No. 25-581

IN THE
SUPREME COURT OF THE UNITED STATES

ST. MARY CATHOLIC PARISH IN LITTLETON, ET AL.,
Petitioners,

v.

LISA ROY, ET AL.,
Respondents.

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

BRIEF FOR *AMICI CURIAE* INTERFAITH ALLIANCE AND INTERFAITH ALLIANCE OF COLORADO IN SUPPORT OF RESPONDENTS

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This brief is filed on behalf of Interfaith Alliance and Interfaith Alliance of Colorado in support of Respondents.[1]

INTEREST OF AMICI CURIAE

Interfaith Alliance is a national interfaith organization dedicated to protecting the integrity of both religion and democracy in America. Interfaith Alliance was founded in 1994 by a broad coalition of mainstream religious leaders who wanted to challenge the outsized impact of religious extremists in our country. For more than thirty years, Interfaith Alliance has advocated at all levels of government for an equitable and just America where the freedoms of belief and religious practice are protected, and where all persons are treated with dignity and have the opportunity to thrive.

Interfaith Alliance brings together people of many faith traditions and people of no faith tradition in defense of an inclusive democracy. It is committed both to the free exercise of religion and to the separation of religion and government, and it works to ensure that public institutions remain open to all Americans regardless of what they believe.

Interfaith Alliance of Colorado ("IAC") is an affiliate of Interfaith Alliance and an interfaith public policy and advocacy organization with a statewide network of more than 400 faith communities representing more than two dozen faith traditions. It

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

promotes justice, religious liberty, and interfaith understanding by building relationships to educate, advocate, and catalyze positive social change. IAC was founded in 1998 by faith leaders from diverse backgrounds who were frustrated by the absence of diverse faith representation in the public sphere, and it has since continued to bring people together across faith traditions to advocate for an inclusive, multifaith democracy that protects rights and equality for every Coloradan.

IAC has an interest in ensuring that the Free Exercise Clause—a historic constitutional safeguard—is not transformed into a tool of exclusion. To that end, IAC works with people of faith and conscience across the state to champion a vision of religious liberty as a shield that protects individual belief and practice, not a sword used to exclude or disadvantage others. True religious freedom belongs to everyone, or it belongs to no one.

Amici have a direct interest in the questions presented here. Interfaith Alliance and IAC have an interest in ensuring that publicly funded programs—including Colorado's universal preschool program—remain open to families of all faiths and of no faith.

SUMMARY OF ARGUMENT

Petitioners' claim depends on a premise the record cannot support: that Colorado singled out religious preschools for disfavored treatment. Under *Employment Division v. Smith*, a neutral and generally applicable law does not trigger heightened scrutiny merely because it burdens a religious practice. The decisions Petitioners invoke are not to the contrary. In each of them, strict scrutiny followed because the government had written a religious classification into the law itself—barring applicants “owned or controlled by a church,” or schools that “present[ed]” material “through the lens” of a faith—or because the record revealed official hostility toward the claimant’s beliefs. Neither condition is present here. Colorado’s equal-opportunity requirement asks nothing about a preschool’s religious character, affiliation, doctrine, or curriculum. It asks only that a preschool that accepts public money to serve the public serve all of it.

The record affirmatively refutes Petitioners’ charge of targeting. From the first stakeholder meetings through the final rule, Colorado worked to bring faith-based providers into its universal preschool program while protecting families of every faith from being turned away. The Department’s statewide outreach ran through umbrella organizations; its faith-based working group—one of five provider working groups—grew out of its work with a Jewish preschool network and expanded to Lutheran, Presbyterian, Catholic, nondenominational, and interfaith participants, Petitioner St. Mary’s among them. When a coalition of religious providers wrote with concerns, the Department answered that faith-based providers “can, and are encouraged to, participate.” Colorado reshaped its matching algorithm at religious providers’ request to keep congregations together. And when a court held that accommodation went too far, Colorado gave up the accommodation rather than the protection. Forty faith-based preschools now participate, teaching their own faith to their own students, with the State claiming no authority over what they teach.

That record is the opposite of the targeting this Court condemned in *Trinity Lutheran*, *Espinoza*, *Carson*, *Masterpiece Cakeshop*, and *Lukumi*. Petitioners ask the Court to treat an incidental conflict between a neutral rule and their preferred admissions practice as though it were deliberate religious discrimination. The two are worlds apart, and the judgment below should be affirmed.

