

No. 25-581

In the Supreme Court of the United States

ST. MARY CATHOLIC PARISH, LITTLETON, COLORADO,
ET AL., PETITIONERS

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE
DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY
CHILDHOOD, ET AL.

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

**BRIEF FOR LAW AND RELIGION SCHOLARS
AS *AMICI CURIAE* SUPPORTING RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici are constitutional scholars with expertise in the Religion Clauses. They submit this brief to explain how Petitioners' view of the Free Exercise Clause contradicts settled precedent and long-standing tenets of religious liberty in a pluralistic society.²

Amici are:

¹ No party's counsel wrote this brief in whole or in part; no party's counsel contributed money for this brief's preparation or submission; and no person or entity—other than *amici* and their counsel—contributed money for this brief's preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Employment Division v. Smith, 494 U.S. 872 (1990), held that laws with the incidental effect of burdening religion are ordinarily *not* subject to strict scrutiny under the Free Exercise Clause as long as they are “neutral” and “generally applicable.”

At the certiorari stage, Petitioners asked this Court to reconsider *Smith*. The Court declined that request.

Petitioners now urge this Court to overrule *Smith* in all but name. They portray *Smith* as a “residual rule” that is “rarely applie[d]” and “does not control” most Free Exercise cases. Pet. Br. 18, 20, 22.

They rely on *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), to urge a “most favored nation” approach to the Free Exercise Clause. That approach requires strict scrutiny whenever the State grants any exemption that is comparable to the requested religious exemption. They also contend that *Carson v. Makin*, 596 U.S. 767 (2022), and *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), have already displaced *Smith*. In short, Petitioners advocate for a regime in which laws whose effects impose any burdens on religion almost always trigger strict scrutiny.

1. The Court should not adopt the most-favored-nation approach as the governing rule for Free Exercise cases.

This Court has consistently held that the Free Exercise Clause is violated when a law *targets* religion—not when it imposes burdens on religious practice only incidentally while imposing the same requirements on secular actors. The most-favored-nation approach is therefore irreconcilable with this Court’s precedents.

The most-favored-nation approach also lacks support in the text and history of the Free Exercise Clause. The original public meaning of the Clause is that it forbids laws targeting religion as such, not that it affirmatively requires religious exemptions from laws that the State permissibly enacts.

The Nation’s historical practice confirms that point. For nine decades after the ratification of the Fourteenth Amendment, courts and commentators uniformly rejected the proposition that an individual’s religious

beliefs could excuse compliance with otherwise valid, nondiscriminatory laws. And the Court reaffirmed that long-standing tradition in *Smith*, after a detour between 1963 and 1990. That well-settled tradition contradicts an approach that would mandate religious exemptions whenever a law contains a single secular exemption.

The most-favored-nation approach is also unworkable. Choosing to regulate some activity and not other activity is inherent in legislating. Most statutes thus contain at least some exceptions. Under the most-favored-nation approach, however, the presence of a single exception in a law would subject it to “the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). *Smith*’s standard of *general* applicability would become a requirement of *uniform* applicability. A statute’s survival would turn on a court’s view of whether an exception is “comparable,” a malleable inquiry that would allow courts to pursue their preferred policy outcomes. The result would be “constitutionally required religious exemptions from civic obligations of almost every conceivable kind”—something this Court warned against in *City of Boerne*, 521 U.S. at 534.

Here, there is zero evidence that Colorado targeted religion. Quite the contrary. The record shows that the state “welcomed” faith-based preschools and “actively solicited their participation.” Pet. App. 21a. And Colorado’s rules evenhandedly forbid discrimination in both secular and religious preschools. Petitioners identify no activity that secular organizations may do but they may not. That should resolve this case.

2. Petitioners contend that *Carson v. Makin*, 596 U.S. 767 (2022), carved out public-benefits cases from *Smith*’s rule. Not so. *Carson* was emphatic that it was merely

applying this Court’s precedents forbidding “discrimination against religion,” not announcing new rules for Free Exercise cases. 596 U.S. at 781. The law in *Carson* excluded religious schools “solely because they [were] religious.” *Id.* at 780.

Here, Colorado did no such thing. It welcomed faith-based preschools on the same terms as all other participants. And several Catholic preschools do, in fact, participate. By actively inviting Petitioners but declining to let them *dictate their own terms* for participation—terms different from those applicable to all others—Colorado did not discriminate against religion.

3. Finally, Petitioners argue that the existence of a “catchall” preference in the regulations triggers strict scrutiny under *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). Wrong again. In *Fulton*, government officials had unfettered discretion to waive a nondiscrimination requirement. Here, Colorado law imposes a nondiscrimination mandate without exception, and the regulations make clear that any preference under the “catchall” must comply with that nondiscrimination rule. The nondiscrimination provision in this case is, therefore, not like the one in *Fulton*.

* * *

Amici hold diverse views on whether the Court should one day overrule *Smith* and on what might replace it.³ But

³ Compare James M. Oleske, Jr., *Free Exercise Uncertainty: Original Meaning? History and Tradition? Pragmatic Nuance?*, 70 Wayne L. Rev. 137, 142, 169-173 (2024) (arguing that “modestly heightened scrutiny” should apply, which would “bring[] free exercise doctrine closer into alignment with free speech doctrine”); Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 Case W. Res. L. Rev. 55, 57, 103-104 (2006) (arguing that *Smith* was “wrongly

amici speak with one voice in urging the Court to reject Petitioners’ invitation to overrule *Smith sub rosa*. Having declined to reconsider *Smith*, this Court should reject Petitioners’ attempts to render *Smith* nugatory and should affirm the judgment below.

