

No. 25-581

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**In the Supreme Court of the United States**

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

*Petitioners,*

v.

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

*Respondents.*

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

**REPLY BRIEF FOR PETITIONERS**

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## TABLE OF CONTENTS

|                                                                                                                        | Page |
|------------------------------------------------------------------------------------------------------------------------|------|
| TABLE OF AUTHORITIES.....                                                                                              | ii   |
| REPLY BRIEF.....                                                                                                       | 1    |
| I. <i>Smith</i> is rarely controlling. ....                                                                            | 3    |
| II. Colorado’s exclusion of Petitioners<br>triggers strict scrutiny under <i>Carson</i> . ....                         | 5    |
| A. <i>Carson</i> reaffirmed a longstanding<br>rule prohibiting denial of benefits<br>based on religious exercise. .... | 6    |
| B. Colorado’s actions trigger strict<br>scrutiny under <i>Carson</i> . ....                                            | 12   |
| III. Colorado’s mandate also fails <i>Smith</i> ’s<br>general applicability test. ....                                 | 16   |
| IV. The mandate does not survive<br>strict scrutiny. ....                                                              | 23   |
| CONCLUSION .....                                                                                                       | 26   |

## TABLE OF AUTHORITIES

|                                                                                                            | <b>Page(s)</b>           |
|------------------------------------------------------------------------------------------------------------|--------------------------|
| <b>Cases</b>                                                                                               |                          |
| <i>Blackhawk v. Pennsylvania</i> ,<br>381 F.3d 202 (3d Cir. 2004).....                                     | 19                       |
| <i>Carson v. Makin</i> ,<br>596 U.S. 767 (2022) .....                                                      | 5, 6, 7, 8, 9, 10, 15    |
| <i>Church of Lukumi Babalu</i><br><i>Aye, Inc. v. City of Hialeah</i> ,<br>508 U.S. 520 (1993) .....       | 8, 23                    |
| <i>Crosspoint Church v. Makin</i> ,<br>180 F.4th 354 (1st Cir. 2026) .....                                 | 13                       |
| <i>Elrod v. Burns</i> ,<br>427 U.S. 347 (1976) .....                                                       | 8                        |
| <i>Employment Div. v. Smith</i> ,<br>494 U.S. 872 (1990) .....                                             | 9, 15                    |
| <i>Everson v. Board of Educ.</i> ,<br>330 U.S. 1 (1947) .....                                              | 11                       |
| <i>Fulton v. City of Philadelphia</i> ,<br>593 U.S. 522 (2021) .....                                       | 4, 9, 15, 19, 23, 24, 25 |
| <i>Gonzales v. O Centro Espírita</i><br><i>Beneficente União do Vegetal</i> ,<br>546 U.S. 418 (2006) ..... | 14                       |

|                                                                                                                                            |           |
|--------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <i>Kennedy v. Bremerton Sch. Dist.</i> ,<br>597 U.S. 507 (2022) .....                                                                      | 20        |
| <i>Koontz v. St. Johns River<br/>Water Mgmt. Dist.</i> ,<br>570 U.S. 595 (2013) .....                                                      | 11        |
| <i>Lewis-Williams v. San Francisco<br/>Bay Area Rapid Transit Dist.</i> ,<br>No. 25-618, 2026 WL 2674526<br>(9th Cir. Sep. 11, 2026) ..... | 5         |
| <i>Mahmoud v. Taylor</i> ,<br>606 U.S. 522 (2025) .....                                                                                    | 5, 16     |
| <i>Sherbert v. Verner</i> ,<br>374 U.S. 398 (1963) .....                                                                                   | 8, 18     |
| <i>Simon &amp; Schuster, Inc. v. Members<br/>of N.Y. State Crime Victims Bd.</i> ,<br>502 U.S. 105 (1991) .....                            | 21        |
| <i>St. Dominic Acad. v. Makin</i> ,<br>181 F.4th 11 (1st Cir. 2026) .....                                                                  | 12-13     |
| <i>Students for Fair Admissions,<br/>Inc. v. President &amp; Fellows<br/>of Harvard Coll.</i> ,<br>600 U.S. 181 (2023) .....               | 10        |
| <i>Tandon v. Newsom</i> ,<br>593 U.S. 61 (2021) .....                                                                                      | 17-18, 21 |
| <i>Thomas v. Review Bd.</i> ,<br>450 U.S. 707 (1981) .....                                                                                 | 8         |

**Other Authorities**

|                                                                                                                                      |    |
|--------------------------------------------------------------------------------------------------------------------------------------|----|
| Colorado Universal Preschool,<br><i>Anchor Center for Blind Children</i> .....                                                       | 19 |
| Michael W. McConnell,<br><i>Free Exercise Revisionism and the</i><br><i>Smith Decision</i> ,<br>57 U. Chi. L. Rev. 1109 (1990) ..... | 18 |

## REPLY BRIEF

From the beginning of this dispute, Colorado has offered a Marxist defense (Groucho, not Karl) of its actions: Colorado has its principles, but if you don't like those, well, Colorado has others. Colorado cycled through several definitions of the congregation exemption before dispensing with it altogether after trial. Colorado liberally handed out bespoke "preferences" before saying it could not do so for schools with certain religious beliefs. And Colorado insists it doesn't allow any distinction based on characteristics like race, disability, or income—except when it does. The only consistency in all this maneuvering is Colorado's dedication to keeping Catholic schools out of UPK.

