well or poorly), this would not conceivably rise to the level of gender-identity discrimination under Colorado law.

In short, Petitioners’ concerns that their intended treatment of four-year-olds would violate the UPK

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.* at 5.

¹⁶ Philip Graham, *Transgender Children and Young People: How the Evidence Can Point the Way Forward*, 47 *BJPsych Bulletin* 98, 98 (2023), <https://doi.org/10.1016/j.esxm.2021.100448>.

¹⁷ *Id.* at 99.

¹⁸ *Id.* at 102.

Program’s sexual orientation and gender identity non-discrimination obligations lack any factual basis.

**E. Petitioners and Many of Their Amici
Simply Want to Abolish the *Smith/Lukumi*
Framework.**

Though the nondiscrimination requirement is a neutral law under *Smith/Lukumi*,¹⁹ Petitioners maintain “there is nothing neutral about” the program, quoting *Carson*. Pet.Br.30. They try to reach that result by arguing that the effects of the nondiscrimination provision are to: (1) bar Archdiocesan schools from participating; (2) disfavor their views on sexuality and marriage; (3) deny eligibility because of inherently religious choices; (4) require the abandonment of religious practices; and (5) exclude on the basis of religious exercise. *Id.* at 30-33. Effectively, Petitioners argue that any state policy—here a legislative policy of the highest order to protect against discrimination—that imposes any burden on a religious school’s religious practices becomes, in fact, an anti-religious view that burdens and targets the school solely because it is religious.²⁰ But that is not what *Carson*

¹⁹ To be clear, the nondiscrimination provision focuses on *equal opportunity* to enroll and receive services. This provision is not aimed at regulating the schools’ instructional content but rather prohibits schools’ discriminatory *conduct* towards students. The presence of a Pre-K student with LGBTQ parents or a gender-diverse four-year-old in the classroom poses no burden on what religious institutions teach or believe.

²⁰ Testimony confirmed that the Archdiocese accepted the nondiscrimination obligations, objecting only to religious affiliation, sexual orientation and gender identity. J.A.125-26, 148; Pet.App.63a. In other words, the Church recognizes at least some nondiscrimination provisions as legitimate conditions on money coming to religious schools.

holds, and it would, in effect, gut the *Smith/Lukumi* framework by triggering strict scrutiny for neutral and generally applicable laws that incidentally burden religious practices. Such a “categorical strict scrutiny regime” lacks much needed “nuance[],” *Fulton*, 593 U.S. at 543 (Barrett, J., concurring), which is especially vital in the public-funding context, where conditions on funding serve weighty government interests.

Despite their obvious attempted end-run around *Smith*, Petitioners suggest that Colorado is mimicking Maine’s unconstitutional statutory scheme in *Carson* by using “magic words” to mask the UPK Program’s operational effect of targeting religious schools. Pet.Br.33. But nothing of the sort is happening. In its neutral, democratic, and legislative judgment, Colorado placed a nondiscrimination obligation on the use of public money by all schools that participate in the UPK Program, whether religious or not.

Ultimately, Petitioners’ arguments are simply a dangerous effort to subvert the *Smith/Lukumi* framework, which the Court should reject.

II. THE UPK PROGRAM WOULD SURVIVE STRICT SCRUTINY BECAUSE IT IS NARROWLY TAILORED TO COLORADO’S COMPELLING GOVERNMENT INTERESTS.

Even if the Court were to apply strict scrutiny to the UPK Program, it would nonetheless easily survive that heightened level of review because it is “justified by a compelling state interest and ... narrowly tailored in pursuit of that interest.” *Kennedy*, 597 U.S. at 525 (citing *Lukumi*, 508 U.S. at 546). The UPK nondiscrimination requirement furthers multiple

compelling governmental interests: (1) it safeguards against the well-documented vulnerabilities of students with LGBTQ families and LGBTQ students themselves to discrimination and harassment that deprive them of equal educational opportunity; and (2) it furthers Colorado’s constitutional obligation not to fund and facilitate discrimination against a class of children due to their parentage or identities. Enforcement of the nondiscrimination requirement against all schools participating in the state UPK Program is the most narrowly tailored means of fulfilling each of those interests. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (nondiscrimination laws are “precisely tailored to achieve th[e] critical goal” of ensuring equal opportunity).

A. Colorado Has a Compelling Interest in Ensuring Equal Educational Opportunity for Children with LGBTQ Parents and LGBTQ Students.

