SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ST. MARY CATHOLIC PARISH,)
LITTLETON, COLORADO, ET AL.,)
Petitioners,)
v.) No. 25-581
LISA ROY, IN HER OFFICIAL CAPACITY)
AS EXECUTIVE DIRECTOR OF THE)
COLORADO DEPARTMENT OF EARLY)
CHILDHOOD, ET AL.,)
Respondents.)

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Washington, D.C.

Tuesday, November 3, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

NICHOLAS R. REAVES, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

SARAH M. HARRIS, Principal Deputy Solicitor General, Department of Justice, Washington D.C.; for the United States, as amicus curiae, supporting the Petitioners.

HELEN NORTON, Deputy Solicitor General, Denver, Colorado; on behalf of the Respondents.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-581, St. Mary Catholic Parish versus Roy.

Mr. Reaves.

ORAL ARGUMENT OF NICHOLAS R. REAVES

ON BEHALF OF THE PETITIONERS

MR. REAVES: Mr. Chief Justice, and may it please the Court:

The Archdiocese of Denver schools exist to pass on the faith to the next generation. To do this, they ask all families who enroll to be open to and supportive of the church's teachings. Because of this sincere religious exercise, the State has denied Colorado families the ability to use Universal Preschool funding at Catholic schools. Under this Court's public benefits cases, that triggers strict scrutiny.

The Tenth Circuit was wrong to cabin that precedent that this Court reaffirmed in Carson to explicit religious exclusions only. That can't be reconciled with Sherbert, Thomas, or Mahmoud. Nor can it be reconciled with this

Court's instruction in Carson to look to the operation and the effect of the law, not for magic words.

After rejecting Carson, the Tenth Circuit applied Smith, but this too was wrong. When Colorado allows over a thousand schools to turn families away for a variety of different reasons, it has created a flexible and customizable program, nothing like the generally applicable across-the-board laws that Smith envisioned.

And Colorado's inconsistent and contradictory arguments further confirm the state's actions are anything but generally applicable. Colorado has flexibly interpreted the mandate to accommodate important secular interests, but it's called the same law a hard limit when Petitioners sought a religious accommodation.

And Colorado has discretion via the catch-all exemption to permit preschools to organize around "specific competencies or interests" and to serve "specific communities." Yet it has refused to extend that flexible treatment to Petitioners.

Finally, this is not a zero-sum game. Letting families use Universal Preschool funding at Catholic schools won't take away a single seat from the over 2,000 preschools already participating in the program. In fact, letting Catholic schools in will create more seats for everyone, even for families who disagree with Catholic teachings.

I welcome the Court's questions.

JUSTICE THOMAS: Do you think your -- this case is on all fours with Carson, or would we have to extend Carson?

MR. REAVES: I think the rule this Court applied in Carson when it discussed Sherbert and Thomas is on all fours with this case. Both Sherbert and Thomas involved facially neutral laws, and that's my understanding of where this Court derived the public benefits rule it applied in Carson.

I would also look to the holding that this Court articulated at the end of its opinion in Carson, which says, "Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of

their religious exercise." So that's how I understand this Court's decision in Carson.

And I also think the focus of the way that this Court resolved Carson was to look at, you know, what is happening to the religious believer? It didn't focus on the text of the law in Maine. It focused on whether schools are being excluded on account of their religious exercise.

JUSTICE SOTOMAYOR: But I --

CHIEF JUSTICE ROBERTS: But --

JUSTICE SOTOMAYOR: -- I'm a little confused. I'm sorry, Chief, go ahead.

CHIEF JUSTICE ROBERTS: -- Carson was third in a line of cases, you know, Trinity Lutheran, Espinoza, and then Carson. The law in those cases, in each of them, expressly discriminated against religious schools on its face.

That's not the case here. Shouldn't that make a significant difference given the potential reach of the principle you're asking for?

MR. REAVES: Your Honor, a few points. I don't think we're actually asking for a very

broad principle. And I think it is the principle that this Court articulated previously in Sherbert and Thomas and then reaffirmed in Mahmoud. In all three of those cases, the law on its face was neutral.

