No. 25-581

In the Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN LITTLETON, 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 RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

INTERESTS OF THE AMICI CURIAE [1]

Amici are religious and civil-rights organizations that share a commitment to the free exercise of religion and the separation of religion and government. Amici believe that the Free Exercise Clause prohibits the government from targeting disfavored religious beliefs for inferior treatment. But amici oppose an expansion of the Free Exercise Clause that would allow religious litigants to opt out of neutral, generally applicable laws that prevent discrimination and other harms.

The amici are:

- Americans United for Separation of Church and State;
- ACLU of Colorado;
- Alliance of Baptists;
- American Civil Liberties Union;
- Bend the Arc: A Jewish Partnership for Justice;
- DignityUSA;
- Evangelical Lutheran Church in America;
- Global Justice Institute, Metropolitan Community Churches;
- Hindu American Foundation;
- Keshet: LGBTQ+ Jews;
- Methodist Federation for Social Action;

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission.

- Sadhana: Coalition of Progressive Hindus;
- Society for Humanistic Judaism;
- Unitarian Universalist Association.

INTRODUCTION AND SUMMARY OF ARGUMENT

Colorado established its Universal Preschool Program to ensure that all children in Colorado can access free, safe, and high-quality education services in the school year preceding kindergarten. Pet. App. 188a. The State requires all participating providers in the Program to comply with equal-opportunity rules, which prohibit discrimination against children and their families because of their sexual orientation or gender identity, among other characteristics. Pet. App. 204a. This guarantees that all eligible preschool-aged children have access to the Program, free from the stigma and degradation associated with discrimination. The question here is whether the Free Exercise Clause entitles petitioners to an exemption from the equal-opportunity requirements.

The answer should be no. Petitioners' proposed free-exercise standard and their expansive view of exemption entitlements stand in stark opposition to historical understandings of the Free Exercise Clause. Moreover, petitioners' proposed free-exercise regime, under which strict scrutiny automatically applies in public-benefits cases, is incompatible with the law of this Court, which has repeatedly affirmed *Employment Division* v. *Smith*'s rule that neutral and generally applicable laws need not satisfy strict scrutiny. See 494 U.S. 872, 878-879 (1990). This Court's decisions in the *Carson* trilogy—*Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017); *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020); and *Carson* v. *Makin*, 596 U.S. 767 (2022)—affirm that *Smith* is equally controlling in public-benefit contexts, including when public-benefit eligibility rules incidentally burden religion.

The equal-opportunity requirements, unlike the laws at issue in the *Carson* trilogy, are neutral and therefore do not trigger strict scrutiny. They are also generally applicable. Accepting petitioners' view of general applicability would defy common sense and could automatically require the government to justify a staggering array of statutes under strict scrutiny. Finally, petitioners' and their amici's other arguments for invoking strict scrutiny should likewise be rejected, as the equal-opportunity requirements do not enact a denominational preference or interfere with children's religious upbringing.

ARGUMENT

I. The equal-opportunity requirements are consistent with historical understandings of the Free Exercise Clause.

Petitioners essentially advocate for a rule of near-automatic judicial deference to religious objectors. See Pet. Br. 20-26. But petitioners' preferred regime would diametrically contradict historical understandings of the First Amendment. However broadly the Founders understood the right to religious freedom, they did not believe that it mandates exemptions from laws that protect people from harm. History also refutes petitioners' contention (at 25-26) that the Free Exercise Clause restricts the government more than usual when the government funds public programs.

A. The Free Exercise Clause was neither intended nor originally understood to require exemptions that would result in harm to others.

Founding-era Americans did not understand the Free Exercise Clause as creating an entitlement to religion-based exemptions that would cause harm to third parties. Rather, the Clause was enacted to address a long history of governmental suppression of disfavored religious groups. And while scholars have debated the existence and contours of a right to any religious exemptions at the Founding,[2] one thing is clear: The Founders adamantly opposed exemptions that harmed others. This understanding is reflected in the writings of leading Founders, as well as early state constitutions and judicial decisions.

Both Religion Clauses of the First Amendment were informed by the history of European and colonial religious persecution. The "centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson* v. *Board of Educ.*, 330 U.S. 1, 8-9 (1947); see also *Engel* v. *Vitale*, 370 U.S. 421, 432-433 (1962). During the seventeenth and eighteenth centuries, Catholics and Puritans in England were subjected to laws enacted "to destroy dissenting religious sects and force all the people of England to become regular attendants at [the] established church." *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 149 (1961) (Black, J., dissenting). Immigration to colonial America was spurred by these religious conflicts and persecutions. See Carl H. Esbeck, *Protestant Dissent and the*

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[2] Compare, *e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 916 (1992), with Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1465-1466 (1990).

Virginia Disestablishment, 1776-1786, 7 Geo. J.L. & Pub. Pol'y 51, 57 (2009). Yet some colonists then came to engage in similar practices themselves, using political authority to impose their own preferred beliefs and religious institutions at the expense of other denominations. See *Everson*, 330 U.S. at 9-11.

These "historical instances of religious persecution and intolerance * * * gave concern to those who drafted the Free Exercise Clause." *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986). As James Madison explained, "[t]orrents of blood ha[d] been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." James Madison, Memorial and Remonstrance Against Religious Assessments (1785), https://bit.ly/4hrFzdJ (Memorial and Remonstrance). Accordingly, those who drafted the First Amendment sought to ensure that government would, as Madison put it, be prevented from "proscribing all difference in Religious opinion." Memorial and Remonstrance; *Everson*, 330 U.S. at 13.