States, territories, and municipalities historically have championed their compelling interests in eradicating discrimination along a range of invidious lines. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 609 (1982) (ethnicity); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (sex); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (race). As the Supreme Court has recognized, these principles apply with equal force to a government’s interest in protecting LGBTQ people from discrimination. *See Fulton*, 593 U.S. at 542 (noting city’s “weighty” interest in “the equal treatment” of LGBTQ prospective foster parents and foster children); *Masterpiece Cakeshop*, 584 U.S. at 631 (noting that LGBTQ people “cannot be treated as social outcasts or

as inferior in dignity and worth” and that “[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts”); *see also Emilee Carpenter, LLC v. James*, 107 F.4th 92, 111 (2d Cir. 2024) (prohibiting sexual-orientation discrimination is a compelling state interest); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527-28 (3d Cir. 2018) (“preventing discrimination against transgender students” is a compelling government interest).²¹

This interest has been shown to be particularly compelling in the context of education given the well-documented vulnerability of both children of LGBTQ parents and LGBTQ young people themselves to discrimination and harassment in schools. Significant research highlights the dangers of vicarious discrimination²² against students because of their parents’

²¹ Petitioners attempt to use *Fulton* to suggest that Colorado’s interest in ensuring publicly funded educational institutions do not discriminate is not sufficiently specific. Pet.Br.48-49. While a general nondiscrimination commitment may not have sufficed to justify denying a religious agency an exemption from a nondiscrimination requirement when exemptions were granted for secular reasons, *Fulton*, 593 U.S. at 541-42, it is more than sufficient here. Where the law being challenged is neutral and generally applicable and no exemptions exist at all, the relevant question is about Colorado’s compelling interest in the nondiscrimination requirements writ large. An interest in ensuring nondiscriminatory education, particularly when funded with tax dollars, is sufficiently specific and compelling.

²² Vicarious discrimination has long been studied in the context of race discrimination, where findings indicate “experiencing vicarious discrimination via a family member has a similar impact on mental health to personally experiencing discrimination.” Patricia Louie et al., *Vicarious Discrimination, Psychosocial Resources, and Mental Health among Black Americans*, 85

identities, including for those students with LGBTQ parents. The results of a collaborative report²³ by the organizations GLSEN, COLAGE, and Family Equality on the experiences of students with LGBTQ parents or caregivers are telling. Asked about remarks they had heard, 86.8% of students had heard negative comments about LGBTQ+ parents generally and 80.25% about their own families.²⁴ A large majority—over two thirds of participants (70.4%)—reported being verbally harassed at school because of having an LGBTQ+ parent.²⁵

In addition to experiences of harassment, violence, and biased language, this study explored students' experiences of exclusion at school due to having an LGBTQ parent or caregiver. About two-thirds (67.5%) of students reported feeling like school personnel did not acknowledge their type of family. Students also reported more active forms of exclusion, with 68.6% reporting being discouraged by a teacher, principal, or other school staff from talking about their LGBTQ parent(s) or family at school.²⁶ Students experience this discrimination, bullying, and

Soc. Psych. Q. 187, 189 (2022), <https://doi.org/10.1177/01902725221079279>.

²³GLSEN, COLAGE & Family Equality, *Experiences of Students with LGBTQ+ Caregivers and their Families in K-12 Schools* (2023), <https://tinyurl.com/373vtua7> [<https://perma.cc/8VUW-EE9V>]. In 2026, GLSEN changed its name to Glisten. References herein to their research reflect the name in use at publication.

²⁴ *Id.* at 23.

²⁵ *Id.* at 24.

²⁶ *Id.* at 25.

harassment at the hands of both peers and teachers or administrators, with students who have a transgender parent reporting up to a 33% higher incidence of discrimination by adults in the school.²⁷

These experiences are borne out in other studies as well, finding that children of LGBTQ parents are subject to both structural and interpersonal stigmatization, exclusion, and harassment.²⁸ The negative impacts on the psychosocial development of children from this stigma, rejection, and bullying are myriad and result in these students having a less-than-equal education.²⁹ The UPK's nondiscrimination requirement serves the state's compelling interest in shielding Colorado's youngest students from these harms as they begin their formal education journeys.

In the same vein, Colorado has a compelling interest in shielding LGBTQ students from discrimination and harassment. The National School Climate Survey

²⁷ *Id.* at 39.

²⁸ See, e.g., Abbie E. Goldberg & Julianna Z. Smith, *LGBTQ Parents' Accounts of Their Children's Experiences with Heterosexism in Schools*, 13 Psych. of Sexual Orientation & Gender Diversity 84 (2026), <https://doi.org/10.1037/sgd0000716>.

