

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.

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

**BRIEF OF *AMICI CURIAE* PROFESSORS
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INTERESTS OF *AMICI CURIAE*

Amici are law professors who have written extensively about free exercise and the relationship between religion and government. Their scholarship shows how this Court's free-exercise cases implement an equality principle: government may not treat religious commitments as less worthy than nonreligious ones.

Amici submit this brief to explain how that principle helps make sense of *Tandon v. Newsom* and how it was not violated in this case. In their view, *Tandon* is not a mechanical rule under which any secular exception requires a religious one. It asks whether religious activity has been devalued. To get at that issue, the doctrine asks more specifically whether the government has treated secular conduct more favorably even though that conduct undermines its stated interest in the same way as the religious conduct it restricts. That inquiry helps courts determine whether government has failed to give religion equal regard. Here, Colorado has treated religious schools as equally valuable, and in fact it has gone out of its way to include them in its early education program.¹

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¹ No counsel for a party authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or their counsel made such a monetary contribution. Institutional affiliations are provided for identification purposes only. This brief reflects the signatories' personal views and not the views, if any, of their institutions.

Christopher L. Eisgruber, of *Religious Freedom and the Constitution* (2007).

Professor Micah Schwartzman is the Hardy Cross Dillard Professor of Law at the University of Virginia School of Law. He is a co-editor of *The Rise of Corporate Religious Liberty* (2016).

Professor Nelson Tebbe is the Jane M.G. Foster Professor of Law and Associate Dean for Academic Affairs at Cornell Law School. He is the author of *Religious Freedom in an Egalitarian Age* (2017).

SUMMARY OF ARGUMENT

A core principle of this Court’s free-exercise cases is religious equality: government may not treat religious beliefs and practices as less worthy than secular ones. *Smith*’s requirement that laws burdening religious exercise be neutral and generally applicable is how the doctrine enforces that principle. Neutrality guards against laws that target religion. General applicability guards against laws that disfavor religious practice while permitting secular activities without justification; such laws give rise to an inference that there has been a failure of equal regard.

Tandon provides a doctrinal mechanism for implementing that principle. A law is not generally applicable, the Court held, when it “treat[s] any comparable secular activity more favorably than religious exercise.” 593 U.S. 61, 62 (2021) (per curiam). And the Court instructed how comparability is measured: “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.” *Ibid.* *Fulton v. City of Philadelphia* states the same rule from the other side: a law lacks general applicability when it permits secular conduct that undermines the asserted interest “in a similar way.” 593

U.S. 522, 534 (2021). Comparability therefore turns on what the allowance does to the interest the government invoked.

Taking that rule as controlling, the *Tandon* per curiam found general applicability lacking because California had tolerated for secular reasons the very risk it invoked to restrict religious exercise. California's asserted interest was stopping the spread of a virus. It capped gatherings in homes at three households while allowing hair salons, retail stores, personal care services, movie theaters, and indoor restaurants to bring together more people than that. *Tandon*, 593 U.S. at 63. On the per curiam's view of the record, permitting those businesses cut against the very interest California invoked, in the same way permitting the prayer meeting would have.

This case is of another kind. Colorado has affirmatively sought to include religious schools in its early education program. And it has not tolerated for secular reasons the harm its rule is designed to prevent. Its rule does not forbid preferences generally. It forbids eight specific barriers: turning a child away because of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability. Pet. App. 6a. Colorado's asserted interest is ensuring that a family's protected-class status does not deny a child equal opportunity to enroll in and receive high-quality, publicly funded preschool services, including a meaningful choice among otherwise available providers. Resp. Br. 41, 52.

Most of Colorado's permissions never touch that interest. Providers may prefer siblings, the children of their own employees, children within established district boundaries, children whose care is continuing from a prior year, children who are multilingual, and families who commit to volunteering. Pet. App. 8a-10a. None of those

preferences authorizes a provider to turn a child away on any of the eight prohibited grounds.

Two provisions do concern protected grounds, and they are the ones Petitioners' comparability argument relies on. One allows a provider to reserve a placement for a child with an individualized education program, so the provider can conform to obligations imposed by the Individuals with Disabilities Education Act and its state analogue. The other allows Head Start programs to adhere to federal eligibility requirements. Pet. App. 8a. Whether the effect of those permissions on Colorado's asserted interest is similar to the effect of the exclusion Petitioners request is the question, and it is not, for reasons Part III sets out.