Colorado's brief is more of the same. Colorado throws the testimony of its star trial witness, Respondent and UPK Director Dawn Odean, under the bus, repeatedly stating that "Ms. Odean was mistaken." Colorado also disavows the Tenth Circuit, disagreeing with that court's conclusion that *Carson* is part of a line of Free Exercise Clause precedent separate from *Smith*. And Colorado can't even keep its story straight on whether *Smith* really is an ironclad rule or not—trying to maintain that it is, even while admitting that, for example, "*Mahmoud* expressly recognized an exception from *Smith*." The list of Colorado's self-contradictions is longer than these examples, but suffice it to say there is no coherent legal principle behind the tergiversation.

That lack of principle is evident in Colorado's attempts to sideline *Carson* in favor of *Smith*. Like Rip Van Winkle, Colorado appears to have slept through the past three decades of Free Exercise decisions from this Court—all but one in favor of religious litigants—

which confirm that numerous free exercise doctrines exist apart from *Smith*. And when it comes to *Carson*, Colorado treats that landmark case as merely restating *Smith*, a remarkable claim to make about a decision that does not even mention *Smith*.

This attempt to keep *Carson* out of the picture makes sense on one level, as Colorado doesn't really contest that if *Carson* applies, it must lose. Instead it says that if courts apply *Carson* the way it is written, a host of "consequences"—all hypothetical—would ensue. But those consequences are by turns implausible and cabined by existing precedent.

As for general applicability, Colorado offers no defense of the lower courts' reduction of *Fulton* and *Tandon*'s ambit to cases involving either identical secular conduct or unfettered discretion. Instead, Colorado says general applicability depends on what the meaning of the word "equal" is. But even if "equal" means Colorado can grant enrollment preferences it calls "necessary" to ensure children have a "reasonable" opportunity to access UPK, it is still deciding which preferences are "necessary" and which ones aren't—a value-laden assessment. At bottom, the real operation of Colorado's program allows exceptions for many (favored) groups while uniquely denying them to (unfavored) religious groups. That triggers strict scrutiny.

Having triggered strict scrutiny, Colorado fails it. Colorado never explains why it has a compelling interest in specifically excluding Catholic preschools, sticking to a broad invocation of the purposes of UPK. But Colorado's approach undisputedly allows all manner of UPK preschools to continue serving their particular

communities, while forbidding the Archdiocese’s pre-schools from even prioritizing Catholic families. That inconsistent approach to broadening access to UPK means Colorado’s interest is not compelling. Worse still, Colorado claims an interest in forcing Catholic schools to admit those who oppose Church teachings because they might be seeking “solace and sustenance.” This at the expense of thousands of Catholic families who find “solace and sustenance” from providing their children with an authentically Catholic education under the religious guidance of their Archdiocese.

All the flailing might be comical were it not so consequential. For many families, \$6,300 a year is the difference between sending a child to Catholic preschool or not. And for schools, UPK access is all too often the difference between continuing to exist or not. Those high stakes explain why it is essential that the Court not just reject Colorado’s unequal treatment of Catholic schools here, but also expressly reject the idea that *Smith* can be read as a get-out-of-the-First-Amendment card that allows government officials to fine-tune their way out of any challenge. As it stands, *Smith* plays too great a role in the lower courts and thus tempts too many governments to penalize the religious practices they don’t like.

#### **I. *Smith* is rarely controlling.**

In response to Petitioners’ taxonomy of Free Exercise Clause claims not controlled by *Smith* (Br.22-26), Colorado tries to treat virtually all this Court’s precedent as plain-vanilla applications of *Smith*. But Colorado cannot dispute that the Court has declined to ap-

ply *Smith* in a variety of free exercise contexts—including cases involving “forced participation,” “hybrid situations,” “parental rights,” “penalizing religious beliefs as such,” and church autonomy. See Br.22-25; Resp.Br.24 n.9 (“distinct doctrines”); Resp.Br.30 n.11. This, at minimum, shows that the Free Exercise Clause is not synonymous with *Smith* and that the Court has continued to refine Free Exercise Clause jurisprudence since 1990. See U.S.Br.27-34. Yet lower courts frequently treat *Smith* as the beginning and the end of free exercise analysis, Br.26-27; U.S.Br.29-30—an error Colorado’s brief indulges in, Resp.Br.22-23.

In telling its revisionist tale, Colorado suggests that some of the cases Petitioners cite as falling outside of *Smith* actually “applied *Smith*’s framework.” Resp.Br.23. But apart from the handful of cases that both sides agree applied *Smith* (Br.21), Colorado points only to this Court’s public benefits cases and to one of Colorado’s previous losses, *Masterpiece Cakeshop*. As explained below, *Smith* explicitly carved out this Court’s public benefits line of precedent. *Infra* Section II.A. And *Masterpiece* is best understood as an application of the extra-*Smith* free exercise principle that religious animus is *never* permissible. Br.22 (*e.g.*, no strict scrutiny); see also *Fulton v. City of Philadelphia*, 593 U.S. 522, 601 (2021) (Alito, J., concurring) (noting “tension between *Smith* and our opinion in *Masterpiece*”). Colorado’s mistake is assuming that whenever a case’s outcome *could* be explained under *Smith* then it *was* explained by *Smith*. Resp.Br.23-24 (suggesting the Court applied *Smith* in *Carson*, *Espinoza*, and *Trinity Lutheran* because the “law was not neutral”). That is not how *ratio decidendi* works.