²⁹ See *id.* at 95-96; Charlotte J. Patterson et al., *Policy Brief: LGBTQ+ Parents and their Children*, 6 Nat'l Council on Family Relations 3 (Oct. 2021), <https://www.ncfr.org/system/files/2021-10/Policy%20Brief%20Oct%202021.pdf> [https://perma.cc/CSW5-JZKL] (collecting studies); Rachel H. Farr et al., *School Experiences of Young Children and Their Lesbian and Gay Adoptive Parents*, 3 Psych. of Sexual Orientation & Gender Diversity 442 (2016), <https://doi.org/10.1037/sgd0000187>; Simon R. Crouch et al., *Parent-Reported Measures of Child Health and Wellbeing in Same-Sex Parent Families: A Cross-sectional Survey*, 14 BMC Pub. Health 635 (2014), <https://doi.org/10.1186/1471-2458-14-635>.

for 2025 found that 2 in 3 students surveyed reported feeling unsafe at school because of their sexual orientation or gender identity.³⁰ More than half of respondents had experienced LGBTQ-related discriminatory policies or practices at school, and well over 60% reported verbal, physical, or online harassment or assault because of their LGBTQ identity.³¹ These findings are borne out by other researchers as well. One study found that in 2020, 81% of LGBTQ students reported verbal harassment, 26% reported physical harassment, and 11% reported assault.³² A 2023 report by the Human Rights Campaign found that nearly 57% of LGBTQ youth had been verbally or physically harassed at school within the previous 30 days.³³

Discriminatory policies and practices harm LGBTQ students deeply and prevent them from fully participating in the school community.³⁴ They can

³⁰ Yu-Chi Wang & Shweta Moorthy, *The 2025 National School Climate Survey: School Experiences of LGBTQ+ Youth in the U.S.*, Glisten (2026), <https://glisten.org/nscs2025/> [<https://perma.cc/MVN3-ZH3T>] (“2025 NSCS”).

³¹ *Id.*

³² Robert Abreu et. al., *LGBTQ Student Experiences in Schools from 2009-2019: A Systematic Review of Study Characteristics and Recommendations for Prevention and Intervention in School Psychology Journals*, 59 Psych. in the Schs. 115, 116 (2022), <https://doi.org/10.1002/pits.22508>.

³³ Shoshana K. Goldberg et al., *2023 LGBTQ+ Youth Report*, Hum. Rts. Campaign Found. (Aug. 2023), <https://reports.hrc.org/2023-lgbtq-youth-report> [<https://perma.cc/T6KV-4436>].

³⁴ 2025 NSCS, *supra* note 19.

also have serious consequences for students' academic success and general well-being.³⁵

LGBTQ+ students who experienced frequent harassment and assault based on their sexual orientation or gender expression reported missing more days of school, having lower GPAs, lower educational aspirations, and higher rates of school discipline than students who were harassed less often. In addition, students who experienced higher levels of victimization felt less connected to their school community and had poorer psychological well-being, including a higher likelihood of suicidal ideation. LGBTQ+ students who reported experiencing anti-LGBTQ+ discrimination at school also had worse educational outcomes, including missing more days of school, lower GPAs, and lower educational aspirations, and were more likely to be disciplined at school, than students who did not experience anti-LGBTQ+ discrimination. Furthermore, students who experienced anti-LGBTQ+ discrimination also felt less connected to their school

³⁵ See Tecelli Domínguez-Martínez & Rebeca Robles, *Preventing Transphobic Bullying and Promoting Inclusive Educational Environments: Literature Review and Implementing Recommendations*, 50 Archives of Med. Rsch. 543 (2019), <https://doi.org/10.1016/j.arcmed.2019.10.009> (noting serious, long-term consequences of anti-LGBTQ discrimination for a student's educational outcomes, including poorer academic performance and absenteeism).

community and had poorer psychological well-being.³⁶

Stress from discrimination, bullying, harassment, and violence heightens the already disproportionate risks experienced by LGBTQ youth of being victims of violence, using risky substances, and of suicide and poor mental-health outcomes.³⁷

Ensuring nondiscrimination and supportive environments for LGBTQ students can have a dramatic effect on their well-being.³⁸ LGBTQ youth in schools with affirming policies report a greater sense of belonging, more support from staff, and greater inclination to report harassment should it occur.³⁹ Nondiscrimination laws and other protective policies for

³⁶ Joseph G. Kosciw et al., *The 2021 National School Climate Survey*, GLSEN, 130 (2022), <https://tinyurl.com/35bkjps7> [<https://perma.cc/H73Z-8X95>]; see also The Trevor Project, *Anti-LGBTQ+ School Policies and LGBTQ+ Young People* (Aug. 21, 2024), <https://tinyurl.com/yrzwbnsx> [<https://perma.cc/EN9W-T9AQ>] (LGBTQ students at schools with hostile policies more likely to be chronically absent, experience anxiety and depression, and consider or attempt suicide).