ARGUMENT

Free exercise of religion is a core constitutional guarantee. But it does not entitle religious believers to disregard laws that apply to everyone else. Under *Employment Division v. Smith*, 494 U.S. 872 (1990), a law that is neutral and generally applicable does not trigger heightened scrutiny under the Free Exercise Clause, even if it has "the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*); *see also Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring) ("[A] neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise."). This Court has long recognized that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" simply because that law "proscribes . . . conduct that his religion prescribes." *Smith*, 494 U.S. at 879 (internal quotation marks omitted). A contrary rule would "permit every citizen to become a law unto himself." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

This baseline rule reflects the practical reality that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). Petitioners nonetheless contend that Colorado's requirement that all UPK preschools admit and serve children without regard to eight enumerated characteristics triggers strict scrutiny notwithstanding *Smith*, because it conflicts with their religiously motivated admissions practices.

Petitioners' argument rests on the flawed premise that Colorado singled out their religious beliefs for disfavored treatment. But the record demonstrates that Colorado did the opposite. At every stage of designing and implementing its universal preschool program, Colorado sought out faith-based providers, and it wrote and enforced its rules to keep families of every faith from being turned away.

I. The Free Exercise Cases Petitioners Rely on All Involve Actual Targeting of Religion, Either Through a Facial Classification or Proven Governmental Hostility.

Petitioners' argument depends on a flawed premise: that the Free Exercise Clause of the First Amendment subjects a law to strict scrutiny whenever it happens to conflict with a religious practice, regardless of whether the government actually singled out religious practice for disfavored treatment. Petitioners' own authorities refute that premise. *See*

Pet. Br. at 28–31, 33–34. In every case on which Petitioners rely, this Court found strict scrutiny warranted because the government either wrote a religious classification into the law itself or acted with demonstrated hostility toward religious beliefs. As discussed below, Colorado did neither, and Petitioners' authorities accordingly provide no basis for the relief they seek.

Trinity Lutheran, *Espinoza*, and *Carson* all struck down laws that disqualified otherwise-eligible participants from a public benefit "solely because of their religious character." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017); *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 478, 484 (2020); *Carson v. Makin*, 596 U.S. 767, 780 (2022). In each case, that criterion was written directly into the challenged provision.

Missouri's playground-resurfacing program at issue in *Trinity Lutheran* categorically barred any applicant "owned or controlled by a church, sect, or other religious entity." 582 U.S. at 455. The scholarship program in *Espinoza* excluded any school "controlled in whole or in part by any church, sect, or denomination." 591 U.S. at 476. And the tuition-assistance program in *Carson* disqualified any school that "promote[d]" a "faith or belief system" or "present[ed]" academic material "through the lens of [that] faith." 596 U.S. at 775. In each instance, the government drew the line of ineligibility at the school's religious status or religious content, so that the disqualification followed automatically and categorically from the school being religious in that specific sense. *See Trinity Lutheran*, 582 U.S. at 465 ("the rule is simple: No churches need apply").

Carson's own language confirms that its rule is tied to facial classification, not freestanding "religious exercise" as Petitioners propose. When *Carson* held that Maine could not exclude schools "because of their religious exercise," 596 U.S. at 781, it was describing Maine's actual statutory criterion: tuition assistance was denied to any school that "promote[d]" a "faith or belief system" or presented academic material "through the lens of [that] faith," *id.* at 775. The exclusion was defined by reference to religious content on the face of the statute.

Masterpiece Cakeshop and *Church of Lukumi Babalu Aye* reach the same result through a different route: direct evidence of governmental hostility toward religious beliefs. In *Masterpiece*, the constitutional violation arose not from Colorado's public accommodations law itself—which the state courts upheld as neutral and generally applicable under *Smith*—but from the Civil Rights Commission's *adjudication* of the plaintiff's case. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 638–39 (2018). A commissioner described the plaintiff's invocation of his religious beliefs as "one of the most despicable pieces of rhetoric that people can use," comparing it to "defenses of slavery and the Holocaust." *Id.* at 635–36. The Commission also treated the plaintiff's conscience-based objection differently than it had treated secular bakers' comparable objections in prior cases, without principled explanation. *Id.* at 636–38. These "elements of a clear and impermissible hostility" were what triggered strict scrutiny. *Id.* at 634–35.