Colorado’s attempt to shoehorn more cases into “*Smith*’s framework” is mistaken. This was the very maneuver *Smith* made on parental rights—recasting *Yoder* as a “hybrid rights” case—until the Court rejected it in *Mahmoud v. Taylor*, 606 U.S. 522, 565 n.14 (2025) (reinvigorating *Yoder* based on its original rationale). This Court should similarly reject Colorado’s memory-holing, and certainly should not *expand* the controversial and malfunctioning *Smith* standard that five sitting Justices and many lower courts have suggested revisiting. *E.g.*, *Lewis-Williams v. San Francisco Bay Area Rapid Transit Dist.*, No. 25-618, 2026 WL 2674526, at \*9 (9th Cir. Sep. 11, 2026) (Nelson, J., concurring) (“The real problem is that *Smith* is demonstrably erroneous.”). Instead, to guide lower courts, this Court should state explicitly what its post-*Smith* free exercise precedent confirms: *Smith* applies infrequently, and even then, governmental burdens on religion are rarely both neutral and generally applicable. And the Court should reaffirm, in a way that even unwilling governments cannot pretend to mistake, that this Court’s public benefits cases fall outside of *Smith*’s framework.

## **II. Colorado’s exclusion of Petitioners triggers strict scrutiny under *Carson*.**

For nearly 80 years this Court has affirmed that “a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” *Carson v. Makin*, 596 U.S. 767, 778 (2022) (citing *Everson*). Colorado would collapse this longstanding line of precedent into *Smith*’s neutrality test. Resp.Br.25-27. But *Carson* did not frame its analysis, rule, or holding in *Smith*’s terms. *Sherbert* and

*Thomas*—the cases *Carson* relied on—are not neutrality cases. And, tellingly, not even the Tenth Circuit agreed with Colorado. Pet.App.19a (“These cases form an independent line of precedent in the Supreme Court’s Free Exercise case law.”).

**A. *Carson* reaffirmed a longstanding rule prohibiting denial of benefits based on religious exercise.**

1. *Carson* itself refutes Colorado’s claim that this Court’s public benefits cases merely reflect a no-religious-targeting rule. When stating the applicable rule, *Carson* described how this Court has “repeatedly held” that a government “violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” *Carson*, 596 U.S. at 778 (citing *Sherbert*, *Thomas*, and *Everson*). *Carson* then described the holding in *Sherbert*: “A State may not withhold unemployment benefits, for instance, on the ground that an individual lost his job for refusing to abandon the dictates of his faith.” *Ibid.* Notably absent is any reference to religious targeting or neutrality. Rather, this rule fits Petitioners’ theory: Colorado “may not withhold” UPK funding “on the ground that” Petitioners “refus[e] to abandon the dictates of [their] faith.” *Ibid.*; see U.S.Br.30.

That was also how the Court decided *Carson*. Immediately after articulating the rule, the Court concluded that this “‘unremarkable’ principle[] \* \* \* suffice[s] to resolve this case.” *Carson*, 596 U.S. at 780. Colorado’s claim that this Court “interrogat[ed] the neutrality” of Maine’s program, Resp.Br.29, is fiction. The section of *Carson* Colorado cites doesn’t apply *Smith*—it applies the public benefits rule, concludes

that Maine fails strict scrutiny, and then rejects Maine’s attempt to “distinguish” *Espinoza* and *Trinity Lutheran*. *Carson*, 596 U.S. at 780-789. The reference to “neutrality” (*id.* at 781) came in response to the *dissent*’s “neutrality vocabulary.” Resp.Br.27.

Moreover, *Carson* rejected the same empty formalism Colorado pushes here. Maine, like Colorado, claimed it was not excluding religious schools, but was instead extending a particular benefit that had the incidental effect of keeping sectarian schools out: Maine would pay for only the “rough equivalent” of a public education. *Carson*, 596 U.S. at 782; Brief for Respondent 1-2, *Carson*, No. 20-1088 (Oct. 22, 2021) (“The public benefit Maine is offering is a free public education. Petitioners want an entirely different benefit.”). The Court rejected this argument—both because Maine misinterpreted its law, *Carson*, 596 U.S. at 782-784, and because accepting the argument would render the benefits cases “essentially meaningless,” *id.* at 784. As this Court explained, “our holding in *Espinoza* turned on the substance of free exercise protections, not on the presence or absence of magic words.” *Id.* at 785. Thus, *Espinoza*’s “holding applies fully whether the prohibited discrimination is in an express provision like § 2951(2) or in a party’s reconceptualization of the public benefit.” *Ibid.*; see *id.* at 784-785 (“[T]o allow States to ‘recast a condition on funding’ in this manner would be to see ‘the First Amendment ... reduced to a simple semantic exercise.’”).