That difference is the case. No secular provider has been given the permission Petitioners want. Their witness testified that enrollment "would not be possible" for a child whose parents are a same-sex couple, JA 142, and that where parents present a child with a gender identity differing from the child's biological sex and the family does not "see eye to eye" with the school's teaching, school leaders should "please not admit the child," JA 143.

Petitioners' theory would make the bare existence of an exemption enough to defeat general applicability. On their view, favorable treatment of secular conduct entitles a religious objector to the same treatment even when that conduct affects the government's asserted interest in a different way, or not at all. But this rule does not guarantee equal regard. On the contrary, it would make the best treatment government gives anyone the floor for religious exercise, regardless of why that treatment was given. It would convert general applicability from a test for impermissible disregard into a standing entitlement to strict scrutiny, because virtually every regulatory scheme treats someone more favorably for some reason—even

where that reason reflects no disregard for religious exercise.

Tandon provides a doctrinal tool to ferret out discrimination against religion. It should not be read as giving religious objectors carte blanche to disregard a State's equal-opportunity requirement whenever the State accommodates children with disabilities and children from low-income families.

ARGUMENT

I. *TANDON* GIVES COURTS A WAY TO FIND DISREGARD FOR RELIGIOUS EXERCISE.

The Free Exercise Clause does not ordinarily excuse a religious objector from a law that applies to everyone. *Employment Division, Department of Human Resources of Oregon v. Smith* settled that. Members of the Native American Church used peyote in a religious ceremony. Oregon prohibited the drug and made no exception for its sacramental use. The Court held that the State owed them no religious exemption. 494 U.S. 872, 878-79 (1990).

Justice Scalia's formulation in *Smith* carries a recognition within it. A qualifying enactment must be a "valid and neutral law of general applicability." *Id.* at 879. Laws need not announce their hostility or indifference to religious beliefs or practices in so many words to raise a free-exercise concern. General applicability is the mechanism for rooting out those failures of equal regard. That is a problem of proof. Governments rarely announce that they think religious reasons are worth less than secular ones. So the law needs a way to find that out without taking their word for it. Courts need a mechanism that draws on what the government does rather than on what it admits.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah is the classic illustration. A Santeria church

announced plans to open, and the city responded with a series of enactments. Their texts used the words “sacrifice” and “ritual,” and the city declared a policy of opposing “the ritual sacrifices of animals.” 508 U.S. 520, 526-28 (1993). But the Court did not rest on that language, observing that the words “have a religious origin” while “current use admits also of secular meanings,” and that the ordinances “define ‘sacrifice’ in secular terms, without referring to religious practices.” *Id.* at 534. What decided the case was how the scheme operated. It spared kosher slaughter, *id.* at 536-37, along with hunting, slaughter for food, eradication of pests, and euthanasia, *id.* at 537, while reaching Santeria sacrifice. The city had thus made its interests “worthy of being pursued only against conduct with a religious motivation.” *Id.* at 543. That, the Court held, “devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons.” *Id.* at 537-38. The gap between what the city said it cared about and what it actually regulated was the evidence of impermissible disregard.

Tandon treats that insight as a usable test. A regulation is not generally applicable when it “treat[s] any comparable secular activity more favorably than religious exercise.” 593 U.S. at 62. And comparability is “judged against the asserted government interest that justifies the regulation at issue.” *Ibid.* Because California invoked disease transmission, comparability was “concerned with the risks various activities pose, not the reasons why people gather.” *Ibid.* *Fulton v. City of Philadelphia* is to the same effect: a law lacks general applicability when it permits secular conduct that undermines the stated interest “in a similar way.” 593 U.S. at 534.

So the test is a detection device. It asks one narrow, factual question—what the allowance does to the interest the government invoked—and treats the answer as

evidence of how the government valued the religious activity.

Or, to put it another way, general applicability is the Clause’s guarantee that religious and nonreligious commitments receive equal value—a guarantee that “presumptively prohibits government from regulating protected activities while exempting other activities to which the government’s interest applies just as readily.” Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 Colum. L. Rev. 2397, 2397 (2021); see Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in *Law and Religion: A Critical Anthology* 200 (Stephen M. Feldman ed., 2000).

II. UNDER *TANDON* AND *FULTON*, A SECULAR ALLOWANCE IS COMPARABLE WHEN IT UNDERMINES THE GOVERNMENT’S ASSERTED INTEREST IN A SIMILAR WAY.