But while the Free Exercise Clause was intended to prohibit governmental disfavor toward particular faiths, it was not originally understood to mandate exemptions that would harm others. This is clear from the writings of the Founders, including Madison and Thomas Jefferson, who played "leading roles" "in the drafting and adoption of" the First Amendment, *Everson*, 330 U.S. at 13, and whose views "came to be incorporated not only in the Federal Constitution but likewise in those of most of our states," *School Dist.* v. *Schempp*, 374 U.S. 203, 214 (1963).

For example, though Madison believed that the right to practice one's religion freely was of utmost importance, he cautioned that it should not be construed to "trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), https://bit.ly/34wu2n5. According to the Madisonian view, "a believer has no license to invade the private rights of others or to disturb public peace and order, *no matter how conscientious the belief or how trivial the private right on the other side*." McConnell, 103 Harv. L. Rev. at 1464 (emphasis added). Madison was particularly focused on "*equal* title to the free exercise of Religion according to the dictates of Conscience." Memorial and Remonstrance (quoting Va. Declaration of Rights of 1776 § 16). And just "[a]s [a] Bill violates equality by subjecting some [religions] to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. * * * Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others?" *Ibid.*

So too, it is "quite clear that Jefferson did not" endorse a "broad principle of affirmative accommodation" for religious objections. *City of Boerne* v. *Flores*, 521 U.S. 507, 542 (1997) (Scalia, J., concurring in part). While Jefferson warned against the dangers of allowing government to "restrain the profession or propagation of [religious] principles," he believed that government might validly "interfere when [those] principles break out into overt acts against peace and good order." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), https://bit.ly/2JShvmT. In short, Jefferson believed that an individual "has no natural right in opposition to his social duties." Letter from Thomas Jefferson to a Committee of the

Danbury Baptist Association (Jan. 1, 1802), https://bit.ly/4g3LYth.

Prominent religious thinkers of the day also shared this understanding that religious objectors were not entitled to exemptions that would harm third parties. See Ellis M. West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591, 630-632 (1990). For example, John Leland, a Baptist minister who was crucial to persuading Madison to author the First Amendment,[3] wrote: "Let a man's motive be what it may, let him have what object soever in view; if his practice is opposed to good law, he is to be punished." John Leland, *The Yankee Spy* (1794), *in* The Writings of Elder John Leland 215, 228 (L.F. Greene ed., 1845). Similarly, Samuel Stillman, one of New England's most prominent ministers,[4] sermonized: "The subjects of the kingdom of Christ, claim no exemption from the just authority of the magistrate." Samuel Stillman, A Sermon Preached Before the Honorable Council, and the Honorable House of Representatives of the State of Massachusetts-Bay 27 (1779), https://bit.ly/4wy9p43.

Most Founding-era state constitutional analogs to the Free Exercise Clause contained caveats reflecting this basic understanding that the right to free exercise did not confer a right to religious exemptions that would override laws protecting the public and result

[3] See Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 Penn. St. L. Rev. 733, 777-778, 790 (2009).

[4] See Thomas R. McKibbens, The Forgotten Heritage: A Lineage of Great Baptist Preaching 146 (1986).

in harm to others. Of the twelve state constitutions that contained religious-freedom protections, nine of them disavowed protection for acts disturbing the peace. McConnell, 103 Harv. L. Rev. at 1457 n.242, 1461. Two of the other three—Pennsylvania and North Carolina—were among a majority of states that expressly limited protections to acts of worship. *Id.* at 1460. These clauses had a more restrictive scope because the word "worship" was confined to "rituals or ceremonial acts of religion, such as the administration of sacraments or the singing of hymns." *Ibid.* Such rituals were unlikely to harm others. And the remaining state was Virginia, whose constitution was silent on the scope of its protections, *id.* at 1462-1463, but which later clarified by statute that the government was free to regulate "when principles break out into overt acts against peace and good order," Va. Code Ann. § 57-1 (enacted Jan. 16, 1786).

As Professor McConnell has explained, "[t]he wording of the state provisions * * * casts light on the meaning of the first amendment," "for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." McConnell, 103 Harv. L. Rev. at 1456. Viewed together, these provisions demonstrate that, under Founding-era state constitutions, the free-exercise right did not override laws "necessary for the protection of others." See *id.* at 1462, 1464-1466.

Early state-court decisions point in the same direction. Professor Vincent Phillip Muñoz has determined that "no antebellum state court interpreted constitutional protections of religious free exercise to grant exemptions" from laws that protect the public. Vincent Phillip Muñoz, *The Original Meaning of the*

Free Exercise Clause: The Evidence from the First Congress, 31 Harv. J.L. & Pub. Pol'y 1083, 1099 (2008) (citing Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 276-295 (1991)). Indeed, the few early court decisions to address the issue demonstrate precisely the opposite. In the leading case addressing the question, the Pennsylvania Supreme Court held in 1831 that respect for religious obligations "must not be suffered to interfere with the operations of that organ of the government which has more immediately to do with the protection of person[s]." *Phillips* v. *Gratz*, 2 Pen. & W. 412, 416-417 (Pa. 1831); accord *Specht* v. *Commonwealth*, 8 Pa. 312, 322 (1848).

Of course, universal education did not exist at the Founding, see Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, 107 Minn. L. Rev. 1415, 1449-1451 (2023), so there are no historical examples of exemption requests that directly mirror petitioners'. Even so, when Founding-era officials articulated the right to free exercise, they contemplated third-party harm in a similar manner to Colorado's equal-opportunity requirements.

