

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 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 THE LOCAL GOVERNMENT LEGAL
CENTER, NATIONAL LEAGUE OF CITIES, NA-
TIONAL ASSOCIATION OF COUNTIES, IN-
TERNATIONAL MUNICIPAL LAWYERS ASSO-
CIATION, AND INTERNATIONAL
CITY/COUNTY MANAGEMENT ASSOCIATION
AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICI CURIAE*¹

The Local Government Legal Center (“LGLC”) is a coalition of government organizations formed in 2023 to provide education to local governments regarding the Supreme Court and its impact on local governments and officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National League of Cities, the National Association of Counties, and the International Municipal Lawyers Association are the founding members of the LGLC. The International City/County Management Association is an associate member of the LGLC.

The National League of Cities (“NLC”), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages where more than 218 million Americans live.

The National Association of Counties (“NACo”) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation’s 3,069 counties through advocacy, education, and research.

The International Municipal Lawyers Association (“IMLA”) is the nation’s oldest and largest organization devoted solely to local government law. A non-profit, nonpartisan, professional organization, IMLA’s

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

membership comprises more than 2,500 local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, as well as state and federal appellate courts.

The International City/County Management Association ("ICMA") is a nonprofit professional association of more than 13,500 appointed chief executives, assistants, and local government leaders serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The issue in this case is one of great importance to *amici*. Local governments across the country have come to rely on the stability and predictability of the constitutional standard stated in *Employment Division v. Smith*, 494 U.S. 872 (1990), which allows those governments to apply neutral and generally applicable rules across a broad range of essential government programs. The approach advocated by Petitioners, would greatly undermine the *Smith* principle, leading to substantial confusion and uncertainty. Because this issue affects local governments across the nation, and because *amici* have lengthy experience addressing the application of the Free Exercise Clause to government programs, *amici* submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

I. This case is controlled by the doctrine of *Employment Division v. Smith*, 494 U.S. 872 (1990), pursuant to which “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 v. City of Philadelphia*, 593 U.S. 522, 533 (2021). Petitioners are wrong in contending that the Court has substantially retreated from *Smith*; the decisions that Petitioners cite for that proposition actually were *applications* of *Smith*, addressing rules that singled out religion and therefore were *not* neutral or generally applicable. The lower courts, meanwhile, generally apply *Smith* without difficulty—as Petitioners themselves acknowledge.

When Petitioners do address *Smith*, they misstate its principle. *Smith* calls for strict scrutiny only when the state either (a) has broad discretion to recognize exceptions to a rule that burdens religion, or (b) advantages secular over comparable religious conduct. In requiring that participating schools comply with the “equal-opportunity mandate,” Colorado’s preschool program does neither of those things. What Petitioners characterize as exemptions from the mandate are more accurately described as preferences designed to ensure that disabled and low-income children have access to preschool. Those preferences do not undermine the free exercise interests served by *Smith*. Petitioners’ contrary approach—which would make *Smith* inapplicable whenever a government program does not apply identically to all participants in all circumstances—would render *Smith* a dead letter, subjecting to strict scrutiny all state and local rules that religious interests find objectionable.

II. Petitioners’ proposed reconfiguring of *Smith* is wrong as more than a matter of theory. Departing from the settled understanding of *Smith* would cause significant disruption, invite litigation, and undermine the operations of local government. It would be unworkable in practice and would significantly interfere with the full range of local government programs. There is no justification for such a harmful change in the law.

ARGUMENT

I. This Case Is Controlled By The Rule Of *Smith*.

The principle that controls in this case is stated in *Employment Division v. Smith*, 494 U.S. 872 (1990). As the Court has described that principle, *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 v. City of Philadelphia*, 593 U.S. 522, 533 (2021). That rule, which has deep roots in the Court’s doctrine, traces to the view that “either the law is unconstitutional in all of its applications, or the law must be obeyed by all those to whom it applies.” Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TULANE L. REV. 251, 259 (2000).