Put simply, the rule *Carson* reaffirmed and applied did not turn on any non-neutral language Maine used to exclude religious schools; it turned on whether

Maine had denied a public benefit “based on a recipient’s religious exercise.” *Carson*, 596 U.S. at 784-785. *Carson* reiterated this rule *three times*—not once invoking *Smith* or limiting its rule to exclusions described in religious terms. Instead, the Court said the opposite: “*Regardless of how the benefit and restriction are described*, [Maine’s] program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.” *Id.* at 789 (emphasis added); see also *id.* at 781 (“because of their religious exercise”); *id.* at 785 (“based on a recipient’s religious exercise”). For *Carson* purposes, as elsewhere in free-exercise doctrine, what matters is not labels but “the effect of [the] law in its real operation.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (citation omitted).

2. *Carson*’s reliance on *Sherbert* and *Thomas* confirms the scope of this public benefits rule. *Carson*, 596 U.S. at 778. In both *Sherbert* and *Thomas*, the government applied facially neutral rules to deny the plaintiffs public benefits because of their religious exercise. Br.33-34; *Sherbert v. Verner*, 374 U.S. 398, 405 (1963); *Thomas v. Review Bd.*, 450 U.S. 707, 717-718 (1981). In both cases, this Court’s analysis focused on the denial of the public benefit—not on whether the government’s rules were religiously neutral (they were). *Sherbert*, 374 U.S. at 405 (“[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.”); *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) (plurality) (similar, collecting cases). Colorado does not disagree; it argues instead that *Smith* recast these cases as an application of its general applicability test. Resp.Br.28-29.

This argument fails four times over. First, Colorado cannot account for the fact that this Court in *Carson* (a post-*Smith* decision) invoked *Sherbert* and *Thomas* not for the proposition that non-neutral rules trigger strict scrutiny, but for the proposition that religious-exercise-based exclusions from public benefits trigger strict scrutiny. *Carson*, 596 U.S. at 778.

Second, “*Smith* did not overrule *Sherbert*,” *Thomas*, or any of this Court’s other public benefits cases. *Fulton*, 593 U.S. at 600 (Alito, J., concurring). While *Smith* cited *Sherbert* and *Thomas* twice, both times it distinguished the cases because they, unlike *Smith*, did not involve criminal prohibitions. *Smith* first noted that *Sherbert* and *Thomas* were inapplicable because “the conduct at issue in those cases was not prohibited by law.” *Employment Div. v. Smith*, 494 U.S. 872, 876 (1990). *Smith* then cited a three-Justice plurality opinion from *Bowen v. Roy* describing *Sherbert* and *Thomas* as involving a “system of individual exemptions,” but the majority did not purport to *limit* them to that rationale. *Id.* at 884. Quite the opposite: “*Whether or not the decisions are that limited*, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct.” *Ibid.* (emphasis added).

Third, even assuming *Sherbert* and *Thomas* could be retconned as general applicability cases, that does not explain why *Carson* would cite them if, as Colorado argues, *Carson* was applying *Smith*’s neutrality rule. Resp.Br.26-27. Colorado agrees that neutrality and general applicability are distinct inquiries. See Resp.Br.22-23. It would thus make little sense to spotlight two general applicability cases (especially ones

that involve facially neutral laws) to explain *Smith*’s neutrality rule. More sensible is what *Carson* actually did—apply *Sherbert* and *Thomas* on their own terms.

Fourth, *Mahmoud* further undermines Colorado’s argument by applying *Trinity Lutheran* to a facially neutral law. Br.34. In response, Colorado notes that *Trinity Lutheran* involved “express[] discriminat[ion].” Resp.Br.30. But Colorado fails to explain why *Mahmoud*—a case in which the law was undisputedly neutral on its face—would invoke *Trinity Lutheran* if this precedent applied only to instances of explicit religious discrimination. The facts of *Trinity Lutheran* are no answer to Petitioners’ *Mahmoud* argument.<sup>1</sup>

3. Colorado also offers no principled defense of the explicit-religious-exclusions-only line. Colorado never responds to the argument that its reading of *Carson* would allow for easy circumvention. Indeed, its theory would reduce *Carson* to a drafting instruction for state legislatures: use these words, not those, to keep unwanted religious schools out. That cannot be right. *Carson*, 596 U.S. at 785 (rejecting “magic words”); see also, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (“The Constitution deals with substance, not shadows.”).

Nor can Colorado justify the implications of its new rule. Colorado’s rule would permit governments to

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<sup>1</sup> Contra Colorado (Resp.Br.30 n.11), the arguments already presented suffice to conclude that it would be “illogical and perverse” to apply a lesser standard of review here than in *Mahmoud*. U.S.Br.4, 34.

deny believers equal access to benefits solely on account of their religious exercise. So Jewish schools could be denied access to generally available security funding solely because they limit enrollment to Jews. Orthodox.Union.Br.20-21. Or a religious charity serving at-risk youth could have its grant funding cut off based on its sincere belief that it hire only fellow believers. Darren.Patterson.Br.27.