³⁷ Wojciech Kaczkowski et al., *Examining the Relationship Between LGBTQ-Supportive School Health Policies and Practices and Psychosocial Health Outcomes of Lesbian, Gay, Bisexual, and Heterosexual Students*, 9 *LGBT Health* 43 (2022), <https://doi.org/10.1089/lgbt.2021.0133>.

³⁸ The Trevor Project, *School-Related Protective Factors for LGBTQ Middle and High School Students* (Aug. 24, 2023), <https://tinyurl.com/mr47wt9a> [<https://perma.cc/65JQ-DN7R>].

³⁹ Xavier Fields & Christine Min Wotipka, *Effect of LGBT Anti-Discrimination Laws on School Climate and Outcomes for Lesbian, Gay, and Bisexual High School Students*, 19 *J. of LGBT Youth* 309, 314 (2022), <https://doi.org/10.1080/19361653.2020.1821276>.

LGBTQ youth at the state level have similar positive effects, decreasing the incidence of bullying and discrimination, helping set ground rules that recognize LGBTQ youth as full members of the school community, and improving mental-health outcomes.⁴⁰ These laws communicate that LGBTQ students belong and deserve equal treatment at school just like others, making students feel safer and improving their academic outcomes.⁴¹

Against this backdrop of discrimination against LGBTQ students, the UPK Program's protections were designed and enacted to prevent and redress discrimination in pre-kindergarten schools that rob Colorado's students of equal educational opportunity. As discussed *supra*, while preschool-aged children do not typically assert clear LGBTQ identities, exploring gender and relationships is developmentally appropriate at that age even if they do not fully understand what their feelings mean.⁴² This is particularly the case for gender-diverse children, as concerns about their bodies and cross-gender preferences may arise

⁴⁰ Jennifer Pearson et al., *State-Level Policy, School Victimization, and Suicide Risk Among Sexual Minority Youth*, 21 Sexual & Gender Minority Health: Advances in Med. Sociology 65, 70, 95 (2021), <https://doi.org/10.1108/S1057-629020210000021009>.

⁴¹ *Id.* at 95-96; Fields, *supra* note 28, at 320-22.

⁴² Am. Acad. of Pediatrics, *Coming Out: Information for Parents of LGBTQ Teens*, healthychildren.org, <https://tinyurl.com/34xzn39k> [<https://perma.cc/DC2E-P4JA>] (last updated May 1, 2024).

even at that young age.⁴³ Barring discrimination by and in schools participating in the program furthers Colorado’s interest in protecting all students—including those who are gender-diverse or may be perceived as LGBTQ—from the harms of discrimination in educational settings.

Given the prevalence and implications of discrimination for both students with LGBTQ parents and LGBTQ students, Colorado plainly has a compelling interest in prohibiting discrimination on the basis of sexual orientation and gender identity in its UPK Program.

B. Colorado Has a Compelling Interest in Ensuring that the State Is Neither Funding nor Facilitating Discrimination.

Finally, Colorado has an independent obligation under the Equal Protection Clause to ensure that taxpayer dollars are not being used to exclude a class of citizens from a public program. Because “the Constitution does not permit the State to aid discrimination” by private entities, a state may not provide financial aid “if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.” *Norwood v. Harrison*, 413 U.S. 455, 465–66 (1973); see also *Gilmore v. City of Montgomery*, 417 U.S. 556, 568–69 (1974) (“tangible state assistance” to private organizations engaging in discrimination “is constitutionally prohibited” as equal protection requires the state “to steer clear ... of giving significant aid to institutions that practice racial or other invidious

⁴³ Jason Rafferty, *Gender-Diverse & Transgender Children*, healthychildren.org, <https://tinyurl.com/4vw2k4kz> [<https://perma.cc/GGG4-BQ63>] (last updated June 8, 2022).

discrimination”) (quoting *Norwood*, 413 U.S. at 466). Colorado is constrained by equal protection principles from “directly or indirectly” giving effect to private biases. *Palmore*, 466 U.S. at 433.