Although the application of *Smith* certainly is not beyond debate in all factual circumstances, its rule is predictable and straightforward. That rule generally is easily applied, and—as petitioners themselves recognize (Pet. Br. 26-27)—application of the *Smith* doctrine has given the lower courts little difficulty.

Petitioners, however, advocate an approach that would effectively eliminate the doctrine of *Smith* as a

practical matter, subjecting to strict scrutiny virtually any state or local rule that affects religious practice, no matter how incidentally. That approach would cause widespread confusion, invite unending litigation, and undermine stability in the administration of numerous essential public programs. Such a result would be particularly problematic for local governments, which are responsible for providing and implementing the widest range of services and operations to which individual recipients and applicants might object on religious grounds. The Court should affirm *Smith*'s rule as it has been applied for more than three decades and reject Petitioners' aberrant understanding of the law.

A. The Court has not retreated from *Smith*.

In approaching this case, it should be common ground that *Smith* remains good law. Although individual Justices, of course, have questioned *Smith* in the past (see, e.g., *Fulton*, 593 U.S. at 545 (Alito, J., concurring in the judgment)), the decision's validity is not now before the Court. Petitioners presented as a question in the petition for certiorari whether *Smith* should be overruled, and the Court denied review. The current issue therefore concerns what result is dictated by the rule of *Smith*.

But that is not how Petitioners approach the case. Instead, notwithstanding the denial of review on their direct challenge to *Smith*, they effectively contest the validity of *Smith*'s holding. Although Petitioners' brief nowhere says in so many words that "*Smith* should be overruled," their argument seeks to minimize or discredit the decision. In their view, the lower courts' consistent invocation and application of *Smith* is somehow misguided. In fact, they submit, this Court already has largely rendered *Smith* a dead letter by

holding “that *Smith* does not control many categories of Free Exercise Clause cases,” identifying what they describe as “at least eight different categories of cases where *Smith* does not control.” Pet. Br. 22 (bolding omitted).

But this suggestion that the Court has generally retreated from *Smith* is a mischaracterization that doesn’t withstand scrutiny. Petitioners include on their list of *Smith*-rejecting decisions many cases in which the Court invalidated the challenged laws because they were “not neutral or not generally applicable.” Pet. Br. 21. Far from being cases that retreated from *Smith*, however, those are decisions that *applied Smith* according to its terms. Similarly, the specific “categories of cases where *Smith* does not control” that are identified by Petitioners are those to which *Smith* was never intended to apply in the first place: they generally are cases in which the challenged rules apply *only* to religion or in which religious entities are *expressly* treated differently from secular ones—and which therefore are *not*, as *Smith* requires, “neutral and generally applicable.” These categories include cases where the challenged rules are shown to be motivated by religious animus, officially prefer one religion over another, or force participation in overt religious ceremonies. Pet. Br. 22-26. Petitioners get nowhere by noting that the Court has not applied *Smith* in cases where the *Smith* rule is expressly inapplicable.

Petitioners get no further when they insist that, “[m]ost importantly for this case,” the Court has avoided invocation of *Smith* in cases involving “public benefits.” Pet. Br. 25 (bolding omitted). The decisions petitioners cite for this proposition predate *Smith*, which makes it unsurprising that the Court in those

cases did not in terms invoke the *Smith* doctrine. Pet. Br. 25-26 (citing cases). The Court has since made clear that the pre-*Smith* decision on which Petitioners most strongly rely for this point, *Sherbert v. Verner*, 374 U.S. 398 (1963) (see Pet. Br. 25), actually was an application of the *Smith* doctrine because the challenged rule provided for individualized exemptions and therefore was not “generally applicable” within the meaning of *Smith*. *Fulton*, 593 U.S. at 533-534 (discussing *Sherbert* and *Smith*). As Respondents explain, there is no basis in this Court’s decisions for a public benefits exclusion from *Smith*. See Resp. Br. 28-35.