Thus, while Colorado claims Petitioners advance a “sweeping” rule (Resp.Br.32), Colorado’s approach would sweep more broadly. It would allow government actors to step into any field or industry and offer public funding to some market participants—even if that funding came with conditions known to conflict with particular religious practices. The government could then leverage its spending power to push religious groups out, based solely on their sincere religious exercise—all while claiming that they could simply choose not to accept the funding. W.Va.Br.35 (“semantic sleight of hand”); Resp.Br.5 (“UPK is voluntary”). Accepting Colorado’s approach could allow governments to withhold all sorts of public benefits from religious organizations whose longstanding religious practices the government tags as “discrimination.” *E.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013) (“[D]enial of a governmental benefit” can impose “coercive pressure” to “cede a constitutional right.”); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (describing reluctance to send children to schools lacking “police and fire protection, connections for sewage disposal, public highways and sidewalks”).

**B. Colorado’s actions trigger strict scrutiny under *Carson*.**

Straightforward application of this Court’s public benefits precedents resolves this case. Colorado does not dispute the key facts: UPK funding is a public benefit, and Petitioners were denied this benefit solely because of their sincere religious exercise. Resp.Br.15-16. These undisputed facts trigger strict scrutiny under *Carson*. Br.29-30; U.S.Br.33-34.

1. Instead, Colorado fights *Carson*’s holding, claiming that applying *Carson* here will result in “sprawling administrative challenges” and render even “common-place” restrictions on public funding “suspect.” Resp.Br.32-35.

That is exactly backwards. The rule this Court adopted in *Carson* is simple: if a government chooses to create a public benefits program, it cannot deny religious people access to that benefit based on their sincere religious exercise. The alternative rule—*Smith*—is what leads to “sprawling” legal challenges. *Smith*’s analysis—asking, among other things, whether the government has permitted any secular exceptions for others not before the court and what motivated the government to make the challenged decision in the first place—requires exactly the kind of large-scale litigation Colorado claims to fear.

Maine’s response to *Carson* epitomizes this problem. Before this Court had even issued its decision, government officials in Maine began looking for ways to “outmaneuver” it. See Crosspoint.Br.1-2, 25. To start, Maine repealed a religious exemption from its nondiscrimination law, now sweeping in all religious schools receiving public funding. *St. Dominic Acad. v.*

*Makin*, 181 F.4th 11, 26 (1st Cir. 2026). Next, Maine added a “religious expression rule” stating that “to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing.” *Id.* at 24. The undisputed effect of these new rules is that religious schools (with beliefs like Petitioners’) remain barred from Maine’s tuition funding program solely on account of their religious exercise. *Id.* at 27; *Crosspoint Church v. Makin*, 180 F.4th 354, 359 (1st Cir. 2026) (same).

But when the excluded schools challenged this chicanery, the First Circuit did not apply *Carson*. Instead it limited it, holding that because the amended non-discrimination law applies to both secular and religious schools, Maine’s law “does not exclude religious schools from the tuition-assistance program solely based on their religious character.” *St. Dominic*, 181 F.4th at 41, 59. The First Circuit then turned to *Smith* and applied rational basis review: “[W]e are not free to discard *Smith* based on an overly expansive interpretation of *Carson*, especially without any clarity as to what, exactly, would replace *Smith*.” *Id.* at 42.

Maine is not alone. Several other states have pursued *Carson* “workaround[s],” hinging on the argument that *Carson* applies only to *explicit* religious exclusions. See *Notre.Dame.Br.12-20* & n.24 (describing hostile reactions to *Carson* in Maine, Vermont, Maryland, and New Hampshire). As the First Circuit’s decision in *St. Dominic* shows, that reading of *Carson* renders this Court’s precedent trivially easy to avoid.

2. In contrast to these real-world examples, Colorado musters only speculation piled upon speculation. Colorado cites not a single case or real-world example

to support its Chicken Little predictions about what straightforward application of *Carson* would mean for “programs addressing health care, land use, childcare, job training, food and nutrition,” etc. Resp.Br.32-35. And, regardless, courts already have the tools necessary to deal with Colorado’s hypotheticals should they arise.

First, if Colorado’s concerns were at all likely, they would have arisen already. Forty states and the federal government have adopted (via RFRA) legal frameworks that apply heightened scrutiny to *all substantial burdens* on sincere religious exercise. See Robertson.Br.10-12 (“Forty states have rejected *Smith*.”). Despite the fact that forty-one jurisdictions already apply a level of scrutiny consistent with the one Petitioners argue for in this case, Colorado fails to point to *any* cases in which the sorts of problems it alleges have actually arisen. And experience shows states can operate similar programs while accommodating Catholic schools. EdChoice.Br.31-33.

Second, strict scrutiny is a serious backstop. Contra Resp.Br.34. Both this Court and lower courts have applied heightened scrutiny for decades. *E.g.*, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006) (courts “up to the task” of applying RFRA’s “compelling interest test”). And there is no doubt that, in appropriate cases, governments can win under this standard. Would any court even seriously entertain the argument that the government

lacks a compelling interest in requiring domestic violence shelters to keep information about victims confidential? Contra Resp.Br.33.

Its slippery-slope argument unavailing, Colorado next says the right reading of *Carson* “defies common sense,” because benefits conditions (falling outside *Smith*) are “milder forms of regulation” than direct prohibitions. Resp.Br.31-32. But nothing requires governments to create benefits programs in the first place; and if a government determines a benefits program no longer serves its intended purposes, it remains free to end it. *Carson*, 596 U.S. at 779 (“A State need not subsidize private education.”) (quoting *Espinoza*); Resp.Br.34.