For example, several state constitutions made explicit that the free exercise of religion was not to be used to violate the civil rights of others. Rhode Island's Charter of 1663—which became a model for early state constitutions[5]—clarified that religious liberty was not a license for "the civil injury or outward disturbance of others." R.I. Royal Charter of 1663. Maryland's constitution prohibited the use of religious exercise to "injure others, in their natural, civil, or

[5] McConnell, 103 Harv. L. Rev. at 1457.

religious rights." Md. Const. of 1776 Art. XXXIII. The Massachusetts and New Hampshire free-exercise provisions specified that religious exercise must not be used to "disturb" or "obstruct others in their religious worship." Mass. Const. Part I, Art. II (in effect since 1780); N.H. Const. Part I, Art. V (in effect since 1784). And Virginia's provision not only provided a right to free exercise but also established a corresponding "duty" to practice "forbearance, love, and charity toward each other." Va. Declaration of Rights of 1776 § 16.

These provisions confirm that petitioners cannot properly invoke religious liberty to deny others their civil rights. But that is precisely what they seek to do by refusing enrollment to families based on their protected characteristics.

B. Historical understandings of the Free Exercise Clause do not support a religious entitlement to special treatment in the disbursement of government benefits.

Petitioners' suggestion that the Free Exercise Clause applies with greater force to government-funded public benefits also flies in the face of history. Petitioners contend that strict scrutiny automatically applies when a condition on a public benefit incidentally burdens religious exercise, regardless of the condition's neutrality and general applicability. Pet. Br. 25-26. The historical record paints a far different picture, demonstrating that governments have long exercised substantial leeway in choosing what to fund. Indeed, there are many historical examples of funding being denied to religious schools, and those funding denials did not trigger free-exercise arguments. Aaron

Tang & Ethan Hutt, *"Original History" and the Free Exercise Case for Religious Charter Schools*, 103 Wash. U. L. Rev. 639, 641-642 (2026).

Throughout the nineteenth century, as public funding for education grew, states and localities sometimes denied funding requests from religious schools. Tang & Hutt, 103 Wash. U. L. Rev. at 663-676. These denials came in a variety of forms. In 1825, New York City rescinded funds from denominational schools (run by Lutherans, Presbyterians, Catholics, and others) and began exclusively funding nonsectarian schools, chiefly schools run by the New York Free School Society. *Id.* at 665-666. A similar story played out on the west coast, where California discontinued a "two-year experiment with publicly funding religious schools." *Id.* at 674. Other laws afforded governmental officials discretion to deny funding to religious schools. *Id.* at 674-675. Yet "these funding denials did not lead to any free exercise rights talk or litigation in state courts," even as "religious entities *did* litigate other, high-profile lawsuits asserting their state-level free exercise rights." *Id.* at 676, 681.

Petitioners' amici point to a few "ambigu[ous]" historical examples of constitution-based arguments against such funding denials (with no corresponding litigation or threat of litigation). Br. of Amici Curiae Stephanie Barclay and Mark Storslee in Supp. of Pet. 3. For example, they point to opposition from Shearith Israel Congregation, a Jewish synagogue, to New York City's exclusive funding of nonsectarian schools in the early nineteenth century. *Id.* at 12-13. Because those "nonsectarian" schools actually *did* promote religious beliefs (a generic form of Christianity),[6] Shearith Israel argued that the arrangement was "at variance with the liberal spirit of our constitution, which recognizes no distinction in religious worship." *Id.* at 13.

The historical examples identified by Professors Barclay and Storslee are better understood as "policy argument[s]" that rhetorically evoked constitutional ideals without actually asserting a constitutional right. See Tang & Hutt, 103 Wash. U. L. Rev. at 666 n.130. At most, these examples point to a prohibition against denominational discrimination that sounds in anti-establishment, rather than free-exercise, principles: The government may not fund some schools that promote religion while excluding other religious schools on the basis of their religious beliefs. In any event, this Court has recently counseled that a proper history-and-tradition analysis must not rely on "outlier" examples from "a few locales." *Wolford* v. *Lopez*, 146 S. Ct. 2032, 2050 (2026). And the weight of the historical record suggests that denials of funds to religious schools generally did not generate free-exercise objections. See Tang & Hutt, 103 Wash. U. L. Rev. at 666 n.130, 676.

These state-level funding decisions are significant, as "the Free Exercise Clause had more analogs in State Constitutions than any other individual right." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 573, 575 (2021) (Alito, J., concurring in the judgment). To be sure, the *Carson* trilogy may be viewed as in

[6] See William Oland Bourne, History of the Public School Society of the City of New York 38, 641 (1870) (documenting the New York Free School Society's Christian character).

some tension with the history outlined here. But regardless of how the Court may otherwise address that tension, the history surely counsels against petitioners' request to extend the *Carson* trilogy to provide religious entities an entitlement to public benefits on *special terms*, see Pet. Br. 25-26.

II. Conditioning a public benefit on compliance with religion-neutral eligibility requirements does not trigger strict scrutiny.

Religious freedom is a value of the highest order. But, consistent with the history discussed above, the constitutional guarantee of religious freedom is not an entitlement to "general immunity from secular laws." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 746 (2020). Reflecting this principle, under *Smith*, laws that apply generally and are neutral with respect to religion do not trigger heightened scrutiny under the Free Exercise Clause, even if they "ha[ve] the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872).