Petitioners also find no support for their challenge to *Smith* in the cases involving schools upon which they place substantial reliance. Pet. Br. 26, 29-30 (citing *Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Montana Dep’t. of Revenue*, 591 U.S. 464 (2020); and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017)). The programs at issue in those cases also *in terms* excluded religious entities, and therefore were plainly not facially neutral as between secular and religious participants. The question in those cases as presented to the Court was whether the state was justified in disparate treatment of religious entities. Whatever else can be said about those decisions and their impact here, they had no reason to (and did not) consider the application of *Smith*, and do not call its rule into question in cases—like this one—that consider programs that *are* facially neutral. See Resp. Br. 25-28.

Against this background, it is quite odd that Petitioners appear to be critical of the lower courts for “continu[ing] to treat *Smith* as the primary rule of decision”—that is, for embracing what Petitioners

derisively describe as “Judge Wilkinson’s sentiment” that *Smith* continues to “control[].” Pet. Br. 26 (bolding omitted) (citing *Polk v. Montgomery Cnty. Publ. Schs.*, 166 F.4th 400, 422 (4th Cir. 2026) (Wilkinson, J., dissenting), petition for cert. pending, No. 26-8 (U.S. filed July 1, 2026)). Of course that is what the lower courts do: *Smith* remains a controlling decision of this Court. And as this Court declined here to take up the question presented inviting it to overrule *Smith*, that should continue to be the case.

Having said that, Petitioners are correct about one thing: the lower courts *do* apply *Smith* regularly and routinely, so that the *Smith* rule predictably governs in the mine-run of cases that challenge neutral and generally applicable laws on free exercise grounds. In most decisions calling for application of *Smith*, there is no confusion or uncertainty about the governing law, which allows state and local governments to understand what they may and may not do. Petitioners cite a number of such decisions. See Pet. Br. 26-27 (citing cases). And there are many more, as the courts have had no difficulty applying *Smith* to a wide variety of religious exemption claims.² Yet as

² See, e.g., *Abdus-Shahid v. Mayor and City Council of Balt.*, 674 Fed. Appx. 267, 271-272 (4th Cir. 2017) (per curiam) (applying *Smith* to a Baltimore health insurance policy requiring a formal marriage certificate for joint insurance plan—even after a religious ceremony—ultimately holding that this requirement was both neutral and generally applicable); *Cent. Rabbinical Cong. of U.S. & Can. v. New York City Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 186 (2d Cir. 2014) (applying *Smith* to a New York City ordinance prohibiting a controversial religious practice, holding that the act’s targeted application against a religious sect rendered it neither neutral nor generally applicable); *Fairbanks v. Brackettville Bd. of Educ.*, No. 99-50265, 2000 WL 821401, at *2-3 (5th Cir. May 30, 2000) (applying *Smith* to a public school’s grooming policy, holding that it was neutral and generally

Petitioners also recognize, lower courts will look to rules other than *Smith* when the case involves issues unique to religion, addressing such matters as the ministerial exception or church autonomy. Pet. App. 27 (citing cases). Nothing about the application of *Smith* in these contexts calls for this Court’s intervention. In short, there is no problem that needs solving.

B. Petitioners misunderstand the rule of *Smith*.

1. *Smith asks whether a challenged rule draws relevant distinctions between religious and secular entities.*

When Petitioners do finally turn to *Smith*, it is apparent why they spend much of their argument avoiding the decision: they cannot prevail under a fair application of the *Smith* principle. They insist that Colorado’s UPK program fails the *Smith* test because it is not neutral and generally applicable. Pet. Br. 35-48. In making this argument, Petitioners recognize that the state regulation at issue—that is, the Colorado rule that is subject to the *Smith* inquiry—is the “equal-opportunity mandate,” which provides that participating programs may not exclude otherwise eligible children on the basis of protected status. Pet. Br. 37. But Petitioners’ argument on this point is

applicable to all male students); *Mount Elliott Cemetery Ass’n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999) (applying *Smith* to a dispute where a township refused to grant a church an exemption to create a cemetery, holding that the township’s zoning ordinances were both neutral and generally applicable); *Swanson By and Through Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 697-698 (10th Cir. 1998) (applying *Smith* to a school board’s admission policy, holding that its disallowance of “part-time students” was both neutral and generally applicable).