Lukumi likewise turned on proof that the government's object was to suppress a specific religious practice. The ordinances at issue defined "sacrifice" so narrowly, and exempted so much comparable secular killing of animals, that "almost the only conduct" reached was the religious exercise of Santeria church members. *Lukumi*, 508 U.S. at 535–36. That "religious gerrymander," *id.* at 535, was confirmed by a legislative record replete with hostility—city council members had described the plaintiffs' faith as "abhorrent" and an "abomination," *id.* at 541–42. The Court's conclusion rested on the combination of a law whose real-world operation targeted almost nothing but the religious practice and a record confirming that this operation was intentional. *Id.* at 540, 545–46.

Taken together, these decisions mark out what a claimant must show to displace *Smith*. Strict scrutiny followed in each of them because the government had either written religion into the law itself—disqualifying applicants by religious status or religious content on the face of the provision—or revealed, in the manner of its enforcement, that religion was its object. Neither showing turned on the bare fact that a law proved inconvenient for a religious practice. If it did, *Smith* would have no field of operation at all, and every generally applicable rule would be subject to strict scrutiny at the instance of anyone who objected to it on religious grounds.

As this Court has recently reaffirmed, "the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable." *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025) (citing *Smith*, 494 U.S. at 878–79). The touchstone for that neutrality inquiry is whether the government's action was "specifically directed at . . . religious practice." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022) (quoting *Smith*, 494 U.S. at 878). In other words, what matters is whether the government acted because of religion. On that question the record here is not close.

II. Colorado's Program Was a Model of Religious Inclusivity.

From the first public meeting to the final rule, Colorado welcomed faith-based providers to participate in the UPK Program and sought to protect families from religious discrimination. The statute itself was built through a process that invited faith-based providers to the table and was written to guarantee every Colorado child an equal opportunity to enroll, whatever the family's religion. The Department then carried both commitments into practice—through statewide outreach, a working group convened for faith-based providers at the suggestion of a Jewish preschool network, a contract open to any licensed provider, and a matching system reshaped at religious providers' request. And the effort succeeded: faith-based preschools across a range of traditions now participate in UPK, teaching their own faith to their own students, with the State claiming no authority over what they teach.

A. The Program's Statutory Design Was Both Inclusive of Religion and Protective Against Religious Discrimination.

In 2020, Colorado voters approved a measure that supplied the money for universal preschool. Colo. Rev. Stat. § 26.5-4-202(1)(a)(V); Pet.App.4a. The following year, the General Assembly passed the Early Childhood Act to "[p]rovide high-quality, voluntary, affordable early childhood opportunities for all children in Colorado" through a "mixed delivery of child care and early childhood programs," and designated a cabinet-level Department of Early Childhood to carry it out. Colo. Rev. Stat. §§ 26.5-1-102(1)(a), (c), 26.5-1-104(1); Pet.App.53a–54a; Pet.App.5a.

What followed was a process designed to be inclusive from start to finish: a process open to faith-based providers and community stakeholders, aimed at a program open to all children regardless of the characteristics of their family, including their religious affiliation.

First, Colorado facilitated "a very robust stakeholder process that was led by the Early Childhood Leadership Commission to talk about what that state department should look like." JA 219. Beginning in December 2021, the Commission convened "a series of monthly town halls that were open to all Coloradans: providers, parents, advocates, anyone with an interest." JA 220. The stakeholders it gathered were "school district providers, center-based providers, home-based providers, faith-based providers, families." *Id.* And the posture toward all of them was the same: "We encouraged participation throughout this process." *Id.* Faith-based providers thus were included from the beginning of the program's development.

"[T]hat stakeholder process resulted in two reports," and the General Assembly used them as the foundation for the legislation that became the UPK Program. JA 224. The reports directed that the UPK Program "should be a program that was equitable and grounded in equity . . . and House Bill 1295 carried that forward by putting the equity statement into that legislation." JA 224–25. The promise was then written down in the statute. Namely, the resulting legislation required that the program "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." Colo. Rev. Stat. § 26.5-4-205(2)(b); Pet.App.204a. Thus, the legislation was designed to protect children from discrimination based on the characteristics of their families, including their family's religious affiliation.

The same statute made inclusion structural. "Mixed delivery . . . [was] another foundational aspect of the UPK Program." Pet.App.59a; JA 224, 241. Mixed delivery is a system "where a variety of different kinds of preschools, public and private, would be supported by state funds." Pet.App.6a (citing Colo. Rev. Stat. § 26.5-4-203(12)); JA 282. The operative goal of Colorado's mixed delivery system was to "recruit and engage providers . . . of all types, school districts, center-based, home-based, faith-based, that could provide a safe, nurturing, inclusive, nondiscriminatory environment for children." JA 229–30, 248; Pet.App.59a–60a. "Faith-based providers ha[d] always been envisioned to be part of the mixed-delivery model," so that families could "seek a provider of their choosing" including "faith-based providers." JA 241.