ARGUMENT

I. THE COURT SHOULD NOT ADOPT THE MOST-FAVORED-NATION APPROACH

In *Employment Division v. Smith*, 494 U.S. 872, 878 (1990), this Court held that laws that incidentally burden religion are ordinarily not subject to strict scrutiny as long as they are “neutral” and “generally applicable.” A contrary rule, the Court warned, would allow “each conscience” to become “a law unto itself”—a recipe for “anarchy.” *Id.* at 888, 890.

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993), the Court reaffirmed *Smith*’s “general proposition that 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.” And in *City of Boerne v. Flores*, 521 U.S. 507, 508, 532 (1997), the Court held that the Religious Freedom Restoration Act of 1993 was not authorized by Section 5 of the Fourteenth Amendment as “appropriate

decided” but urging consideration of “less rigorous tests or standards” developed in free-speech cases), with, *e.g.*, Ira C. Lupu & Robert W. Tuttle, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 175-176 (2014) (arguing that “the search for a theory of religious exemptions is misguided” because “[r]eligious freedom in America * * * is the product of a constitutional strategy aimed at limiting the state in more general ways”).

legislation” to enforce the Free Exercise Clause. The precise flaw in RFRA was that “Congress’ concern” in passing the statute was “not the object or purpose” of state legislation affecting religion but rather the incidental burdens imposed by that legislation. *Id.* at 531.

**A. The Most-Favored-Nation Approach Appears In
A Single, Interim-Docket Decision And Should
Go No Further**

Tandon v. Newsom, 593 U.S. 61 (2021) (per curiam), suggested a different—and potentially dangerous—approach to the Free Exercise Clause.

In addressing an application for injunctive relief, the Court in *Tandon* wrote that regulations “trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” 593 U.S. at 62. Without full briefing or oral argument, the Court then held that California likely violated the Free Exercise Clause when, during the COVID-19 pandemic, it barred at-home religious services by more than three families but allowed more than three families to gather in hair salons, retail stores, and other commercial spaces. *Id.* at 63.

Although *Tandon* references the concepts of neutrality and general applicability, it rejiggers those analyses substantially. Unlike *Smith* and *City of Boerne*, *Tandon* does not ask whether a neutral, generally applicable law is nevertheless “targeting or discriminating against religion.” Alan E. Brownstein & Vikram David Amar, *Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context*, 54 Loy. U. Chi. L.J. 777, 779 (2022). And whereas “substantial” underinclusion of

comparable secular activity persuaded this Court in *Lukumi* that the municipal ordinances at issue there were “drafted with care to forbid few [animal] killings but those occasioned by religious sacrifice,” 508 U.S. at 543, *Tandon* appears to focus solely on whether *some* “secular activity risks creating the same harm or costs that justifies regulation of the religious activity,” Brownstein & Amar, 54 Loy. U. Chi. L.J. at 780.

Tandon thus appears to afford—for the first time—“‘most favored nation’ status to claims to religious exemptions.” Richard H. Fallon, Jr., *First Amendment Exceptions to Otherwise Valid Laws*, 120 Nw. U.L. Rev. 691, 721 (2025). That status “signifies” that, “if exemptions from otherwise applicable statutory requirements are granted to *anyone*, then those wishing to engage in religiously motivated conduct must receive equally favorable treatment unless denying religious exceptions is necessary to a compelling governmental interest.” *Ibid.* (emphasis added).

To assess “comparability” under *Tandon*, a court must first decide the level of generality at which it will consider the State’s interests. Only then can it compare how secular exemptions and requested religious exemptions might undermine those State interests. Both steps of that analysis are fraught with malleability.

This case illustrates those challenges. A court could view Colorado’s interest as preventing sexual-orientation or gender-identity discrimination in preschool admissions. At that level of generality, Petitioners’ claims must fail because “[n]o preschool participating in [Colorado’s program] is allowed to take sexual orientation or gender identity into account when making admissions decisions, for any reason.” Pet. App. 42a.

Petitioners invite the Court to consider the State's interest at a higher level of generality and then make strained analogies. According to Petitioners, Colorado's equality interest should be viewed with an eye towards each characteristic covered by its equal opportunity rule; that is, Colorado must treat all protected characteristics identically with respect to what equal opportunity requires. Thus, because Colorado allows some preschools to "enroll only children with a disability" and to "deny families enrollment based on income level," Petitioners maintain that Colorado has created "two categorical exemptions" to its nondiscrimination requirement. Pet. Br. 38. Those exemptions, Petitioners say, "undermine Colorado's asserted interest in equal access 'in a similar way'" as Petitioners' request to deny children enrollment based on their or their parents' sexual orientation or gender identity. *Ibid.* (quoting *Fulton*, 593 U.S. at 534). "Colorado's disability and income level exemptions are thus *comparable* to Petitioners' requested religious accommodation." *Id.* at 39 (emphasis added) (citing *Tandon*, 593 U.S. at 62). And because Colorado treats the former "more favorably than" the latter, strict scrutiny must apply. *Ibid.* (quoting *Tandon*, 593 U.S. at 62).