opaque—and appears to rest on a fundamental mischaracterization of *Smith* that, if accepted, would render the *Smith* test illusory.

The equal-opportunity mandate provides that preschools must admit students “regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability[.]” Pet. App. 204a. Petitioners insist that the mandate is not neutral or generally applicable because it contains “two categorical exemptions.” Pet. Br. 38. These “exemptions,” petitioners continue, are: (1) that some “UPK preschools [may] deny families enrollment based on income level” because they provide preferences for low-income students; and (2) that some “UPK preschools [may] enroll only children with a disability.” Pet. Br. 38.³ But this is a very peculiar understanding of the concept of an “exemption.” The provisions upon which Petitioners focus actually are preferences for categories of children with special requirements, created to ensure that such children are able to attend preschool; the preferences implement federal statutory requirements to serve those children. See Pet. App. 36a-38a. Children in those categories are not treated identically in all respects to children outside them, but that does mean that programs offering such preferences are “exempt” from the mandate in the ordinary sense—or in the sense relevant under

³ Petitioners also rely on the Colorado law’s “catch all preference” (Pet. Br. 43-48), but as the Tenth Circuit explained, that provision “does not give preschools the authority to reject certain classes of students if doing so would contravene state law” and “is not a system of individualized exemptions from the nondiscrimination requirement.” Pet. App. 29a-30a. See *id.* at 32a (Director’s testimony suggested “that the statutory nondiscrimination requirement is a hard limit”); 33a (“state law gives no room to the Department to make exceptions”).

Smith. A school that educates in Braille does not discriminate against a seeing student when it gives preference to students who are blind.⁴

And treating these sorts of preferences as exceptions that make *Smith*'s rule inapplicable would radically transform the *Smith* principle. As applied by the Court, *Smith* asks not whether a program applies identically to all affected parties in all circumstances, but whether a particular rule or requirement for participation in the program that a religious entity challenges draws relevant distinctions that disadvantage religion. That understanding of the *Smith* principle follows from its rationale. *Smith* looks to whether a challenged rule is neutral and generally applicable as a way to ensure that religion is not being disfavored, while confirming that the state takes its professed (and, by hypothesis, religion-harming) interest seriously. Necessarily, this requires examination of the particular rule that is said to burden the religious entity, not other and unrelated aspects of the program.

The point comes clear from the Court's articulation and application of the *Smith* test in its leading recent decisions. In *Fulton*, the Court explained that the rule of *Smith* has two prongs. First, "[a] law is not

⁴ This hypothetical calls to mind Justice Barrett's suggestion about context and "common sense" and why "literalism—the antithesis of context-driven interpretation—falls short." See *Biden v. Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, J. concurring). A wooden approach to the *Smith* rule that would find discrimination by the school for the blind teaching in Braille that does not admit the seeing student would result in the same counterintuitive outcomes as finding the "surgeon accessing a vein of a person in the street" criminally liable for "dr[awing] blood in the streets." *Ibid.* Context, and common sense, should have a role in how this Court applies its precedent; the approach counseled by Petitioner would render *Smith* nonsensical.

generally applicable if it invite[s] the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” 593 U.S. at 533 (citations and internal quotation marks omitted). And second, “[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Id.* at 534.