B. The Department's Administrative Implementation Carried That Inclusive Design into Practice.

1. Outreach and the working groups.

In implementing the UPK Program, Colorado went to great lengths to include community voices, including faith-based stakeholders specifically. Colorado "worked . . . in multiple ways to encourage providers to take interest in this program and participate if they were qualified to do so." JA 231–32. By June 2022 the Department had selected thirty-five regional Local Coordinating Organizations, continued holding town halls monthly, and "reached out to provider organizations that were umbrella organizations, to also work with them to bring providers to the table." JA 231–32; Pet.App.60a.

This outreach led the Department to convene working groups with various stakeholders. One was a working group for faith-based providers. The faith-based working group grew out of the Department's work with the Efshar Project, a Jewish preschool umbrella organization. JA 233–34. "[T]hrough discussion, we thought it made good sense and would be of interest to open it up to other faiths," and the Department "did some outreach to try to let faith-based preschool providers of various faiths know that we were convening this group." JA 233. The standing invitation was broader still: "It was always our goal to be transparent and meet with any individuals that were interested in the program and wanted to meet." *Id.*

From December 20, 2022, through June 13, 2023, the group drew "a diverse array of religious organizations, including the Efshar Project . . . Lutheran, Presbyterian, and nondenominational representatives; the Colorado Council of Churches; and the Interfaith Task Force." Pet.App.60a; *see* JA 233–34. Indeed, Petitioner St. Mary's sat at that table too, through Tracy Seul, "one of [the] early and lasting members." JA 234. The group met regularly for nearly six months, and its purpose "was to ensure the Department was inclusive of faith-based providers." Pet.App.301a–02a; JA 233–34.

2. *The Department's written answer to the faith community.*

In February 2023 a coalition of faith-based schools and organizations—among them the Archdiocese of Denver—wrote to the Department. They raised concerns about the equal-opportunity requirement as applied to religious schools and asked whether exemptions might be available to them. Pet.App.283a–87a.

Colorado's response demonstrated its commitment to a program inclusive of faith-based providers. JA 240–41. Colorado wrote, "[w]hile CDEC is aware of your concerns, faith-based providers can, and are encouraged to, participate in the UPK program. To that end, we created an interfaith working group, which meets weekly, to problem solve issues as they arise from within the faith-based community and facilitate participation." Pet.App.289a; JA 240–41. What the Department could not do was suspend the statute: "no provider may discriminate against children or families in violation of state statute." Pet.App.288a–90a. The letter closed by inviting more conversation: "I hope this helps you to understand CDEC's authority and current efforts to include faith-based providers in the UPK Program. Please feel free to reach out if you have additional questions." Pet.App.290a.

3. The Program Service Agreement.

Preschool providers who choose to participate in the UPK Program "are required to sign an agreement stating that they will adhere to the Act's quality standards." Pet.App.6a–7a; JA 231. The terms of entry are the same for every provider: any licensed provider may participate in the UPK Program by signing the contract and meeting the standards the statute prescribes.[2] JA 231. A provider's religious character is neither a qualification nor a disqualification.

The Agreement recites the statutory equal-opportunity requirement, requiring "each preschool provider [to] provide eligible children an equal opportunity to enroll and receive preschool services regardless of … religious affiliation." Pet.App.294a–

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[2] The Act lets the Department waive quality standards for a transitional period where a waiver is "necessary to ensure the availability of a mixed delivery system," but not standards "relating to health and safety." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II). The nondiscrimination requirement is treated as a health and safety requirement, and "[t]he waiver doesn't exempt a provider from what's in the law." JA 285.

95a. Thus, the provision protects, for example, a Catholic family from being turned away by a secular preschool.

4. *Family-provider matching and the congregation preference.*

When the program went live, families were asked to "select up to five registered preschools . . . and then rank them," Pet.App.7a, and a "deferred acceptance algorithm" did the matching, Pet.App.65a, JA 237. It worked well: ninety-four percent of families received one of their top two choices, and eighty-two percent received their first. Pet.App.303a.

The algorithm, however, was indifferent to relationships, and providers raised this concern with the Department. "Initially, some participating preschools thought this kind of ranking system was too haphazard because schools had no control over which students they were matched with. In response, the Department added a function where preschools can set different preferences." Pet.App.7a; JA 347. The preferences were "meant to really identify and acknowledge certain relationships . . . between the provider and the community the provider served," and were "designed to protect . . . the seats in a particular provider setting from the unintended consequences of our computer algorithm." Pet.App.72a; JA 235.