This Court has consistently, and recently, affirmed that *Smith* remains the controlling precedent when evaluating free-exercise challenges. See, *e.g.*, *Mahmoud* v. *Taylor*, 606 U.S. 522, 564 (2025) ("Under our precedents, the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable."); *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (explaining that *Smith*'s standard governs free-exercise challenges). Petitioners' argument that *Smith* has been abandoned is unavailing. They point (at 20-26) to cases that either invoke *Smith*'s framework in determining a law to not be neutral and generally applicable—a scenario *Smith* explicitly contemplated—or cases that involve narrowly defined special circumstances that require a different analysis (also identified by *Smith*), such as church autonomy or parents' control over their children's religious upbringing. See *Smith*, 494 U.S. at 877, 881. If anything, these cases highlight the "continued utility" of *Smith*. Resp. Br. 23.

Petitioners nevertheless contend (at 25-26), citing the *Carson* trilogy, that *Smith* categorically does not control in cases involving public-benefit eligibility requirements. And they demand a new rule for public-benefits cases, under which the government must satisfy strict scrutiny any time a litigant asserts a religious objection to such a requirement, even if that requirement is neutral and generally applicable. See Pet. Br. 28. Petitioners then attempt to invoke strict scrutiny by claiming (at 29) that they were "excluded [from the Program] solely because of their religious exercise."

These arguments should fail. First, the *Carson* trilogy not only is entirely consistent with *Smith* but also reaffirmed *Smith*'s holding. Rather than create a new categorical rule for public-benefits cases, *Trinity Lutheran*, *Espinoza*, and *Carson* merely applied *Smith*'s principle that a government action that is not neutral with respect to religion is subject to strict scrutiny. Second, neither the *Carson* trilogy nor any other operative precedent holds that strict scrutiny applies whenever there is a religious objection to a neutral, generally applicable public-benefit eligibility requirement. Such a rule would be inconsistent with the cases of the *Carson* trilogy—which each made clear that, but for their religious character, the religious entities at issue were otherwise eligible under the respective benefit program—and would lead to absurd results. Finally, the record does not support the application of strict scrutiny under *Carson*. Petitioners declined to comply with a neutral, generally applicable rule and so were not "otherwise eligible," *Carson*, 596 U.S. at 789, for participation in the Program.

A. *Smith* controls in public-benefits cases.

Petitioners assert that, in the *Carson* trilogy, this Court abandoned *Smith* and set out a new rule of decision for free-exercise challenges to public-benefit requirements. But the *Carson* trilogy was premised not on a rejection of *Smith* but rather on *Smith*'s "unremarkable" principle, reiterated in *Lukumi*, that the government cannot impose "special disabilities" on an entity or practice "because of [its] religious character." *Trinity Lutheran*, 582 U.S. at 458, 460, 462 (citation omitted).

In *Smith*, this Court held that, with limited exceptions, laws that are neutral with respect to religion and apply generally do not trigger heightened scrutiny. 494 U.S. at 879. In doing so, the Court abandoned the standard set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), under which "governmental actions that substantially burden a religious practice" trigger strict scrutiny. *Smith*, 494 U.S. at 883. But the Court also clarified that, under its newly articulated standard, the Free Exercise Clause still protected against—and applied strict scrutiny to—laws that "impose *special disabilities* on the basis of religious views or religious status." *Id.* at 877 (emphasis added).

Soon after *Smith*, this Court reiterated its neutrality principle in *Lukumi*, 508 U.S. 520. Echoing

Smith, the Court explained that if a law "impose[s] special disabilities" on the basis of "religious status," then it is not neutral and triggers strict scrutiny. *Ibid.* (quoting *Smith*, 494 U.S. at 877).

This principle provided the foundation for this Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*. In the first case of the trilogy, *Trinity Lutheran*, the Court explicitly situated its holding as an application of *Smith* and *Lukumi*'s requirement of governmental neutrality toward religion. Citing *Smith*, the Court explained that, although the Free Exercise Clause did not entitle religious adherents "to a special dispensation from" neutral and generally applicable laws, "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 460-461 (quoting *Smith*, 494 U.S. at 877). This "now-familiar refrain," which *Lukumi* "restated," *Trinity Lutheran*, 582 U.S. at 461 (citing *Lukumi*, 508 U.S. at 533), led to the conclusion that Missouri's "policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program" triggered strict scrutiny, *id.* at 454, 462. The Missouri policy, the Court held, "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit *solely because of their religious character*," thus imposing precisely the kind of "special disability" on religion forbidden under *Smith* and *Lukumi*. *Id.* at 462 (emphasis added).

Three years later, in *Espinoza*, this Court held that Montana's specific exclusion of religious schools from a taxpayer-funded scholarship program similarly triggered strict scrutiny. 591 U.S. at 479. In reaching this conclusion, the Court reaffirmed the principle of *Smith* and *Lukumi* that the government cannot "impose special disabilities on the basis of religious status." *Id.* at 475 (quoting *Trinity Lutheran*, 582 U.S. at 461). Montana's rule ran afoul of this neutrality principle—and imposed a "special disability" on religion—because it "exclude[d] schools from government aid solely because of religious status," thereby "singl[ing] out" religious schools for worse treatment. *Id.* at 476.