Fulton itself involved the first prong: the challenged rule—the exclusion of applicants from Philadelphia’s foster care system if they denied participation to parents on the basis of sexual orientation—“incorporate[d] a system of individual exemptions, made available in th[at] case at the ‘sole discretion’ of the [program’s] Commissioner.” 593 U.S. at 535. The second prong of *Smith* governed in *Tandon v. Newsom*, 593 U.S. 61 (2021), where California permitted certain COVID-era secular assemblies but denied permission to at-home religious assemblies. There, the Court held this regime impermissible because “California treats some comparable secular activities more favorably than at-home religious exercise.” *Id.* at 63.

In each case, the Court looked to the specific rule or requirement that burdened the religious plaintiff and was the object of its objection. In *Fulton*, that was the City’s anti-discrimination rule that governed participation in the foster care program, over which the City had complete discretion. In *Tandon*, it was the limit on assemblies. The availability of discretion to waive the challenged requirement as it applied to secular applicants, or the availability of an exception to secular entities in “comparable” circumstances, demonstrated that the requirement was not neutral or uniformly applied.

Here, however, the special accommodations for low-income children and children with disabilities that are characterized by Petitioners as “exemptions” for *Smith* purposes are not exemptions at all—and simply do not implicate the policies discussed in *Fulton* and *Tandon*. Those accommodations are not exemptions to the equal-opportunity mandate, which fully applies to programs that serve low-income and disabled children in all circumstances. Instead, as the State and the Tenth Circuit each has explained, they provide preferences to help ensure that categories of disabled and low-income children are able to participate in the UPK program by assuring that they have space in the schools that have the particular facilities and capabilities necessary to serve them. See Resp. Br. 36-43; Pet App. 36a-38a.

Unlike in *Fulton*, the State has *no* discretion to waive the equal-opportunity mandate. See Pet. App. 37a & n.17. And unlike in *Tandon*, pre-schools that are operated to accomplish particular narrow goals—serving underserved or difficult-to-serve communities of low-income and disabled students—are not comparable in the relevant respect to schools that lack those characteristics, in the way that similarly sized secular and religious assemblies *are* similarly situated for purposes of COVID prevention. As the Tenth Circuit recognized, it truly is “farcical” to say that schools directed at advancing the specific state purpose of serving disabled and low-income students, thus facilitating federal Head Start and Individuals with Disabilities Education Act goals, are “exempt” from the equal protection mandate when they provide preferences for children in those categories. Pet. App. 36a-38a. In this context, it seems most peculiar to think that the Constitution requires that, if a State seeks to assure that disabled students have access to preschool, it also

must allow preschools that do *not* serve disabled students to exclude *other* students on some *other* ground. Nothing in *Smith*, or in *Fulton* or *Tandon*, supports that result.

2. *Petitioners’ approach would render Smith a dead letter.*

And Petitioners’ reasoning is not just divorced from the principle that animates *Smith* and the decisions, like *Fulton* and *Tandon*, that elaborate on *Smith*’s substance: Petitioners’ understanding of *Smith*’s exceptions would swallow the *Smith* rule, making *Smith* a dead letter. Petitioners seem to argue that any variation in how a program applies to participants or applicants makes *Smith* inapplicable, even if (as here) that variation has nothing to do with the particular rule that is said to disadvantage a religious applicant. But that is a sort of “gotcha” reading of *Smith* that is disconnected from constitutional principle. If that is what *Smith* means, the *Smith* rule almost never will have application because every program has limits or special elements to address particular programmatic concerns.

The reality is that “[n]early all laws have exceptions.” Colin A. Devine, *A Critique of the Secular Exceptions Approach to Religious Exemptions*, 62 UCLA L. REV. 1348, 1350 (2015). That is inevitable, given the balancing of interests inherent in any government policy. “Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs.” *Stanley v. City of Sanford*, 606 U.S. 46, 58 (2025) (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017)). See Brief for Eugene Volokh as *Amicus Curiae* at 4, 24-27,

Fulton v. City of Philadelphia, 593 U.S. 522 (2021) (discussing exceptions to “trespass law, the duty to testify, antidiscrimination law, copyright law, contract law, and many others”); see also Note, *Pandora’s Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1196 (2023). Even many laws that contain no express exemptions are understood to contain implicit limits. Cf. *Dixon v. United States*, 548 U.S. 1, 19 (2006) (Alito, J., concurring) (“Duress was an established defense at common law. When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense.”) (citation omitted).