Some *amici* go even further. They contend that "[t]he interests the [S]tate has accommodated" through its disability and income-level exemptions are "comparable" to Petitioners' requested religious accommodation "however one characterizes Colorado's interest." Douglas Laycock et al. Amicus Br. (Laycock Br.) 13. The first option they give for framing the inquiry is the same one offered by Petitioners. See *ibid.* Alternatively, if the State's interest is in "permit[ting] preschool programs that bring in more disabled or low-income children" so

that those children can receive “distinctive treatment to meet their distinctive needs,” *amici* boldly argue that Petitioners’ requested religious exemption—being allowed to exclude children whose parents either are in same-sex relationships or support their child’s transgender identity—“likewise maintains a program meeting the distinctive needs of some children.” *Id.* at 14.

These arguments highlight the difficulties that plague the most-favored-nation approach. For Petitioners to prevail here, the Court would have to hold that allowing preschools to provide tailored environments for disabled and socioeconomically disadvantaged children is “comparable” to allowing preschools to discriminate against other children and their families. To “cast so expansive a comparative net” would require Colorado to “treat apples [like] watermelons” and render the “comparability” requirement practically meaningless. See *Tandon*, 593 U.S. at 65 (Kagan, J., dissenting).

Applying *Tandon* in that fashion would have far-reaching consequences. Most laws contain *some* sort of exemption or exclusion from enforcement. The process of legislating involves choosing what to regulate and what *not* to regulate. That is a feature of the system. Yet the most-favored-nation approach would make it a bug. It would require laws to satisfy strict scrutiny virtually any time an affected party claimed a religious exemption. “[I]f the presence of just one secular exception means that a religious claim for exemption wins as well, the result will undermine the *Smith* rule and its expressed policy of deference to democratically enacted laws.” Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & Religion 187, 195 (2001).

The only majority opinion in which this Court has arguably applied the most-favored-nation approach was *Tandon*. But that case—like most interim-docket decisions—is not a “comprehensive opinion” that received the “benefit of not only *amici* and oral argument but months of internal consultation and deliberation.” *Trump v. Cook*, 146 S. Ct. 2234, 2255 (2026). It instead offers only a “preliminary” assessment of the issues presented, and it primarily “reflects the Court’s judgment about the risk of irreparable harm to the [parties].” *Mirabelli v. Bonta*, 607 U.S. 492, 500 (2026) (Barrett, J., concurring). Those process-based concerns should carry special force for decisions, like *Tandon*, that are issued as “general course correction[s]” to a lower court. *Id.* at 501; see *Tandon*, 593 U.S. at 64 (rejecting the Ninth Circuit’s analysis of COVID-19 orders for the fifth time).

Accordingly, the Court should clarify that, to the extent that the ruling in *Tandon* relied on the most-favored-nation approach, it is an “isolated deviation from the strong current of precedents—a derelict on the waters of the law.” *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

Alternatively, the Court should hold that any statements in *Tandon* that might, “strictly speaking,” endorse the most-favored-nation approach are, “with the benefit of hindsight,” “not quite as tailored as [they] should have been.” *Olivier v. City of Brandon*, 607 U.S. 552, 565 (2026). *Tandon*, if not disavowed, should be harmonized with settled precedent. It should not be taken to have tacitly overruled numerous prior cases.

**B. The Most-Favored-Nation Approach Is
Inconsistent With This Court’s Precedent**

1. This Court’s cases distinguish between laws targeting religion and generally applicable laws that may have an incidental effect on some religious conduct. The former are presumptively unconstitutional. The latter are presumptively constitutional. Indeed, whether generally applicable laws violate the Free Exercise Clause typically turns on whether the laws were crafted in a way that reflects an intent to discriminate against religion.

In *Smith*, 494 U.S. at 874, 882, this Court held that the Free Exercise Clause allowed Oregon to regulate and deny unemployment benefits to individuals who used peyote—even if their use was a religious practice. The Court explained that “if prohibiting the exercise of religion * * * is not the *object*” of a governmental action—“but merely the incidental effect of a generally applicable and otherwise valid provision”—“the First Amendment has not been offended.” *Id.* at 878 (emphasis added). Because nothing in the record suggested that the State had aimed to regulate religious beliefs, the State could regulate the use of peyote by all. *Id.* at 882.

The Court has consistently applied the distinction embodied in *Smith*. In *Lukumi*, 508 U.S. at 547, the Court reaffirmed the core approach of *Smith* while invalidating an ordinance that outlawed certain forms of animal slaughter. The Court recognized that all laws “are selective to some extent.” *Lukumi*, 508 U.S. at 542. Underinclusiveness, the Court explained, triggers heightened scrutiny only when it is so “substantial” that it supports an inference that the State is pursuing its asserted “interests only against conduct motivated by religious belief.” *Id.* at 545.

Underinclusiveness thus raises Free Exercise concerns only when it suggests that the State is forcing “religion alone [to] bear the burden of [its] ordinances.” *Lukumi*, 508 U.S. at 544. As Justice Scalia’s concurrence put it: “[T]he defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.” *Id.* at 557. And as the Court later observed: The ordinances in *Lukumi* “had a discriminatory purpose easy to ferret out: prohibiting sacrificial rituals integral to Santeria but distasteful to local residents.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 461 (2017).