Throughout its brief, Colorado also clings to *Smith*’s claim that “politically accountable actors” can “decide when religious exemptions \* \* \* are warranted.” Resp.Br.34. But even *Smith* conceded that this approach would disadvantage those with minority or unpopular religious beliefs. *Smith*, 494 U.S. at 890. Thirty-six years later, *Smith*’s concession appears accurate. See, e.g., *Fulton*, 593 U.S. at 545 (Alito, J., concurring) (listing some of *Smith*’s “startling consequences”); Orthodox.Union.Br.4 (“The ramifications for vulnerable minority communities of upholding Colorado’s policy would be profound.”). In any event, “[i]n this country,” “the Bill of Rights and the doctrine of

judicial review” protect those that politically accountable actors would rather ignore. *Mahmoud*, 606 U.S. at 563.

### **III. Colorado’s mandate also fails *Smith*’s general applicability test.**

Colorado fares no better under *Smith*. Instead, its new legal theories before this Court simply confirm a central problem with *Smith*: it incentivizes governments to keep tweaking their programs (and their asserted government interests) to try to find a way to distinguish secular exemptions from religious exercise. See FCA.Br.20 (*Smith* encourages governments to “twist—and retwist—their rules in pretzels.”).<sup>2</sup>

In the end, none of Colorado’s maneuvering matters. Regardless of how Colorado interprets “equal opportunity,” it cannot distinguish, in a constitutionally meaningful way, the secular conduct it permits from the religious accommodation Petitioners require. Throughout Colorado’s brief, the distinction that *actually* does the work is Colorado’s steadfast belief that Petitioners’ religious exercise is bad, while the secular exemptions it allows are good. *E.g.*, Resp.Br.36, 43 (contrasting “specialized services” for “children with

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<sup>2</sup> Colorado also contorts the record. The Archdiocese’s policies are anything but a “departure from its prior practice.” Resp.Br.14 n.5. The Archdiocese’s religious policies have been applied consistently across all programs and long predate UPK. J.A.150-156 (describing DPP, CCCAP, and Catholic Charities Head Start); Pet.App.83a (similar); J.A.140 (longstanding policy). And while the Archdiocese’s preschool enrollment was *initially* “holding steady” in November 2023—three months after UPK began—it has since declined significantly. Compare Resp.Br.16 n.7 (citing Supp.App.91a), with Br.18 (almost 20% decline).

disabilities” with “exclusion from publicly-funded services based on protected-class status”). That’s both wrong and constitutionally impermissible. See Br.41-42.

1. Under *Tandon*, Colorado’s categorical exemptions for preschools that prioritize low-income families and children with disabilities show that the mandate is not generally applicable. Br.36-43. The mandate requires preschools to provide “eligible children an equal opportunity to enroll \* \* \* regardless of” eight protected characteristics, including “religious affiliation,” “sexual orientation,” “gender identity,” “disability,” and “income level.” Br.5-6. Colorado rests its argument before this Court on the meaning of “*equal* opportunity,” claiming that enrollment preferences for low-income families and children with disabilities ensure “equal opportunity,” because “specialized services and modifications are sometimes necessary to provide an equal opportunity.” Resp.Br.38 (emphasis added).

While Petitioners disagree with Respondents’ brand-new statutory interpretation argument (see Br.37-38), under *either* the statute’s plain text *or* this new interpretation of “equal,” allowing UPK preschools to consider disability and income level undermines the mandate’s general applicability.

If the mandate is given its plain meaning and read to require UPK preschools to give all families an equal (*i.e.*, the same) opportunity to enroll regardless of any protected characteristic, then enrollment preferences based on disability and income level are unmistakably comparable secular activity treated more favorably than Petitioners’ religious exercise. Br.36-39; *Tandon*

v. *Newsom*, 593 U.S. 61, 62 (2021) (“[G]overnment regulations are not neutral and generally applicable \* \* \* whenever they treat *any* comparable secular activity more favorably than religious exercise.”).

If, on the other hand, “equal” doesn’t actually mean *equal* but instead means that Colorado can grant enrollment preferences because such preferences are, in its view, necessary to ensure children have a “reasonable” or “meaningful” opportunity to access UPK preschools, see Resp.Br.40, 42-43, Colorado still loses.

Religious accommodations, too, are sometimes necessary to “achieve equal opportunity,” Resp.Br.43, because religious people face constraints on their conduct that others lack. As *Sherbert* explained, extending unemployment benefits to “Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences.” 374 U.S. at 409; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1140 (1990) (“analogy can be drawn between free exercise theory and the theory of handicap discrimination”); Laycock.Br.15 (Colorado “devalue[s]” religious reasons “by judging them to be of lesser import than nonreligious reasons.”).

Colorado thus offers no constitutionally meaningful way to distinguish disability and income level accommodations from Petitioners’ religious accommodation. Instead, by extending preferential treatment to accommodate families whose options might be limited by their income or disability, but not families whose options are constrained by their Catholic faith (Br.29),

Colorado is still favoring comparable secular conduct over Petitioners' religious exercise. See U.S.Br.15-20.