This case offers an obvious illustration of the problem with Petitioners’ approach. The Colorado program’s special treatment of preschools that serve disabled and low-income children is directed at the unique problems of providing services to children with those characteristics, and to increase access to state programs for those children. It is designed to implement requirements of federal law directed specifically at those categories of children. See Pet. App. 37a. That treatment says nothing about the impact of the equal-opportunity mandate on preschools generally. In *Smith*’s terms, that mandate is neutral and generally applicable because it applies even-handedly to *all* participating programs, even though (for example) programs that serve low-income children have relevantly different characteristics. It serves no rational purpose to say that an accommodation addressing the special requirements of programs serving children with disabilities also means that religious programs may opt out of unrelated and otherwise generally applicable requirements.

3. *Petitioners' approach would subject numerous innocuous state and local programs to strict scrutiny.*

Petitioners compound the disruption of their approach by insisting that the alternative to *Smith* is strict scrutiny whenever—under their aberrational view—the challenged requirement will burden religion. But see *Fulton*, 593 U.S. at 543 (Barrett, J., concurring) (“I am skeptical about swapping *Smith*’s categorical antidiscrimination approach for an equally categorical strict scrutiny regime”). Perhaps some important state and local rules would survive strict scrutiny. But in recent years, strict scrutiny in the free exercise context has been very strict indeed. As the Court has emphasized, in applying strict scrutiny, “[r]ather than rely on ‘broadly formulated interests,’ courts must ‘scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.’” *Fulton*, 593 U.S. at 541 (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)). Thus, for example, the relevant question in *Fulton* was “not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [the applicant].” *Ibid.* See *Smith*, 494 U.S. at 888 (strict scrutiny would “deem[] presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order”).

That approach raises the stakes of the threshold determination of which rules receive strict scrutiny. It will often be very difficult to show that the government has a compelling interest in denying any individual exemption, considered in isolation. The marginal harm from declining to apply a rule in one case

is often small or difficult to quantify. Moreover, if the presence of exemptions in a regulatory scheme undermines the government’s assertion of a compelling interest, many laws that are determined to be non-neutral and therefore trigger strict scrutiny will also *fail* strict scrutiny for the same reason.⁵

Rather than invent discrimination and imagine religious animus where it does not exist, *Fulton* and *Tandon* stand for a common-sense approach recognizing that the problem with exceptions is not that a program fails to apply identically to all persons in all circumstances, but that exemptions may be manipulated to “make[] a value judgment in favor of secular motivations, but not religious motivations.” *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.); see generally Lawrence G. Sager & Nelson Tebbe, *Salvaging Tandon*, 31 WIDENER L. REV. 1 (2025). That is what concerned the Court in *Fulton* and *Tandon*. But it is not remotely what has happened here, where the State is seeking not to permit exclusion of any child from any preschool, but to guarantee the availability of a preschool space to children who might otherwise

⁵ Pre-*Smith*, this Court sometimes seemed to adopt a more relaxed form of strict scrutiny, looking to the government’s interests at a high level of generality and evaluating the potential slippery-slope concerns presented by granting any exemptions (rather than isolating the harm from one particular exemption). See, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (holding that Social Security taxes survive strict scrutiny). But those days may be gone, and if strict scrutiny is often fatal, it cannot be the case that strict scrutiny applies to almost everything local governments do. Cf. *Fulton*, 593 U.S. at 544 (Barrett, J., concurring) (“[I]f the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?”).

have been wholly excluded from an education. Nothing in this Court's decisions, or in constitutional principle, treats that decision as illegitimate.