When a State denies a religious group an exemption from a general rule but grants a comparable exemption to a secular one, there is reason to worry that the State has devalued the religious claim because it is religious. *Tandon* holds that such a regime is subject to strict scrutiny. Everything turns on what makes the two comparable, and the answer is not that the government’s concern is present in both. It is what each allowance does to that concern. *Fulton* puts the test in terms of secular conduct that undermines the asserted interest “in a similar way.” 593 U.S. at 534. Professor Tebbe has described the same inquiry as asking whether secular exemptions “implicate the government’s interest in the same way as the claimed religious exemptions.” Tebbe, *supra*, at 2412.

The per curiam applied that rule to California’s own asserted concern. California said it was limiting viral transmission; it then allowed a range of commercial settings to gather people from more than three

households while capping worship in a home at three. 593 U.S. at 63. On the per curiam’s reading, permitting the businesses cut against the very interest California had invoked, and a State that tolerates its own asserted harm for commercial reasons cannot then call the religious reason insufficient.

But not every secular exemption shows impermissible disregard. Sometimes an exemption exists because it reaches conduct the government has no interest in preventing at all.

Then-Judge Alito’s opinion for the Third Circuit in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* provides the cleanest demonstration, because it contains both an impermissible exemption and a permissible exemption in the same case. Newark required officers to shave. It allowed beards for medical need and beards for undercover work. Two Muslim officers wanted beards their faith required. 170 F.3d 359, 360-61 (3d Cir. 1999).

Stop at the exemption level and the two allowances are identical. Each allows a bearded officer. The department’s interest in each, though, was different. The city’s general interest was in a uniform public appearance for the police force. The medical beard cut against that interest: a member of the public sees the departure from uniformity whatever the officer’s reason. Allowing that beard while refusing the religious one *was* a “value judgment.” *Id.* at 366.

The undercover beard was different. Undercover officers “obviously are not held out to the public as law enforcement person[n]el,” *ibid.*, so excusing their beards took nothing away from the appearance of uniformed police. As then-Judge Alito put it, the Clause “does not require the government to apply its laws to activities that it does not have an interest in preventing.” *Ibid.*

The medical beard failed. The undercover beard did not. Effect on the asserted interest was the dividing line.

Fraternal Order of Police thus shows that a secular allowance does not evidence religious disregard unless it impairs the government's interest in the same manner as the religious allowance would. The undercover beard and the medical beard are identical at the level of description. They differ in effect. That distinction is not a judgment about the relative worth of medicine, police work, or faith. It is a factual question about the government's interest, and it is the question *Tandon* directs courts to ask. A test that skipped it would find disregard everywhere, including where none has occurred.

III. COLORADO'S PREFERENCES SATISFY *TANDON* BECAUSE THEY REMOVE BARRIERS TO ENROLLMENT WHILE THE EXEMPTION PETITIONERS SEEK WOULD RAISE ONE.

A central question in this case is whether Colorado's law meets the test of *Tandon* or not—that is, whether it makes special allowances for secular reasons when the same allowances would apply equally if the reasons were religious. The answer is no.

Everything turns on what, exactly, Colorado's law actually does, and what the State's interest actually is. The answers to those two questions decide this case. Colorado offers universal pre-K to its four-year-olds. Equal opportunity is guaranteed: Colorado's law forbids denying a child enrollment because of "race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability." Pet. App. 6a. Colorado states its interest as "ensuring that every four-year-old Coloradan has equal opportunity, regardless of protected-class status, to enroll in and receive high-quality publicly funded preschool services." Resp. Br. 41. Removing barriers is how Colorado pursues that interest,

and it is the measure against which every secular allowance must be judged.

Notably—and this is important—Petitioners’ general-applicability argument does not challenge those special protections as impermissible. They take it as a given that a State can protect students from discrimination on the basis of those characteristics without running afoul of the Free Exercise Clause. That is a sensible position because challenging that mandate would call into question virtually all of American antidiscrimination law.

Rather, Petitioners set their sights on the other half of Colorado’s law. Pre-K providers are allowed to prefer, in selecting students, children previously enrolled, siblings of enrolled children, the children of their own employees, children within a geographic catchment, children who are multilingual, and families who commit to volunteering; they may focus on a knowledge area, or require vaccination. Pet. App. 8a-10a. Petitioners’ comparability argument does not rest on those preferences. They are ordinary tools for matching children to seats in a school, and none of them turns on a protected characteristic.

Petitioners’ comparability argument instead rests on two permissions: the preference for children with an individualized education program (disabled children), and the preference Head Start providers hold for low-income families. Pet. App. 8a. Petitioners do not ask that those preferences be set aside. They invoke them as comparators, arguing that Colorado is willing to distinguish among children on protected grounds when it thinks the child’s secular interest is important enough but refuses when the interest is religious. Those are the strongest comparators Petitioners have, because disability and income level are among the eight protected characteristics. But that is where the resemblance ends.