Colorado even *admits* it is making value judgments, explaining that its new theory hinges on “reconcil[ing]” multiple important secular interests found in various other parts of the UPK statute and in federal law. Resp.Br.21, 38 (“[t]aken together”). But once Colorado starts balancing competing interests, it effectively concedes that the law is “sufficiently open-ended to bring the regulation within the individualized exemption rule.” *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209-210 (3d Cir. 2004) (Alito, J.); Br.41-42. If Colorado can interpret the term “equal opportunity” flexibly to accommodate important secular interests found outside of the mandate, it must extend that flexible interpretation to accommodate Petitioners' sincere religious exercise. *Fulton*, 593 U.S. at 534.<sup>3</sup>

Moreover, this Court's precedent bars Colorado from concocting ever more elaborate and nuanced government interests during litigation to distinguish away the secular exemptions it allows. At the time Colorado denied Petitioners' request for a religious accommodation, its only argument was that “the department

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<sup>3</sup> Colorado argues that seats at preschools serving children with specific disabilities are “not interchangeable.” Resp.Br.8. This undermines Colorado's argument. A UPK preschool that specializes in serving blind children (cf. Resp.Br.42) must, for example, be able to turn away children with *other* disabilities. *E.g.*, Colorado Universal Preschool, *Anchor Center for Blind Children*, <https://perma.cc/KFX4-4DEU> (“We prioritize children with vision impairments first.”); NWLC.Br.29-30 (similar); J.A.118 (“serving children with certain disabilities”). Colorado's own strained logic thus “depriv[es] families, based on protected-class status, of otherwise-available publicly funded preschool options.” Resp.Br.42.

did not have the authority to grant an exception.” J.A.252. Since then, new theories have appeared at each stage of the case. In the district court, Colorado said that enrollment preferences for low-income families and children with disabilities were justified because “historically, [these families] haven’t had equitable access or aligned care that meets their needs.” Defs.’ Proposed Findings of Fact and Conclusions of Law, ¶¶ 88-90, ECF.109. In the Tenth Circuit, Colorado argued (for the first time) that the terms “disability” and “income level” in the mandate were “one-way ratchets” that just meant “*with a disability*” and “*low income*.” Resp.C.A.Br.31. Before this Court, Colorado argues that “*equal opportunity*” sometimes means “reasonable opportunity,” Resp.Br.38-43, and even claims that a central argument it made in its briefing below was “mistaken,” Resp.Br.47-49.<sup>4</sup>

Colorado’s constantly evolving legal theories are the opposite of the kind of “evenhanded, across-the-board” enforcement required by the general applicability rule. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). “Government justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *Id.* at 543 n.8 (cleaned up).

Finally, Colorado tries to fold its secular enrollment preferences into its asserted interest to avoid the implication that such preferences undermine its interest. *E.g.*, Resp.Br.42. But *Tandon* rejected that gambit, holding that California’s interest was in “reducing

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<sup>4</sup> Colorado also appears to abandon the Tenth Circuit’s “different barriers to equal access” theory. See Br.42-43.

the spread of COVID,” not in the granular distinctions it drew based on which activities ostensibly created greater risks of COVID transmission. See *Tandon*, 593 U.S. at 63-64 (also rejecting distinction between public and private buildings); U.S.Br.14-16.

Here, however, Colorado attempts to use the mandate’s secular exemptions to reverse-engineer a government interest perfectly contoured to explain away those secular exemptions. “If accepted, this sort of circular defense can sidestep judicial review of almost any statute.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (rejecting attempt to equate “effect of the statute” with “State’s interest”). Instead, general applicability analysis turns on the overall purpose of the challenged law or regulatory scheme—here, Colorado’s stated interest in increasing access to free quality preschool for all. See Br.4-5, 37 (describing UPK statute’s stated interests); U.S.Br.18-19.

2. Under *Fulton*, Colorado’s case-by-case discretion also negates general applicability. Br.44-45; U.S.Br.20-24. Respondent Odean testified that UPK preschools could prioritize families based on race, sexual orientation, and gender identity. Br.44-45. Colorado now says that Odean lacked “any authority” to grant exemptions and says (three times) that she was “mistaken” about the UPK statute’s meaning. Resp.Br.47-49.

But Respondent Odean consistently testified to the *Department’s* understanding of what the UPK statute required. *E.g.*, J.A.302. And if Odean were simply “mistaken,” the Department’s attorneys could have corrected her testimony. They never did. See J.A.348-

350. Instead, Odean’s consistent testimony was that preferences for historically discriminated-against minorities *did not* violate the Department’s understanding of what the law required. Br.45.

Colorado next invokes *Loper Bright*, claiming Odean’s testimony is irrelevant because the mandate’s text does not permit exemptions “based on the traditional tools of statutory construction.” Resp.Br.48. But just seven pages earlier, Colorado urged this Court to *defer* to a patently *atextual* interpretation of the same statute. Resp.Br.41 (“great deference”). Colorado cannot have it both ways. Nor can Colorado dismiss Odean’s testimony simply by invoking the mandate’s text. Colorado must show *both* that the UPK statute and regulations are generally applicable as written *and* that its operation of the UPK program—its *enforcement* of the law—is generally applicable. Br.46-47. Odean’s sworn testimony is enough to conclude that the mandate is not generally applicable. Br.45; see U.S.Br.22-23 (“Assessing preschools’ requests necessarily involves individualized consideration of why the school seeks the preference.”).