This interest is particularly salient in protecting children from discriminatory harm relative to their parents’ identities. *See, e.g., id.* (effects of private racial prejudice could not justify removing child from custody of mother in interracial marriage); *Obergefell*, 576 U.S. at 668 (laws excluding same-sex couples from marriage harmed and humiliated their children, who were “relegated through no fault of their own to a more difficult and uncertain family life”); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (courts cannot shield nonmarital children from “social opprobrium,” but Equal Protection requires striking down discriminatory laws that penalize children who bear no responsibility for the circumstances or status of their birth).

The UPK nondiscrimination requirements for schools receiving taxpayer dollars ensure that Colorado does not “place[] its power, property, and prestige behind ...admitted discrimination.” *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (by leasing property to discriminatory entity, city unconstitutionally “place[d] its power, property and prestige behind the admitted discrimination”). They unquestionably further Colorado’s “compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

C. Requiring Compliance with the UPK Program by Schools in the State Program is the Most Narrowly Tailored Means of Furthering Colorado’s Compelling Interests.

Having established the compelling interests that justify the UPK Program’s nondiscrimination requirements for schools approved to receive tax dollars in the program, the next inquiry is whether the UPK Program is narrowly tailored in pursuit of those interests. *Kennedy*, 597 U.S. at 525. It unquestionably is.

Enforcing the UPK Program is the most precise way to further Colorado’s interests. “Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination..., it makes sense that the only way to achieve the scheme’s objectives is through its enforcement.” *Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 596 (6th Cir. 2018), *aff’d sub nom., Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020). Colorado need not show more when, as Justice Alito wrote in *Hobby Lobby*, 573 U.S. at 733, “prohibitions on ... discrimination are precisely tailored to achieve th[e] critical goal” of “providing an equal opportunity to participate” in Colorado’s publicly funded UPK Program.

D. The UPK Program’s Nondiscrimination Requirement Serves a Valid, Independent Governmental Purpose and, Thus, Does Not “Establish” Religion in Violation of the First Amendment’s Establishment Clause.

Some *amici* claim that Colorado’s nondiscrimination requirement serves no valid, independent

governmental purpose, but merely attempts to impose an orthodoxy of state-preferred religious views about LGBTQ people in violation of the Establishment Clause’s prohibition of religious discrimination. *See, e.g.*, U.S. Conf. of Catholic Bishops Amicus Br. at 2, 15; Amicus Br. of Nat’l Ass’n of Evangelicals at 16-17. Two responses are warranted.

First, they argue Colorado can have no legitimate interest in barring religious discrimination by religious schools to avoid equal-access requirements for taxpayer-funded education programs. Yet just the opposite is true. Prohibiting religious discrimination is an entirely proper—and independent—subject of legislation. *Boyajian v. Gatzunis*, 212 F.3d 1, 5 (1st Cir. 2000) (“Prohibition of religious discrimination is unquestionably an appropriate, secular legislative purpose.”); *see also Williams v. California*, 764 F.3d 1002, 1012 (9th Cir. 2014). Indeed, numerous nondiscrimination laws bar religious discrimination. *E.g.*, 42 U.S.C. § 2000a(a) (banning “discrimination or segregation on the ground of ... religion” in public accommodations). As one court noted, “[p]rohibition of religious discrimination is unquestionably an appropriate, secular legislative purpose.” *Boyajian*, 212 F.3d at 5.

Second, this Court directly rejected such arguments in *Bob Jones*. The University had argued that denying them tax-exempt status “violates the Establishment Clause by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden.” *Bob Jones Univ.*, 461 U.S. at 604 n.30. The Court rebuffed that argument, concluding “that a regulation does not violate the Establishment Clause merely because it

‘happens to coincide or harmonize with the tenets of some or all religions.’” *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Just as the IRS policy at issue there was founded on the “neutral, secular basis” of eradicating racial discrimination in education, uniformly applying to all religiously operated schools, *id.* at 604, so, too, is Colorado’s aim of eradicating sexual orientation and transgender status discrimination in education. Colorado’s commitment is to equal educational opportunity for all children—LGBTQ or not, and including children with LGBTQ parents—a purely independent and valid governmental purpose.

This Court has found this interest in eliminating discrimination in education to be not only a legitimate, but a “compelling,” “fundamental, overriding interest,” even where the discriminatory practices in question derived from the subject school’s sincerely held religious beliefs. *Bob Jones Univ.*, 461 U.S. at 604; *see also Alfred L. Snapp & Son*, 458 U.S. at 609 (“This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.”).

A nondiscrimination rule aimed at ensuring equal access to taxpayer-funded educational opportunities thus plainly serves compelling, let alone legitimate, government ends. Withholding public funding from those who discriminate, even when based on religion, is both narrowly tailored to and rationally relates to those ends.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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