In the final case of the trilogy, *Carson*, the Court again appealed to *Smith* and *Lukumi*'s neutrality rule to hold that the exclusion of religious schools from a Maine tuition-assistance program triggered strict scrutiny. 596 U.S. at 780. "The State," the Court explained, "pays tuition for certain students at private schools—so long as the schools are not religious." *Id.* at 781. When some entities are disqualified from receipt of public funding "solely because they are religious," *id.* at 780 (quoting *Espinoza*, 591 U.S. at 487), "[t]hat is discrimination against religion," *id.* at 781. In short, the Court concluded, "there is nothing neutral about Maine's program." *Ibid.*

The *Carson* trilogy did not hold that "*Smith* does not control" in public-benefits cases. Contra Pet. Br. 22, 25. Instead, these cases merely affirm *Smith* and *Lukumi*'s "unremarkable" rule that the government fails to act neutrally when it singles out religious entities for disfavored treatment solely because they are religious. See *Carson*, 596 U.S. at 780-781.

B. Strict scrutiny is not triggered merely because a religious entity disagrees with a religion-neutral public-benefit condition.

Petitioners assert (at 28) that, under *Carson*, strict scrutiny applies whenever there is a religion-based conflict with a public-benefit eligibility rule. But neither the *Carson* trilogy nor any other operative precedent requires strict scrutiny simply because a religious entity disagrees with a religion-neutral law.

Under *Smith*, when a burden on religious exercise is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878; see also *Lukumi*, 508 U.S. at 531 ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

The *Carson* trilogy, too, reiterated that a religious objection to a neutral eligibility requirement does not by itself trigger scrutiny. As the Court explained in *Trinity Lutheran*, the Free Exercise Clause does not entitle religious adherents to "special dispensation" from the law "on account of their religion," and it does not create a special "entitlement" to government funding for religious organizations regardless of their compliance with neutral eligibility requirements. 582 U.S. at 460, 463. Instead, the First Amendment simply allows religious entities to "compete on an equal footing" with other entities. *Id.* at 463 (citation omitted).

This well-established understanding of the Free Exercise Clause explains why *Trinity Lutheran*, *Espinoza*, and *Carson* repeatedly emphasized that the respective state policies excluded "otherwise eligible" or "otherwise fully qualified" religious entities from the pertinent programs "solely because of [their] religious character." *Trinity Lutheran*, 582 U.S. at 462, 466; *Espinoza*, 591 U.S. at 476, 484; *Carson*, 596 U.S. at 780, 789. These policies contravened the First Amendment because an entity's religious character—not merely its refusal to comply with religion-neutral eligibility requirements applicable to everyone—was the "but for" cause of the benefit denial. *Trinity Lutheran*, 582 U.S. at 454.

Petitioners contend that *Carson* relied on two pre-*Smith* cases, *Sherbert* and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), which they say together stand for a separate rule that survived *Smith*: that strict scrutiny applies whenever "the conduct that led to [a] denial of benefits was—for the claimants—religious." Pet. Br. 34. But *Smith* expressly cabined *Sherbert* and *Thomas* to situations involving "individualized governmental assessment of the reasons for the relevant conduct"—in other words, situations where the statutory scheme at issue is not neutral and generally applicable because it lends itself to being applied in a manner that grants preferential treatment to secularly motivated conduct. See *Smith*, 494 U.S. at 884; *Holt* v. *Hobbs*, 574 U.S. 352, 357 (2015) ("*Smith* largely repudiated the method of analysis used in * * * *Sherbert*.").

To the extent that petitioners assert that the *Carson* trilogy breathed new life into *Sherbert* and *Thomas* beyond *Smith*'s limited interpretation, their argument is incompatible with this Court's other decisions involving government benefits. For example, as here, in *Fulton* the plaintiff asserted a religious objection to compliance with a nondiscrimination requirement that was a condition of receiving a government contract. 593 U.S. at 532. But rather than skipping straight to strict scrutiny, *Fulton* adhered to *Smith*, analyzing the provision at issue to determine whether it was neutral and generally applicable. *Id.* at 533.

Petitioners' assertion (at 34) that *Mahmoud*, 606 U.S. 522, supports a broad "rule against religious-exercise-based benefits exclusions" is equally misguided. In *Mahmoud*, this Court affirmed *Smith*'s recognition of an "exception to [its] general rule," *id.* at 564, where the government "substantially interfer[es]" with parents' ability to guide "the religious development" of their children, *id.* at 565 (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972)). Applying this standard, the Court determined that a Maryland school district's refusal to provide opt-outs for parents with religious objections to certain curriculum materials constituted such a burden and triggered strict scrutiny. *Id.* at 564.

Petitioners emphasize that *Mahmoud* cited *Trinity Lutheran* when it explained that the availability of home schooling and private schools did not obviate the parents' free-exercise concerns. See *Mahmoud*, 606 U.S. at 560-561. But petitioners are wrong that the Court, by raising *Trinity Lutheran*, somehow endorsed an unfettered right to flout neutral, generally applicable public-benefit eligibility requirements. Indeed, if the *Mahmoud* Court had recognized such a right, there would have been no need to determine whether the curriculum materials at issue substantially interfered with children's religious development. The parent-plaintiffs could have obtained strict scrutiny simply by virtue of having a religious objection. But see *id.* at 550-555 (describing in detail how the curriculum materials interfered with children's religious development).

C. A rule requiring strict scrutiny in every public-benefits case would lead to absurd results.

Under petitioners' proposed rule, religious objections to benefit-eligibility requirements would automatically trigger strict scrutiny. This would create a bizarre legal regime under which government entities would have to justify regulations on conduct in *government-funded* programs under a *higher* legal standard than regulations on the same conduct in society in general.