In *City of Boerne*, 521 U.S. 507, the Court reiterated that the Free Exercise Clause is concerned with discrimination against religion. The Court invalidated RFRA as applied to the States precisely because it was not targeted at legislation “passed because of religious bigotry.” *Id.* at 530. Instead, “Congress’ concern” in passing RFRA was with “the incidental burdens imposed” by laws of general applicability. *Id.* at 531. But “[i]t is difficult to maintain that” laws of general applicability that impose burdens on religion only incidentally are “enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination.” *Ibid.*

Accordingly, the problem with RFRA was that it promised to strike down “[l]aws valid under *Smith* * * * without regard to whether they had the object of stifling or punishing free exercise.” *City of Boerne*, 521 U.S. at 534. That “[s]weeping coverage,” the Court said, would “considerabl[y]” intrude on “the States’ traditional

prerogatives and general authority to regulate for the health and welfare of their citizens.” *Id.* at 532, 534.

Finally, in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the Court held that a university policy requiring all recognized student groups to comply with a nondiscrimination policy did not violate the Free Exercise Clause. It explained, applying *Smith*, that the “Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct.” *Id.* at 697 n.27.

This Court’s precedents make clear that laws that “target the religious for ‘special disabilities’ based on their ‘religious status’” are “subject[] to the strictest scrutiny.” *Trinity Lutheran*, 582 U.S. at 458. In sharp contrast, a law that does *not* target religion is presumptively constitutional, “no matter how severely that law burdens religious exercise.” *Fulton*, 593 U.S. at 543 (Barrett, J., concurring) (describing the *Smith* rule).⁴

This understanding of the Free Exercise Clause mirrors other areas of constitutional law. See, e.g., *Louisiana v. Callais*, 146 S. Ct. 1131, 1155 (2026) (noting that Fifteenth Amendment “focus[es]” “on *intentional* racial discrimination”); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (requiring discriminatory purpose to

⁴ There are, of course, exceptions to this rule. A neutral, generally applicable law may trigger strict scrutiny if it substantially interferes with the “right of parents to guide the religious development of their children.” *Mahmoud v. Taylor*, 606 U.S. 522, 559, 565 (2025). And a neutral, generally applicable employment-nondiscrimination requirement may violate the Free Exercise Clause if it interferes with a church’s ability to choose its ministerial employees. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). But those exceptions are not at issue here.

succeed on Equal Protection claim). And it extends to civil and criminal laws alike. See, *e.g.*, *City of Boerne*, 521 U.S. at 531-535 (explaining that RFRA would “displac[e] laws and prohibit[] official actions of almost every description and regardless of subject matter”).

2. The repeatedly reaffirmed rule of *Smith* resolves this case. The exceptions allegedly built into Colorado’s scheme do not give rise to a reasonable inference of targeting religion. Petitioners fail to identify *any* course of conduct that secular organizations may do but religious organizations may not. The nondiscrimination mandate applies evenhandedly to all preschools.

That should end the matter. Respondents are “pursu[ing] [their] governmental interests,” *Lukumi*, 508 U.S. at 545, in ensuring that children have equal opportunity to receive a preschool education. And they are doing so by regulating secular and religious conduct in identical ways. They are acting *for* children, including kids from nontraditional families, not *against* religion.

Respondents are not even arguably singling out religion for adverse treatment. The record overwhelmingly shows the opposite. Respondents “organized working groups with different preschool providers”—including “faith-based preschool providers” like Petitioners—to “solicit input at regular meetings.” Pet. App. 12a. Petitioners themselves participated in those meetings (and opposed the nondiscrimination requirement). *Ibid.* The record thus suggests that Respondents disagreed with Petitioners on a policy matter. It does not support an inference that Respondents targeted or were otherwise hostile to Petitioners or other faith-based providers. Petitioners should not now be

allowed to weaponize the Free Exercise Clause to rewrite the law and grant themselves an exemption.

3. Petitioners resist this straightforward conclusion. Citing *Tandon*, they repeatedly invite this Court to apply a muscular version of the most-favored-nation approach. See Pet. Br. 36-39; see also Laycock Br. 8-9, 13 (going even further). Yet they make no effort to square that approach with this Court’s statements that the Free Exercise Clause seeks to prevent “intentional discrimination”—not “unintentional neglect or indifference.” James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 *Animal L.* 295, 335 (2013).

Nor is harmonization of Petitioners’ position with pre-*Tandon* precedents possible. An approach to the Free Exercise Clause that requires the government to provide a religious exemption whenever it provides any secular exemption—broadly comparable or not—would “constitutionally compel religious exemptions from even modestly underinclusive laws that bear no indicia of discriminatory intent.” James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 *Wis. L. Rev.* 689, 729 (2019). Petitioners’ approach would thus “convert *Smith*’s requirement of general applicability into a requirement of uniform or near-uniform applicability.” *Ibid.*

That result cannot be squared with precedent. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 *U. Chi. L. Rev.* 413, 414 (1996) (“First Amendment law * * * has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them.”).

At bottom, Petitioners’ request to apply the most-favored-nation approach is an invitation to overrule *Smith sub rosa*. The Court should decline that invitation.