But, to also talk about the scope of this rule, when we're talking about public benefits, it's -- it's a relatively small category of things we're talking about. This Court has applied the public benefits precedent when we're talking about welfare benefits and education funding predominantly, and I don't think this rule would -- would change much beyond that.

CHIEF JUSTICE ROBERTS: Well, just to interrupt for a moment, would it not in your view apply to things like drivers' licenses, employment benefits, Social Security? I'm not quite sure how you limit the applicability of your principle.

MR. REAVES: Yeah. Your Honor, I think it would apply to situations where the government is subsidizing private conduct. A license, for example, would not be a public benefit because that's the government using its

regulatory power. So I think that would be more akin to, you know, maybe you would apply a different Free Exercise Clause principle like Smith. But my read of the public benefits cases is that the underlying conduct has to be something you can do already and we're just talking about the government subsidizing private conduct.

In -- in this Court's Everson decision, it described the rule as the ben -- as "the benefits of public welfare legislation." And I think that's kind of the realm of what we're looking at here.

JUSTICE JACKSON: What I guess I -- I'm -- I'm trying to understand is what do we do with the fact that not all Catholic schools are being excluded in fact as a result of this rule? I mean, my understanding is that there are many religious schools, that the -- the -- not only does the State seek to have religious schools as a part of this program but that many religious schools even in the same faith have chosen to participate, have followed the mandate. So what -- what do we do with that?

MR. REAVES: Mm-hmm. Your Honor, I

think it's telling that neither of the courts below found the -- the argument compelling. And this is at JA 155. But, essentially, the testimony from the superintendent of Catholic schools was that Catholic Charities, which operates these Head Start programs, which do participate in the program, they have a very different mission and ministry. Their ministry is to serve those most in need.

So you can think of that akin to Catholic Charities running a soup kitchen. They don't ask people if they're Catholic.

JUSTICE JACKSON: They're the ones that are in the program?

MR. REAVES: They're the ones that are in the program, Your Honor.

JUSTICE JACKSON: Mm-hmm.

MR. REAVES: And on the flip side, you have parish preschools, and the role of the parish preschools is different. They have a different mission. Their mission is to support parents in the Catholic education of their children. And so they -- they ask all families who seek to enroll to affirm in good faith the statement of community beliefs.

JUSTICE JACKSON: But you say that --

MR. REAVES: So it's just -- it's a different religious --

JUSTICE JACKSON: -- that -- but, in response to the Chief Justice, you say that this is about the government subsidizing private conduct. And if we frame it that way, I guess I'm a little concerned that these parish preschools would like to do something that the State has determined is a violation of its own principles with respect to discriminating against or excluding a certain group of people.

So why is it -- it that the state can uniformly condition the receipt of these funds on something like you can't discriminate? It seems to me you're asking for a special rule for religious schools, that when Colorado says anyone who receives these funds has to be open to everyone and can't discriminate, what you're asking for in the context of this Free Exercise claim is a special rule for religious schools to be able to not follow that condition.

And why -- am I right about that or no?

MR. REAVES: No, Your Honor.

JUSTICE JACKSON: Okay.

MR. REAVES: So -- so two points. And this does kind of get into some of the general applicability analysis, which I don't think is relevant to the Carson claim. But, at the end of the day, we are seeking the same thing that lots of other schools are allowed to do.

Over a thousand other schools participate in the program and that they're --

JUSTICE JACKSON: That's not the -- I'm not on the general applicability. I'm on the why is it discrimination -- why is Colorado's intention to have this principle that applies to everyone -- assume for the moment it applies to everyone -- why is it discrimination if the religious schools say we don't want to follow that? And I -- I mean, I sort of thought that's what Smith was doing in -- in its analysis.

You -- you have to follow the general rules of the society as long as they're not targeting you on the basis of your religion.

MR. REAVES: Your Honor, I would make two points.

JUSTICE JACKSON: Mm-hmm.

MR. REAVES: First, the Carson rule is really rooted in Sherbert and Thomas. And the rule -- the argument you're articulating is the same argument that Indiana made in Thomas. They said, you know, these rules apply to everybody.