Petitioners' proposed rule would automatically subject government-funding restrictions to strict scrutiny. If a funding restriction failed strict scrutiny, it would force the government to provide taxpayer dollars—and the state's imprimatur—to beneficiaries whose conduct undercuts state policy goals, including equality goals. Meanwhile, the government would be free to enact across-the-board civil or criminal prohibitions on the *very same* conduct at issue without triggering the same heightened review. In other words, a prohibition on discrimination in a government-funded program would trigger strict scrutiny, but if the same prohibition extended to both publicly funded and privately funded entities, then heightened scrutiny would not apply (at least to the privately funded ones).

Funding conduct should not *reduce* the ability of the government to regulate it. See *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-217 (2013); *Rust* v. *Sullivan*, 500 U.S. 173, 196-198 (1991); *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 544-545 (1983). And, as this

Court has made clear, "the Constitution does not permit the State to aid discrimination" by private entities. See *Norwood* v. *Harrison*, 413 U.S. 455, 465-466 (1973); accord *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 568-569 (1974). Yet that is exactly what petitioners' proposed legal regime would require.

D. The equal-opportunity requirements are religion-neutral.

Unlike the laws at issue in *Trinity Lutheran*, *Espinoza*, and *Carson*, the equal-opportunity requirements do not exclude any providers "solely because of their religious character," *Carson*, 596 U.S. at 780 (quoting *Trinity Lutheran*, 582 U.S. at 462), or otherwise impose "special disabilities on the basis of . . . religious status," *Trinity Lutheran*, 582 U.S. at 461 (quoting *Lukumi*, 508 U.S. at 533). The equal-opportunity requirements set out religion-neutral nondiscrimination rules for participating preschools that apply *regardless* of the religious character of providers and *regardless* of whether a provider's conduct is religiously or secularly motivated. The Tenth Circuit therefore was correct in holding that the equal-opportunity requirements do not trigger strict scrutiny under the *Carson* trilogy. Pet. App. 22a.

Contesting this, petitioners assert (at 29) that the equal-opportunity requirements run afoul of *Carson* because they exclude preschools "solely because of their religious exercise." But, as explained above, strict scrutiny is not triggered merely because a law has the incidental effect of burdening religious exercise. And petitioners point to no evidence, aside from their religious objection itself, that the equal-opportunity requirements "target[] religious conduct for distinctive treatment" or otherwise evince a lack of neutrality on the part of Colorado. *Carson*, 596 U.S. at 781 (quoting *Lukumi*, 508 U.S. at 546). Far from imposing "special disabilities" on petitioners "solely because of their religious character," the equal-opportunity requirements simply require petitioners to "compete on an equal footing" with all other providers. *Trinity Lutheran*, 582 U.S. at 458, 462, 463.

III. The equal-opportunity requirements are generally applicable.

The equal-opportunity requirements are generally applicable. No Program provision undermines the relevant government interests. Nor does any Program provision provide impermissible discretion to discriminate against religious providers. Petitioners' arguments to the contrary are unavailing and, if adopted, would destabilize well-established law.

A. The equal-opportunity requirements do not favor secular conduct or provide impermissible discretion.

A law is generally applicable unless it forbids religious exemptions while allowing secular exemptions that are similarly detrimental to the same underlying government interest, see *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021), or it includes a discretionary mechanism that can be used to discriminate against religion, *Fulton*, 593 U.S. at 533-534, 537. The challenged requirements lack either flaw.

First, the equal-opportunity requirements do not contain exemptions that treat "comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. In arguing that the equal-opportunity requirements are not generally applicable under *Tandon*, petitioners point to two Program provisions: (1) a regulatory provision that allows certain preschool providers to prioritize students with Individualized Education Plans (IEPs) when those schools must do so to "ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act * * * or the Exceptional Children's Education Act"; and (2) a provision that allows "Head Start programs[] adhering to any applicable federal law requirements including eligibility requirements" to prioritize students from low-income families. Pet. Br. 38; Pet. App. 8a. But neither of these provisions undermines the law's general applicability.

As an initial matter, the conduct of Head Start and IEP providers enabled by these provisions is not "comparable" to petitioners' desired conduct. *Tandon*, 593 U.S. at 62. "[W]hether 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.* Colorado's "interests in prohibiting discrimination on different protected grounds are not identical, as unique policy and legal considerations underlie how * * * laws deal with discrimination against members of different protected groups." *Emilee Carpenter, LLC* v. *James*, 107 F.4th 92, 111 (2d Cir. 2024); see also, *e.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439-443 (1985) (explaining that the government may take into account the unique history and needs of a specific population in shaping policy).

To define the government interest too broadly, and say that one statutory interest (preventing sexual-orientation and gender-identity discrimination) can be undermined by provisions advancing a different interest (preventing income- and disability-based discrimination) would ignore the fundamental question asked by the general-applicability test: whether the law applies equally to religious and secular behavior. For this reason, in evaluating whether the law in this case is generally applicable, the relevant inquiry is whether any provisions, such as the provisions regarding income and disability, undermine Colorado's interests in preventing sexual-orientation and gender-identity discrimination—not whether any provisions undermine Colorado's interests in preventing other types of discrimination. And neither the Head Start nor the IEP provisions, nor any other provisions, undermine Colorado's "asserted * * * interest" in protecting children and their families from discrimination based on sexual orientation or gender identity, which is the "regulation at issue." See *Tandon*, 593 U.S. at 62.