C. The Most-Favored-Nation Approach Is Inconsistent With The Original Public Meaning Of The Free Exercise Clause And This Nation’s History And Tradition

The Court should be particularly cautious about applying the most-favored-nation approach given the limited historical briefing here. Petitioners make no attempt to show that the approach comports with the original public meaning of the Free Exercise Clause or is consistent with this Nation’s history and tradition. See Pet. Br. 45-53. Some *amici* do assert (despite the limited cert. grant) that *Smith* “departs from original meaning,” but they do not try to explain how the most-favored-nation approach would be consistent with it—an important issue that *is* within the scope of the questions on which certiorari was granted. *E.g.*, Laycock Br. 7-8.⁵

That lacuna in the briefing is not surprising. The “weight of scholarship” supports the *Smith* rule—a rule that cannot be reconciled with the most-favored-nation approach. James M. Oleske, Jr., *Free Exercise Uncertainty: Original Meaning? History and Tradition? Pragmatic Nuance?*, 70 Wayne L. Rev. 137, 157 (2024) (collecting sources). The Court should thus not

⁵ Although some other *amici* argue that the original public meaning of the Free Exercise Clause supports Petitioners, see, *e.g.*, Stephanie Barclay Amicus Br. 1-5; Richard Rogers Amicus Br. 11-21, they too decline to argue that the most-favored-nation approach is consistent with the original public meaning of the Free Exercise Clause or this Nation’s history and tradition.

apply the approach here. See *Vidal v. Elster*, 602 U.S. 286, 330-331 (2024) (Sotomayor, J., concurring in the judgment) (warning that tests “unmoored from constitutional text and precedent” are “unhelpful”).

1. The Free Exercise Clause provides: “Congress shall make no law * * * prohibiting the free exercise [of religion].” U.S. Const. amend. I. The “leading view” among scholars is that this language “precludes Congress from making laws regulating religion as such, but does not *require* religious exemptions from laws Congress is empowered to make.” Oleske, *Free Exercise Uncertainty*, 70 Wayne L. Rev. at 152-153 (emphasis added) (collecting sources).

Professor Philip Hamburger put it well: “Rather than suppose that civil laws will in some respects prohibit the free exercise of religion and that exemptions will be necessary, the First Amendment assumes Congress can avoid enacting laws that prohibit free exercise” altogether. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 937-938 (1992). Accordingly, the “First Amendment is a singularly improbable foundation for claims of exemption.” Philip Hamburger, *More Is Less*, 90 Va. L. Rev. 835, 854 n.58 (2004).

Similarly, Professor Gerard Bradley has written that *make no law* “means that a class of legislation is forbidden”; a right to religious exemptions would “not forbid a class of legislation.” Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 306 (1991).

Professor Ellis West has likewise concluded that the *make no law* language “prevents the passage of certain kinds of laws”; it does not provide a right to exemptions

from laws that Congress “is authorized to pass.” Ellis M. West, *THE FREE EXERCISE OF RELIGION IN AMERICA: ITS ORIGINAL CONSTITUTIONAL MEANING* 280 (2019).

And Professor Vincent Phillip Muñoz has explained that the “absolute ban” embodied in the *make no law* language fits the Framers’ understanding that “[t]he inalienable natural right of religious liberty is a jurisdictional concept,” with “authority over religious exercise[] as such [denied] to the government.” Vincent Phillip Muñoz, *RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING* 229-235 (2022).

In short, “[i]f the Free Exercise Clause means what it says, it prohibits the enactment of certain kinds of laws”—that is, “laws about religion.” John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 Harv. J.L. & Pub. Pol’y 169, 170-171 (1992). The most-favored-nation approach disregards that principle to its peril.

2. The most-favored-nation approach is also inconsistent with this Nation’s history and tradition.

Before 1963, the near-universal understanding of the courts was that individuals have no right to violate otherwise valid laws on the ground that their religious beliefs commanded the violation. That well-settled understanding “withstood the critical scrutiny of time and political change,” *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014), for nine decades after ratification of the Fourteenth Amendment. And it directly contradicts the most-favored-nation approach. Cf. Oleske, *Free Exercise Uncertainty*, 70 Wayne L. Rev. at 163 (demonstrating that before *Sherbert v. Verner*, 374 U.S. 398 (1963), there was “no deeply rooted history and tradition” of vindicating religious-exemption rights through the courts).

In 1878, this Court explained that “[t]o permit” an individual to “excuse” himself from otherwise valid laws “because of his religious belief[s]” “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878) (upholding criminal conviction for polygamy); see *Davis v. Beason*, 133 U.S. 333, 342-343 (1890) (upholding statute concerning polygamy because “[h]owever free the exercise of religion may be, it must be subordinate to the criminal laws of the country”), overruled on other grounds, *Romer v. Evans*, 517 U.S. 620 (1996).

To be sure, *Reynolds* and *Davis* are not “generally viewed as among the Court’s finest moments.” Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DePaul L. Rev. 1197, 1209 (2005). Yet the cases “are nevertheless consistent with * * * the historical understanding of the Free Exercise Clause,” which did not grant a constitutional right to “believers to be relieved of incidental burdens on their beliefs and practices.” *Ibid.*

A few examples further illustrate that shared understanding. In 1918, the Texas Supreme Court explained that neither the state nor the federal constitution “relieve[s] one from obedience to reasonable health regulations, enacted under the police power of the state, because such regulations happen not to conform to one’s religious belief.” *City of New Braunfels v. Waldschmidt*, 207 S.W. 303, 305 (Tex. 1918) (vaccination requirements). This Court later agreed that “[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable

disease or the latter to ill health or death.” *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944).