II. Petitioners' Proposed Approach Would Undermine The Operations Of Local Government.

Petitioners' proposed reconfiguring of *Smith* is wrong as more than a matter of theory. Departing from the settled understanding of *Smith* would cause significant disruption, invite litigation, and undermine the operations of local government. For numerous practical reasons, the Court should hesitate before taking the step invited by Petitioners.

First, the strict scrutiny regime demanded by Petitioners would be unworkable in practice. That is suggested by the concurring and dissenting opinions in *Smith* itself, which each applied strict scrutiny review to the challenged Oregon statute but reached conflicting conclusions as to whether the statute survived that review. Compare 494 U.S. at 905-906 (O'Connor, J., concurring) (State had shown a compelling interest in regulating the drug in question, "[a]lthough the question is close"), with *id.* at 907-921 (Blackmun, J., dissenting) ("Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion"). The very terminology used—that "the question is close" and that the State's interest was not "sufficiently" compelling—indicates that strict scrutiny review often puts the judiciary in the difficult role of making policy decisions best left to the legislature. When, as in this case, such review would be triggered by comparing the impact of incommensurate "exemptions," the resulting analysis would require courts to second-guess legislative judgments

about the bases for a wide range of laws, and about the laws' practical necessity.

Second, Petitioners' approach would significantly disrupt the full range of local government programs. Consider, for example, local government decisions related to employment. Government employers need the ability to apply neutral and generally applicable policies to their employees in a myriad of ways. Yet Petitioners would allow employment decisions involving matters such as drug testing, work schedules, and holidays (to name just a few) to be challenged on free exercise grounds so long as (for instance) the programs were modified to accommodate employees with disabilities and therefore, as Petitioners see it, are not generally applicable. See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1497 (1999). Similar disputes would arise involving the private contractors through which local governments increasingly serve the public. Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 712 (2014) ("there is no apparent reason why [for-profit corporations] may not further religious objectives"). The resulting disputes would be never-ending and highly disruptive.

Third, the effects on local government would go far beyond the employment and independent contractor settings. As this Court recognized in *Smith*, "religious exemptions from civic obligations of almost every conceivable kind" have been sought, including from "compulsory military service," "payment of taxes," "health and safety regulation such as manslaughter and child neglect laws," "compulsory vaccination laws," "traffic laws," "social welfare legislation such as minimum wage laws," "child labor laws," "animal cruelty laws," "environmental protection

laws,” and “laws providing for equality of opportunity for the races.” *Smith*, 494 U.S. at 888-889 (citations omitted). Innumerable other such rules involve schools. See, e.g., *Swanson*, 135 F.3d at 698 (school board’s neutral and generally applicable policy that part-time attendance was not allowed did not infringe upon home-schooled student’s right to Free Exercise); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 439-440 (9th Cir. 2008) (high school’s neutral and generally applicable dress code did not infringe on Free Exercise rights of students who sued to wear t-shirts bearing religious messages). Additional areas typically regulated by local government that may give rise to religious objections include noise and other ordinances meant to prevent nuisances to neighbors; building codes; zoning requirements; locations of roads; and local holidays. Local governments also make awards of grant money, such as to local arts organizations or charities. Under Petitioners’ expansive theory of “exemption,” all of these decisions could generate free exercise litigation. See, e.g., *Knotts v. City of Cuyahoga Falls*, No. 25-cv-01120, 2026 WL 878936, at *9 (N.D. Ohio Mar. 31, 2026) (municipal noise ordinance neutral under *Smith*).