Under *Tandon* the question is not whether two policies both classify children. It is whether permitting those secular preferences undercuts Colorado's interest. It does not.

One thing unites every preference Colorado permits and separates all of them from what it forbids: no preference Colorado has approved authorizes a provider to turn a child away on any of the eight protected grounds. The preferences sort children among providers, but they do not authorize what the rule forbids, and Colorado requires that an approved preference remain consistent with the equal-opportunity mandate. Pet. App. 10a. The State's witness confirmed as much, preference by preference, testifying that neither the cooperative-preschool preference, JA 292, nor the school-district boundary preference, JA 293, nor the IEP preference, JA 294, nor the Head Start preference, JA 295, permits any exception to the antidiscrimination provision.

The preferences for disabled and poor students remove physical barriers to attendance, something unique to disabled and poor students. A child with a disability may be unable to attend school at all. Not disfavored—unable. Attendance can require a particular placement, particular classroom ratios, and particular aligned services, and the Individuals with Disabilities Education Act obliges the State to supply them. 20 U.S.C. § 1400 *et seq.* Colorado therefore lets capacity be reserved “to ensure conformity with obligations incurred pursuant to law,” and that capacity carries the services prescribed for the identified child. JA 293. Head Start capacity carries the “comprehensive supports” that make attendance possible for children living in poverty. JA 294. Colorado sets capacity aside because, as to children with disabilities, “historically, they haven’t had equitable access or aligned care that meets their needs.” JA 294. A seat that exists so that a child can attend at all does not

undercut an interest in getting children through the door. It promotes the interest in equal opportunity.

Petitioners ask for an allowance that works in a fundamentally different way. Their witness testified that for a child of a same-sex couple, “[e]nrollment would not be possible,” JA 142, and that where parents present a child with a gender identity differing from the child’s biological sex and the family does not “see eye to eye” with what the school teaches, school leaders should “please not admit the child,” JA 143. Sexual orientation and gender identity are two of the eight protected grounds. Pet. App. 6a. The relief Petitioners seek would close the door on a child based on a ground the rule prohibits. The existing permissions and the requested exemption are not two applications of one policy that Colorado has administered unevenly. They move in opposite directions, and only one of them cuts against the interest Colorado asserted. Permitting accommodation of disabled and indigent students costs Colorado none of the access its rule was adopted to secure, while permitting the requested religious exemption would cost it precisely that.

Petitioners answer that Colorado is simply choosing among competing reasons for preferring one group of children over another. A preschool limited to disabled children excludes nondisabled children; one limited to poor children excludes wealthy children. And if Colorado may permit those preferences because it regards their secular purposes as sufficiently important, Petitioners argue, the State could just as readily regard some other secular purpose as sufficient to justify a preschool limited to white families or wealthy families, while refusing a religiously motivated preference on the ground that the resulting barriers are “fundamentally different.” Pet. Br. 43. But *Tandon* does not require Colorado to treat all reasons for differential treatment as equivalent, or ask whether one reason is more worthy than another. It asks

whether the conduct permitted by Colorado undermines its asserted interest in the same way as the conduct it forbids. The disability and income preferences do not: they are means of extending equal educational opportunity to children whose circumstances impede access to preschool. Petitioners' requested exemption would instead deny an otherwise available opportunity because of a protected characteristic. The distinction therefore rests not on the relative value of secular and religious reasons, but on their different effects on the State's asserted interest. The words "fundamentally different" are not mere words in this instance—they are literally true. The State's interest in permitting disabled and poor children to attend school is an interest in making physical attendance at school possible for those children; neither whiteness nor wealth nor religious belief is a physical barrier to education in the ways that hunger and paralysis are.

Colorado's law satisfies *Tandon*, and it satisfies general applicability. It shows equal regard rather than disregard. The contrast makes the point exact. Had Colorado permitted a preschool to turn away children with disabilities in order to raise outcomes for the other students, it would have sacrificed its own asserted interest for a secular reason, and a religious provider denied the same latitude could point to that allowance as evidence of disregard. That would make this case *Tandon*. But Colorado has given no secular provider the power to exclude that Petitioners now seek for religious reasons. Nor has it allowed any provider to use an inclusion preference as a means of excluding children on a ground the rule protects. Where government has withheld from everyone the permission the religious objector requests, the law is generally applicable, and strict scrutiny has no role to play.

CONCLUSION

The Court should affirm.

Respectfully submitted.

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