But even if the relevant government interest were in "equal opportunity" more broadly, neither the IEP nor the Head Start provisions undermine that goal. In fact, these provisions *aid* Colorado's efforts to ensure that all children have an equal opportunity for quality preschool education. Low-income children and children with disabilities have more trouble accessing and attending preschool, and the Program's IEP and Head Start provisions *increase* equal access for these children by allowing the related specialized providers to both be part of the Program and adhere to federal regulations. Pet. App. 39a n.18. These provisions therefore do not undermine any state interest and do not trigger strict scrutiny under *Tandon*. "Comparability is concerned with the risks various activities pose," *Tandon*, 593 U.S. at 62, and no risk of invidious discrimination arises from the provisions that allow IEP and Head Start providers to prioritize disabled and low-income students in accordance with federal guidelines.

Nor does the Program create any impermissible governmental discretion that would open the door to discrimination against religiously motivated action. A law is not generally applicable if it creates a mechanism for case-by-case exemptions that "invites the government to consider the particular reasons for a person's conduct" and, in so doing, enables the government to—in its "discretion"—give less "solicitude" to religiously motivated conduct. *Fulton*, 593 U.S. at 533, 534, 535-537 (citation modified). This facet of the general-applicability test aims to protect religion from "hostility" and "discriminatory intent." See *Bowen*, 476 U.S. at 708; *Smith*, 494 U.S. at 884.

Citing this principle from *Fulton*, petitioners take issue with the Program's programmatic preference (the "catchall" provision), which allows for certain community, relationship, or activity-based preferences. Pet. App. 9a; Pet. Br. 43. This provision was designed to solve the complexities of matching thousands of kids with preschool providers by, for example, enabling continuity of care, keeping families together, honoring existing contracts, and ensuring that children are not separated from their community school by mistake. Pet. App. 9a-10a; Resp. Br. 13-14. And, importantly, the provision explicitly does not allow *any* deviation from the equal-opportunity requirements, whether religiously motivated or not. See 8 Colo. Code Regs. 1404-1 § 4.109(A)(9), (B); Resp. Br. 13-14, 44. In other words, the provision does not give the government discretion to allow *any* provider to deny children admission based on gender identity or sexual orientation—or any other protected characteristic. Accordingly, this provision does not provide any discretion to disfavor religiously motivated denials of admission and does not undermine the general applicability of the challenged prohibitions.

B. Petitioners' view of general applicability would undermine a broad range of sensible legislation.

Petitioners' version of general applicability—under which exemptions, qualifications, or carveouts in a law that are unrelated to the specific prohibitions at issue would automatically trigger strict scrutiny for free-exercise claims—would fly in the face of common sense and could render anything but the simplest of laws subject to strict-scrutiny analysis, opening the floodgates to litigation against government entities.

It is plenty common, and untroubling, for antidiscrimination laws to have qualifications. This makes sense, because an action that would be discriminatory in one context might not be in another. Under both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, for example, employers may make hiring decisions that would otherwise be prohibited discrimination, so long as the decisions are based on a bona fide occupational qualification ("BFOQ"). 42 U.S.C. 2000e-2(e); 29 U.S.C. 623(f)(1). In such cases, the decisions are not actionable discrimination and thus do not undermine the applicable government interests. For instance, under the BFOQ exception, a movie director can permissibly choose to cast only men in male roles—this is not discrimination against women. 29 C.F.R. 1604.2(a)(2). So, too, courts have held that companies can appropriately limit the age of airplane pilots if necessary for safety and if testing for individual capacity is not possible. See, *e.g.*, *EEOC* v. *Exxon Mobil Corp.*, 560 F.

App'x 282, 284-285, 289 (5th Cir. 2014). But under petitioners' theory, BFOQ exemptions would necessarily be framed as a setback to the government's interest in nondiscrimination, forcing the government to meet strict scrutiny in response to employers' religious objections to the relevant statute. The same would be true for any law that prohibits discrimination based on sex, age, religion, or any other protected characteristic, while also offering *any* exemption, qualification, or carveout.

Moreover, legislatures frequently incorporate preferences into statutory schemes as a means of advancing specific policy priorities. For example, the statutes controlling government hiring often include a preference for veterans. See, *e.g.*, 5 U.S.C. 2108, 3309 (veterans receive a bonus in the federal competitive civil service exam); Ark. Code Ann. § 21-3-302 (preference for veterans in state employment); Kan. Stat. Ann. § 73-201 (same); Miss. Code Ann. § 25-9-303 (same). These statutory schemes do not devalue religious individuals compared with veterans in a way that undermines the general applicability of the laws. They simply reflect these legislatures' reasonable wish to provide special employment opportunities for those who have served our country. Yet petitioners' legal theory would treat the veterans' preferences as discrimination against non-veterans that justifies religion-based discrimination against any otherwise protected class.

Other examples of legislative preferences abound. Housing statutes, for instance, often reflect specific legislative priorities. Section 8 of the Housing Act of 1937 aims to increase housing access for low-income families. 42 U.S.C. 1437f. But when selecting families off a waiting list, public-housing agencies are allowed to prioritize working families, individuals with disabilities, victims of domestic violence, and the elderly, even if these individuals have a higher income than others on the waiting list. 24 C.F.R. 982.207(b)(2)-(5). Under petitioners' theory, the mere existence of these preferences—regardless of whether they are comparable to prohibitions that are challenged by religious objectors or actually undermine the interests supporting those prohibitions—could subject all prohibitions in these statutes to strict scrutiny.