In 1941, this Court upheld the convictions of five Jehovah’s Witnesses who were convicted of marching on a “public street without a special license.” *Cox v. New Hampshire*, 312 U.S. 569, 570-571 (1941). The Court explained: “Civil liberties * * * imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.” *Id.* at 574. It continued: When a law “is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command.” *Ibid.*

In 1948, the Virginia Supreme Court stated that “[t]he constitutional protection of religious freedom, while it insures religious equality, on the other hand does not provide immunity from compliance with reasonable civil requirements imposed by the State. The individual cannot be permitted, on religious grounds, to be the judge of his duty to obey the regulatory laws enacted by the State in the interests of the public welfare.” *Rice v. Commonwealth*, 49 S.E.2d 342, 347 (Va. 1948) (school-attendance requirements).

These cases are not outliers. See Oleske, *Free Exercise Uncertainty*, 70 Wayne L. Rev. at 165, 180-182 (collecting dozens of state and federal cases rejecting constitutional-exemption claims); see also *supra* pp. 12-14 (discussing *Smith* and its progeny). As this Court recently reaffirmed: “[I]t is a general rule that [religious] objections do not allow business owners and other actors

in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. 617, 631 (2018) (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam)).⁶

To be sure, in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court indicated that, in some circumstances, the Free Exercise Clause may presumptively require religious exemptions from generally applicable laws. But *Sherbert* was “the first time” that this Court had ever invalidated “a measure as an onerous though indirect burden” on religion. Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 Wis. L. Rev. 217, 279 (1966). And debate about how far those precedents should be extended—if at all—persisted for the next two decades. In *Smith*, the Court resolved that debate by reaffirming its lengthy pre-1963 understanding of the Free Exercise Clause and limiting *Sherbert* and *Yoder* to specific circumstances involving either mechanisms for individualized exemptions or parental rights. See *Smith*,

⁶ Commentators also expressed skepticism toward exemption claims in the nine decades following the Fourteenth Amendment’s ratification. See, e.g., Theodore W. Dwight, COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY 117 (Edward F. Dwight ed., 1894) (“It was not the object of [the Religion Clauses] to allow the plea of religious liberty to be used as a cloak for the violation of law and good order.”); David R. Manwaring, RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY 51 (1962) (“There is no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters.”).

494 U.S. at 881-884. The rule of law suggests that the extensively considered resolution and reasoning of *Smith*—not the hastily considered language of *Tandon*—must control unless and until this Court overrules *Smith*.

The most-favored-nation approach would “sweep away” history, “create new controversy,” and “begin anew the very divisions along religious lines that the [First Amendment] seeks to prevent.” *Town of Greece*, 572 U.S. at 577. Nothing in the Constitution compels that result.

D. The Most-Favored-Nation Approach Is Difficult To Apply And Would Subject Nearly Every Law To Strict Scrutiny

Even leaving aside its lack of grounding in law or history, the most-favored-nation approach should be rejected as unworkable. Scholars lambast the approach for being unprincipled,⁷ incoherent,⁸ and difficult to apply.⁹ The Court should be wary of embracing a new

⁷ See Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol’y 627, 664 (2003) (“unprincipled and bizarre manner of distributing constitutional exemptions”).

⁸ See Fallon, 120 Nw. U. L. Rev. at 749-751 (“incoherent” and “untenab[le]”); Zalman Rothschild, *The Impossibility of Religious Equality*, 125 Colum. L. Rev. 453, 494 (2025) (“conceptually incoherent”); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119, 193-203 (2002) (“intellectually incoherent”).

⁹ See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1542 (1999) (observing that most-favored-nation approach offers few guardrails to prevent “courts [from] substituting their moral and practical judgments”); Christian Legal Society et al. Amicus Br. at 34, *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (No. 19-123) (explaining that the need to select adequate comparators “vastly complicates every litigation”); Eugene Volokh Amicus Br. at 28, *Fulton v. City of*

approach to the Free Exercise Clause that promises to create more problems than it solves. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (rejecting interpretation of First Amendment that would leave lower courts to “fashion ad hoc standards, in individual cases, according to their own ideas of what seems” desirable or expedient).

The problems with the most-favored-nation approach are magnified by its sheer breadth. A rule that “[i]f any comparable activity is being treated better than religion, strict scrutiny applies” would subject nearly every law to a categorical strict-scrutiny regime. Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 Iowa L. Rev. 2237, 2241 (2023) (“Few government purposes * * * are pursued with monomaniacal intensity.”). After all, “virtually all laws * * * contain many secular exceptions.” Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1540 (1999); see also Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U. L. Rev. 167, 173 (2019) (“[i]f a law with even a few secular exceptions isn’t neutral and generally applicable, then not many laws are”).