Indeed, religious objections of the most unusual variety can be made to all sorts of local code enforcement. See, e.g., *Mayle v. Chicago Park Dist.*, No. 18 C 6211, 2019 WL 2773681, *6 (N.D. Ill. July 2, 2019) (dismissing claim that city infringed upon plaintiff’s Free Exercise Clause right to practice Satanism when it prohibited plaintiff from bringing his Guinea Hog to public facilities and noting that under *Smith* “neutral laws with general applicability do not apply to the Clause”); *aff’d sub nom. Mayle v. City of Chicago*, 803 Fed. Appx. 31 (7th Cir. 2020). Absent the clear rule of

Smith, attending to the diversity and number of religious exemption claims could be overwhelming.

Fourth, the sorts of requests for religious exemptions demanded by Petitioners would burden local governments because they would be hard to resolve. For the reasons suggested above, “[c]laims that a law substantially burdens someone’s exercise of religion will often be difficult to contest.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Strict-scrutiny review of local government decisions would be fact-specific, highly individualized, and subjective. Many local governments simply lack the resources to process the potentially innumerable religious objections to generally applicable laws that Petitioners’ approach would encourage.

Fifth, local governments could not avoid litigation by simply acceding to demands for a religious exemption from generally applicable laws, of the sort demanded here by Petitioners. Efforts to accommodate religion can themselves run into legal difficulties, as indicated by the Court’s unanimous decision last Term in *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025). There, the Court held unconstitutional as applied a Wisconsin statute that “exempts certain religious organizations from paying taxes into the State’s unemployment compensation system” because (as interpreted by the Wisconsin Supreme Court) the law’s criteria for what counted as a religious organization “imposed a denominational preference.” *Id.* at 241. The State is now considering eliminating the exemption entirely in order to solve the constitutional problem. See Micah Schwartzman, *The Asymmetry of Religious Motivation*, 135 YALE L.J.F. 467, 480 n.82 (2026).

A version of this problem can be seen in this very case. Earlier in the litigation, Petitioners trained some of their fire on the “congregation preference” in Colorado law, contending that this exemption “fails to satisfy the requirement of neutrality towards religion” because “the State offers no exemption to religious providers without attached congregations, or to providers who seek to maintain the religious character of their schools in other ways.” Motion for Preliminary Injunction at 19-20, No. 23-cv-02079 (Sep. 13, 2023), ECF No. 32. Petitioners also cited the “exception[]” for “membership in a religious congregation” as being one of the factors that “triggers strict scrutiny under *Tandon*.” Motion for Summary Judgment at 9, No. 23-cv-02079 (Nov. 21, 2023), ECF No. 61. After the district court found that the congregational preference indeed triggered strict scrutiny (see 736 F. Supp. 3d at 1003), Colorado acted to remove it. Petitioners then argued that the removal of the purportedly discriminatory preference was itself further evidence of discrimination. See, *e.g.*, Appellants’ Reply Brief, No. 24-1267, 2024 WL 4765240, at *19 (10th Cir. Nov. 7, 2024).

Petitioners’ approach therefore places state and local governments between a rock and a hard place. Although Petitioners paint a picture of anti-religious persecution, the reality is that Petitioners’ approach would make it difficult for governments that are solicitous of religious freedom to design programs and policies in a fair and administrable manner. In fact, it is likely that Petitioners’ approach would lead state and local government to abandon beneficial programs—like the Colorado preferences that support educational benefits for disabled and low-income children—for fear that the inclusion of such programs would generate prohibitively expensive litigation and lead to the elimination of desirable and generally applicable

rules, like the equal protection mandate. The Court should avoid issuing rulings that unnecessarily create this sort of “significant uncertainty,” “confusion,” or “upheaval.” *Trump v. Cook*, 146 S. Ct. 2234, 2257, 609 U.S. __, __ (2026) (Kavanaugh, J., concurring).

In sum, the result urged by Petitioners would misapply *Smith*, wrongly subjecting to strict scrutiny generally applicable and neutral laws that only incidentally affect religious exercise. That approach would jeopardize myriad other beneficial public programs. And it would embroil local governments nationwide in needless and costly litigation. The Court should not move the law in that direction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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