One of those preferences was for congregations. It was available to "all faith-based organizations, regardless of denomination," and let them designate all or a portion of their licensed seats for members of their congregation. JA 236. It was not "particular to any one faith"; "[i]t was open to all faiths." JA 239. A preschool matched with a family outside its congregation could decline the match, subject to Department review. JA 235–38; Pet.App.7a; Pet.App.289a–90a. This preference grew out of feedback from faith-based schools that indicated members of their congregation were being excluded from enrolling by the algorithm. JA 235–38.

Colorado administered that preference without drawing theological lines. Providers counted as faith-based "because they attest to being so," and "congregation" was written "to be as expansive as possible." JA 346. The State did not ask what a congregation was, or who counted as a member, or whether a given tradition had congregations at all. *Id.* It took each provider at its word.

The preference, however, was "an exception to the algorithm, not to the law." JA 347; *see also* JA 301. The rule said so expressly: "[i]n utilizing these programmatic preferences, eligible preschool providers must still comply with" the nondiscrimination provision. 8 Colo. Code Regs. § 1404-1:4.109(B). The preference "was not in any way giving a provider any kind of exception to the agreement or to anything in rule or statute." JA 235.

In June 2024 the district court struck down the congregation preference because it violated the statute's mandate against discriminating based on religious affiliation. Pet.App.135a–37a. Colorado subsequently eliminated the congregation preference, declining to appeal the district court's ruling. 8 Colo. Code Regs. § 1404-1:4.109(A); Pet.App.15a–16a. Although it is not operative, the congregation preference demonstrates Colorado's extensive efforts to include faith-based providers. And its response to the district court shows its commitment to comply with the law and avoid discriminating based on religious affiliation, even unintentionally.

C. Colorado Has Successfully Included Religious Providers Without Impeding Their Ability to Provide Faith-Based Education.

Colorado's efforts to include faith-based providers have been successful. Forty faith-based providers participate in UPK, and over 900 children have been matched to them. JA 307–08; Pet.App.303a. They span traditions, from nondenominational Christian preschools to Jewish early childhood programs affiliated with the Efshar Project. JA 307. Indeed, several Catholic Charities providers are part of the UPK Program. Pet.App.12a; JA 307–08, 1268–69.

These providers participate as religious providers. A participating preschool may teach its own faith curriculum, form children in its tradition, and keep its religious identity and character intact. JA 306; Pet.App.64a. The Department has never claimed authority over any of it; the aim, as it put the matter, is "to honor mixed delivery and what each provider uniquely brings." JA 306. Its proposed rules said so expressly: "Nothing in these rules shall be construed to affect an eligible preschool provider's right to engage in privately funded, inherently religious activity, or affect the independence of eligible preschool providers." JA 306, 337–38.

III. This Record Places Colorado's UPK Policy Squarely Outside the Targeting Cases on Which Petitioners Rely.

The cases in which this Court has found religion targeted for disfavored treatment bear no resemblance to this one. Colorado's UPK nondiscrimination policy contains no classification keyed to religious status or religious content: it does not ask whether a preschool is affiliated with a church, what a preschool teaches, or how a preschool presents any subject to its students. It asks only whether a preschool, once it opts to participate in UPK, admits and serves children without regard to eight enumerated characteristics—a requirement that applies with equal force to secular and religious preschools alike, and that forty faith-based preschools, including Catholic Charities, currently satisfy.

Nor does the record contain anything resembling the hostility that drove *Masterpiece* and *Lukumi*. There is no disparaging comment by any Department official directed at Petitioners' faith, no disparate treatment of a comparable secular objection, and no legislative or administrative history suggesting the nondiscrimination clause was designed to reach Catholic preschools' religious practices while sparing comparable secular conduct. Instead, the record shows the opposite: at each stage of implementing the UPK Program, Colorado sought to include faith-based providers, including Petitioners. The Department convened a working group with faith-based preschool providers, including St. Mary's itself, and—in response to the concerns that group raised—created a congregation preference specifically to ease religious preschools' participation in UPK, an accommodation later invalidated not because it favored secular providers over religious ones, but for the opposite reason.

In sum, this record shows a government that built its program to include religion and drew the line only at excluding children. This is not the conduct that this Court's free exercise jurisprudence actually condemns.

CONCLUSION

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

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Respectfully submitted,

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