Examples abound. Title VII of the Civil Rights Act of 1964 exempts businesses with fewer than fifteen employees and allows covered employers to consider an individual’s sex, religion, or national origin if those

Philadelphia, 593 U.S. 522 (2021) (No. 19-123) (cautioning that the approach would “revive the main problems of the early 1900s substantive due process cases”); cf. *Smith*, 494 U.S. at 889 & n.5 (identifying danger of judges “balanc[ing] against the importance of general laws the significance of religious practice”).

characteristics are reasonably necessary to carry out a particular job.¹⁰ The Copyright Act contains one operative section followed by over a dozen exceptions.¹¹ The duty to testify when subpoenaed is often littered with exemptions.¹² Trespass statutes contain exemptions for necessity, law-enforcement actions, and adverse possession.¹³ Many statutory-rape laws carve out exceptions based on age proximity between perpetrator and victim.¹⁴ And statutes restricting abortions often “permit abortions for secular reasons like life, rape, incest, or IVF—but not religion.”¹⁵

The fact that the legal system often defines “private rights using somewhat complex, seemingly exception-filled rules” is an inherent part of the legislative process. Volokh, 46 UCLA L. Rev. at 1542. That fact “doesn’t make them any less worthy as private rights, and doesn’t mean that others should be able to violate these rights simply because they feel religiously motivated or compelled to do so.” *Ibid.* Yet the most-favored-nation approach would subject countless laws to strict scrutiny if anyone claimed the right to a religious exemption from their enforcement.

¹⁰ See 42 U.S.C. §§ 2000e(b), 2000e-2(e)(1).

¹¹ See 17 U.S.C. §§ 106-122.

¹² See, e.g., Cal. Evid. Code §§ 950-1063 (West 2026).

¹³ See, e.g., N.Y. Penal Law §§ 140.05, 35.05 (McKinney 2026); N.Y. Real Prop. Acts. Law § 501 (McKinney 2026).

¹⁴ See, e.g., N.Y. Penal Law §§ 130.25, 130.30, 130.35 (McKinney 2026).

¹⁵ Elizabeth Sepper, *Free Exercise of Abortion*, 49 B.Y.U. L. Rev. 177, 219 (2023); see also Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 Iowa L. Rev. 2299, 2321 (2023) (“Under *Tandon*, * * * secular exceptions to abortion bans ought to trigger the requirement that comparable religious claims also receive accommodations.”).

That is not hyperbole. At least one federal court has held that a private business was constitutionally entitled to a religious exemption from Title VII because the statute includes some “secular” exemptions. *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 612-613 (N.D. Tex. 2021) (relying on *Tandon*), *aff’d in part, vacated in part, rev’d in part sub nom. Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023).

There is no need to open this can of worms. Other areas of First Amendment jurisprudence have already declined to apply strict scrutiny to laws that burden protected rights only incidentally. See, *e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-662 (1994) (explaining that strict scrutiny does not apply “to content-neutral restrictions that impose an incidental burden on speech”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389-390 (1992) (same for incidental burdens on expressive conduct); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (same).¹⁶ Nothing in the Constitution compels a different result for the Free Exercise Clause. Cf. *Fulton*, 593 U.S. at 543 (Barrett, J., concurring) (expressing reservations about adopting a “categorical strict scrutiny regime” in Free Exercise cases).

II. PETITIONERS’ RELIANCE ON *CARSON* IS MISPLACED

Petitioners argue that *Carson v. Makin*, 596 U.S. 767 (2022), requires reversal. Pet. Br. 1-3. They read *Carson* to require strict scrutiny whenever a state denies “otherwise available public benefits ‘based on a recipient’s

¹⁶ See also Frederick Mark Gedicks, *The Myth of Second-Class Free Exercise*, 70 Vill. L. Rev. 1, 21, 45 (2025) (most-favored-nation approach “provide[s] more protection of religious exercise than that afforded the freedoms of press, speech, and assembly”).

religious exercise.” *Id.* at 28 (quoting *Carson*, 596 U.S. at 785). According to Petitioners, *Carson*—together with *Trinity Lutheran*, 582 U.S. 449, and *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020)—supports a “public benefits” exception to *Smith*. Pet. Br. 25-26. That supposed public-benefits rule, Petitioners say, is not limited to laws that “specifically target[]” religion but instead applies to any law that—like this one—“appears neutral on its face.” Pet. Br. 19 (cleaned up).

That is flat wrong. This Court treated *Carson* as a textbook case of express discrimination. Nothing in *Carson* purported to apply a new Free Exercise rule for all public-benefits cases. The Maine law expressly “exclude[d] any and all sectarian schools” from receiving public funds. 596 U.S. at 781 n.*. That point was critical to the Court’s analysis. Indeed, *Carson* repeatedly stressed that Maine had “specifically carved out private religious schools from those eligible to receive such funds” and disqualified those schools from funding “solely because they [were] religious.” *Id.* at 780. Maine’s no-sectarian-schools rule was “discrimination against religion,” and that discrimination was what triggered strict scrutiny. *Id.* at 781; see also *id.* at 786 (explaining that “express discrimination” likewise triggered strict scrutiny in *Trinity Lutheran* and *Espinoza*).

The difference between those cases and this one is night and day. Petitioners strain to argue that “Colorado knowingly excluded Catholic preschools.” Pet. Br. 1; see also *id.* at 30-31, 50. That claim finds no support in the record. Unlike Maine, Montana, and Missouri, Colorado “did not exclude faith-based preschools from participating in” its preschool program. Pet. App. 21a. On the contrary, as the court of appeals observed, Colorado “welcomed

[faith-based preschools] and actively solicited their participation.” *Ibid.* Indeed, it is undisputed that “several preschools affiliated with Catholic Charities” are participating in the Colorado preschool program. Pet. App. 12a; see also Pet. Br. 13 n.3 (same). Colorado simply requires that religious preschools follow the rules that apply to all other preschools, including the nondiscrimination mandate. This across-the-board requirement is not “discrimination against religion.” *Carson*, 596 U.S. at 781. Accordingly, this case is nothing like *Carson*, *Espinoza*, or *Trinity Lutheran*.