It is also common for state statutes to incorporate carveouts that allow regulated entities to deviate from state requirements when necessary to follow federal law and retain federal funds—the way the Head Start and IEP provisions do. See, *e.g.*, Tenn. Code Ann. § 4-5-104 (state agencies can be exempted from Tennessee's Uniform Administrative Procedures Act if the statute conflicts with federal law or jeopardizes receipt of federal funds); Iowa Code Ann. § 20.27 (Iowa's collective bargaining statute inoperative if it jeopardizes receipt of federal aid); Cal. Welf. & Inst. Code § 14184.102(f) (implementation of California's new Medicaid initiative limited to avoid jeopardizing federal financial participation). These provisions typically enhance the success of the initiatives they modify and therefore cannot be said to undermine the underlying state interest. To classify such provisions as exemptions that subject their statutes to strict scrutiny in the face of any religious objections would be illogical and invite chaos.

Many other statutory schemes are broad and complex with any number of qualifications and exemptions. The federal tax code is one. See *Hernandez* v. *Commissioner*, 490 U.S. 680, 700 (1989) (noting code's deductions and exemptions). Under it, many charitable organizations, farmers' cooperatives, shipowners' associations, political organizations, and homeowners' associations are exempt from income taxes. 26 U.S.C. 501-530a. And various categories of expenditures are eligible for itemized deductions. 26 U.S.C. 161 *et seq*. Criminal codes are no different. They contain certain exemptions for law enforcement officers and physicians, safe harbor provisions for good-faith actors or Good Samaritans, different standards for juveniles and individuals with mental illness, and defenses that apply to actions taken in self-defense. See, *e.g.*, 18 U.S.C. 922(q)(2)(B)(vi) (law enforcement exemption for certain firearm prohibitions); 21 U.S.C. 829 (medical practitioner exemption from the Controlled Substances Act); Md. Code. Ann. Crim. Proc. § 1-210 (criminal immunity for those who seek or provide medical assistance in certain circumstances); 18 U.S.C. 5032 (distinct treatment for juvenile offenders); 18 U.S.C. 17 ("insanity defense" to prosecution under federal statutes); 720 Ill. Comp. Stat. Ann. 5/7-1 (self-defense justifying the use of force).

Petitioners' arguments not only would render the tax and criminal codes constitutionally suspect but also would, if accepted, likely mean significant decisions of this Court were wrongly decided. For example, in *Hernandez*, the Court noted the deductions and exemptions in the tax code but explained them as Congress's legitimate prerogative, and not one that in turn supported a free-exercise challenge to the code's tax-deduction provisions. 490 U.S. at 700. And the Oregon controlled-substance law at issue in *Smith* contained an exemption for medically prescribed use of the drug at issue. *Smith*, 494 U.S. at 874. If the government interest there had been viewed solely as "preventing the use of certain drugs," that exemption would have defeated that goal and the law would not have been held generally applicable. But courts can and do recognize the multiple government interests reflected in a law. Oregon's interest was more appropriately defined as "curbing the unregulated use of dangerous drugs," *Fraternal Ord. of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.), and therefore general applicability was not undermined by the medical exemption.

Adopting petitioners' view of general applicability could render almost any law automatically subject to strict scrutiny when challenged by religious objectors and throw into question legislatures' basic ability to govern.

IV. The equal-opportunity requirements do not enact a denominational preference or interfere with children's religious upbringing.

Petitioners and their amici make two final attempts to invoke strict scrutiny, asserting that the equal-opportunity requirements enact a denominational preference, Pet. Br. 32, and interfere with parents' ability to control their children's religious upbringing, Br. of U.S. as Amicus Curiae 33; Br. of Amicus Curiae Thomas More Society 20-21. Neither of these arguments succeeds.

First, the fact that petitioners but not other religious providers object to the equal-opportunity requirements does not mean that there is a denominational preference that would trigger heightened scrutiny under *Catholic Charities Bureau, Inc.* v. *Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025). In *Catholic Charities*, this Court held that a Wisconsin unemployment insurance regime that "explicitly differentiat[ed] between religions based on theological practices" enacted a "denominational preference" and thus violated the Establishment Clause. *Id.* at 250. Importantly, though, the Court affirmed that evaluating eligibility for a public benefit based on "secular criteria"—even secular criteria that "happen to have a disparate impact upon different religious organizations"—does not raise constitutional concerns. *Ibid.* (citation modified). Here, the equal-opportunity requirements are just such secular criteria; it is of no constitutional moment that the requirements happen to be consistent with some religious providers' beliefs but not others'.

Second, the equal-opportunity requirements do not impose the same kind of burden on parents' ability to direct their children's religious upbringing as the ones the Court considered in *Yoder*, 406 U.S. 205, *Mahmoud*, 606 U.S. 522, or *Mirabelli* v. *Bonta*, 607 U.S. 492 (2026). The equal-opportunity requirements do not compel families to send their children to preschool, *Yoder*, 406 U.S. at 207, set any curriculum requirements or otherwise attempt to impose any viewpoint on students, *Mahmoud*, 606 U.S. at 550-555, or "facilitate" children expressing a gender identity or sexual orientation to which their parents object, *Mirabelli*, 607 U.S. at 497. The equal-opportunity requirements simply prohibit providers from discriminating in enrollment on the basis of students' and families' protected characteristics.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted.

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