In addition, the regulations governing the catchall exemption further confirm the Department’s discretion, and thus also defeat general applicability under *Fulton*. Br.44; U.S.Br.24-25. As Petitioners explained, Colorado’s regulations permit UPK preschools to prioritize families receiving “public assistance benefit(s),” including “housing assistance,” even though the mandate requires equal access regardless of “income level” and “lack of housing.” Br.5-6, 44. In response, Colorado merely states that prioritizing families who receive

housing assistance helps families escape homelessness. Resp.Br.46. Perhaps—but that is irrelevant. Families receiving a subsidy for housing assistance no longer “lack housing.” Br.44. Putting aside the *purpose* of housing assistance, Colorado does not dispute this preferential treatment.<sup>5</sup>

3. Colorado also doesn’t dispute that the mandate has only been used to exclude *religious* preschools. Br.46 n.7. When “the only conduct” prohibited by a facially neutral law is religious, this Court has not hesitated to find an impermissible “religious gerrymander” that alone triggers strict scrutiny. *Lukumi*, 508 U.S. at 535.

#### **IV. The mandate does not survive strict scrutiny.**

Having triggered strict scrutiny, Colorado fails it. First, Colorado “rel[ies] on ‘broadly formulated interests,’” *Fulton*, 593 U.S. at 541—providing quality preschool to all four-year-old Coloradans. Resp.Br.51. But Colorado must instead “scrutinize the asserted harm of granting specific exemptions to particular religious claimants.” *Fulton*, 593 U.S. at 541. That means Colorado must show it has a compelling interest “in denying an exception” from the mandate specifically *to Pe-*

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<sup>5</sup> Colorado complains of “no evidence,” Resp.Br.46 n.15, about how housing prioritization would work in practice, but it sprang these regulations on the court during trial. Br.7; J.A.313; see also *Fulton*, 593 U.S. at 537 (mere existence of discretion suffices).

*tioners. Ibid.* And “[o]nce properly narrowed, [Colorado’s] asserted interests are insufficient,” for the reasons identified in the opening brief and below. *Ibid.*<sup>6</sup>

Second, Colorado cannot have a compelling interest in denying Petitioners a religious accommodation when it permits secular preschools to use enrollment preferences that similarly violate the mandate. *Supra* Section III. Colorado’s actions belie its insistence that “its non-discrimination policies can brook no departures.” *Fulton*, 593 U.S. at 542.

Third, Colorado cannot carry its burden of proof by hypothesizing. Br.49-50; Resp.Br.53-54, 56 (describing what “LGBTQ parents” “may” want, and describing “illustration[s]”). After a full merits trial and years of litigation, Colorado offers only pure “speculation,” which “is insufficient to satisfy strict scrutiny.” *Fulton*, 593 U.S. at 542.<sup>7</sup>

Nor has Colorado explained how excluding Catholic preschools helps any family that opposes Catholic teachings access UPK preschools. Instead, with the Archdiocese’s preschools excluded, there are some Catholic families unable to forgo UPK benefits who are filling otherwise-available seats at non-Catholic UPK

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<sup>6</sup> Nor does Colorado treat even this alleged interest as compelling: some UPK preschools can deny admission based on a family’s “protected-class status.” *Supra* n.3.

<sup>7</sup> Colorado suggests there have been no complaints about Catholic preschools excluding families *because* Petitioners are barred from UPK. Resp.Br.53 n.16. But Catholic preschools have been operating under state licensure for decades without any such complaints, as Colorado told the district court. Pet.App.306a; J.A.335-336.

preschools. Br.50-51; see, e.g., Conscience.Project.Br.12-13. And contrary to Colorado’s speculations, no one will be forced to “travel farther.” Compare Resp.Br.56, with Pet.App.94a (no impact on LGBTQ preschool access). “If anything,” including Catholic preschools “seems likely to increase, not reduce,” UPK preschool access, even for families who oppose the Church’s teachings. *Fulton*, 593 U.S. at 542. And while Colorado and its *amici* repeatedly bang the discrimination drum, they ignore Colorado’s *actual, governmental* discrimination in favor of an attack on Petitioners’ constitutionally protected religious exercise.

In a final fit ofchutzpah, Colorado offers one more interest: helping people get religion. Colorado explains that some families who oppose the Church’s teachings may nevertheless “seek out” the Archdiocese’s preschools because they “draw on religion and faith as a source of solace and sustenance.” Resp.Br.54. In Colorado’s cynical calculus, families who want Church schools but not so much the Church herself are worthy of Colorado’s attentions, while families who want their children to get a Catholic education as part of a faithful Catholic community are shunted aside.

\* \* \*

At bottom, there has never been any evidence that excluding Catholic preschools makes UPK more accessible to families who oppose the Catholic Church’s teachings. Meanwhile, thousands of parents who support those teachings, like the Sheleys, are forced to choose between a valuable public benefit and following their faith. Our Constitution demands more.

**CONCLUSION**

The decision below should be reversed.

Respectfully submitted.

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