This Court’s precedents foreclose Petitioners’ argument that a law that is “neutral on its face” triggers strict scrutiny in the public-benefits context. Pet. Br. 19. That view runs headlong into *Smith*, which was itself a public-benefits case. And it would be inconsistent with the Court’s statements that religious exemptions are *less* likely to be required in public-benefits cases. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-604 (1983) (tax benefits); *Bowen v. Roy*, 476 U.S. 693, 702 (1986) (plurality opinion) (welfare benefits). Indeed, this Court has “held in several contexts that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.” *Regan v. Tax’n With Representation of Washington*, 461 U.S. 540, 549 (1983). Those precedents make sense. It would be odd to have a more religion-protective rule for conditions that can be avoided by declining a benefit than for cases of generally applicable, coercive regulations, whose burdens cannot be escaped.

All told, the Court in *Carson* held that the “unremarkable” antidiscrimination rule from *Trinity Lutheran* and *Espinoza* “suffice[d] to resolve [that] case.”

596 U.S. at 780. The Court should therefore decline Petitioners’ invitation to reimagine *Carson* to have worked a sea change in Free Exercise jurisprudence.

III. PETITIONERS’ RELIANCE ON *FULTON* IS MISPLACED

Petitioners argue that Colorado’s nondiscrimination requirement is subject to strict scrutiny under *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), because it contains a “catchall preference” mechanism that allows the Department of Early Childhood to “grant one-off exemptions” from the nondiscrimination mandate. Pet. Br. 43-44, 46. They point to trial testimony from a single state official stating that the “catchall preference” might allow schools to “admit only ‘gender-nonconforming children’ and to prioritize serving ‘children of color from historically underserved areas’ and ‘the LGBTQ community.’” *Id.* at 44.

By contrast, Respondents argue (at 44-50) that state officials have *no* authority to grant individualized exemptions from the nondiscrimination requirement.

Amici are not experts in Colorado antidiscrimination law. But Respondents’ position has substantial purchase in the text of Colorado’s nondiscrimination requirement. The regulations governing the “catchall preference” explicitly state that a preference may be approved under the catchall only if it does “not conflict with” the statutory requirement that preschools “provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child’s family.” Pet. App. 211a (regulations); Pet. App. 203a-204a (statute). To make the

point doubly clear, the regulations separately provide that a participating school's use of preferences "must still comply" with the nondiscrimination requirement. Pet. App. 211a; see also Pet. App. 212a (regulatory nondiscrimination provision).

The nondiscrimination provision in this case is not like the one in *Fulton*. The contractual provision in *Fulton* required nondiscrimination "unless an exception is granted by the Commissioner * * * in his/her sole discretion." 593 U.S. at 535. Nothing of the sort exists here. Respondents cannot grant a preschool—religious or secular—a "catchall preference" that would allow the preschool to deny admission to students based on the students' or their parents' sexual orientation or gender identity. Instead, the program rules include a "requirement that each preschool provider" comply with the nondiscrimination rule—no ifs, ands, or buts. Pet. App. 204a. The catchall preference thus does not provide "government officials [with] discretion to grant individualized exemptions" *from the nondiscrimination requirement* itself. *Fulton*, 593 U.S. at 544 (Barrett, J., concurring).

The *Fulton* rule "mirrors a rule familiar from the free-speech context." Oleske, *Free Exercise (Dis)Honesty*, 2019 Wis. L. Rev. at 727. In that context, this Court has held that content-neutral permitting schemes may be invalid if they "delegate overly broad licensing discretion to a government official." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v.*

Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988). *Fulton* therefore confirms that the Free Exercise Clause should be interpreted in light of “other First Amendment rights—like speech and assembly.” *Fulton*, 593 U.S. at 543-544 (Barrett, J., concurring).

Any statements in the trial testimony suggesting that a government official may one day hypothetically grant an unlawful preference should not be capable of transforming the plain text of Colorado’s across-the-board nondiscrimination mandate into an unwieldy system of freewheeling discretion. If it did, then *every* statute would be one rogue official away from strict scrutiny. Nothing in *Fulton* compels that result.

To the extent that this Court has doubts about what conduct qualifies as a denial of equal opportunity under Colorado’s statute and implementing regulations, it would be prudent to remand so that the court of appeals can ask the Colorado Supreme Court to provide a definitive answer to those state-law questions. See, e.g., *McKesson v. Doe*, 592 U.S. 1, 4-5 (2020) (per curiam) (remanding for lower court to certify state-law questions to state supreme court); *Emp. Div. v. Smith*, 485 U.S. 660, 673 (1988) (remanding for Oregon Supreme Court to decide “the legality of the religious use of peyote in Oregon”).

That approach would allow the Colorado Supreme Court to offer guidance on the “novel issues of state law” that permeate this case. *McKesson*, 592 U.S. at 5; see *Fulton*, 593 U.S. at 620 (Gorsuch, J., concurring in the judgment) (faulting majority for “declar[ing]” a “new rule of Pennsylvania common law”). And it would “ensure that any conflict * * * between state law and the First Amendment is not purely hypothetical.” *McKesson*, 592 U.S. at 6.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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