But what this Court said in those cases was, if there's a sincere religious exercise that's being burdened, the government has to show a really good reason for doing that. And in terms of the discrimination here, I actually think --

JUSTICE JACKSON: But that's not what we said in Smith, right? It wasn't just the burden. It was that the -- the rule had to be not neutral and not generally applicable.

And yet somehow, here, you're suggesting that a rule that applies to all schools doesn't target religion, you can get -- you -- you -- you don't have to follow if it burdens religion. And that's not what -- what I thought our baseline rule was in this area.

MR. REAVES: Well, Your Honor, my read of this Court's decision in Carson is that it

roots the rule in Sherbert and Thomas, not in Smith. And I think the Tenth Circuit was right about one thing. They were right to say -- yes, Justice?

JUSTICE KAGAN: But, Mr. Reaves, I mean, going back to the Chief Justice's question, and this may be just a restatement of Justice Jackson, what Carson most was was the third in a line of cases about schools, you know, Trinity Lutheran, Espinoza, Carson, all three of which had explicit exclusions for either religious institutions or religious practice.

And -- and whatever is cited there, you know, oh, look, there's a citation to Sherbert, Carson really followed from those two other cases or -- or, you know, the Court understood it that way, and it was a nondiscrimination principle. It was religious people are not being treated the same way as non-religious people here in each of those three cases.

And I think what you're asking us to do is something far beyond that. It's saying, even though religious people are being treated

the same way -- and this puts aside Question 1 a little bit, you know, where you have some argument on -- on the neutrality front, but -- but I just want to focus on your main argument, which is, even though religious people are being treated the same way on the face of the statute, that's not enough.

They need a special accommodation. They need to be treated differently from other people to have a -- a -- a -- because of their religious faith, to have a special accommodation. And that, it seems to me, is very much not what Trinity Lutheran and Espinoza and Carson are about.

MR. REAVES: Your Honor, I think the problem with limiting Carson in that way is it makes that rule very easy to circumvent. And that was a concern this Court had in Carson itself. It talked about how easy it would be to circumvent the prior cases if it really turned on how the government described the program.

So, you know, you can imagine situations where the government is keeping out religious schools, but it's just not using the

word "religion" or the word "sectarian." That's the situation --

JUSTICE KAGAN: Yeah, it does not seem to me that this is a good case to raise the kind of specter of circumvention. I don't think that there's any idea here or, you know, I think it would be a bit far-fetched to say that the government is doing this surreptitiously to get at religious schools, which I agree, you know, in a case of -- we've had cases of that kind, where it's like, oh, look, they -- they framed it neutrally, but their motive was very clear.

I mean, this is a case of the state trying to enforce its own nondiscrimination principles, which it takes deeply seriously, including as applied to sexual orientation.

So -- so I don't think that this is kind of like a surreptitious circumvention case. It's a case where you're saying, no, because of religious faith, we need a special exemption, an accommodation, a way of being treated differently with respect to that neutral antidiscrimination principle.

MR. REAVES: Your Honor, I do think

there is a circumvention concern here because the way the program operates, you have over 2300 schools that can limit enrollment for all kinds of reasons. You can have a school that says, we're only going to admit vegetarians who speak two languages. But you won't allow Catholic schools to limit enrollment in this one particular way.

JUSTICE SOTOMAYOR: I -- I'm sorry --

MR. REAVES: And the testimony --

JUSTICE SOTOMAYOR: -- I -- I -- I'm a little confused, okay? The Catholic schools are not being excluded on their face. They're choosing not to participate because they won't get an exemption, correct? So this is their choice.

MR. REAVES: They're being excluded by Colorado.

JUSTICE SOTOMAYOR: Well, no, because Colorado permits them to apply if they will accept all children. They're saying, we don't want to accept the children of a certain class of people, homosexual people. So the children are being -- they're not saying -- Colorado is not saying you have to teach equality. It's

not saying you have to teach it's okay to be homosexual. You don't have to teach -- change your values in any way.

You can teach whatever it is you want to teach, but if parents choose to subject their children to this teaching, you have to accept that child. Is that correct?

MR. REAVES: Well, Your Honor, for the Catholic Church, it's not about excluding anyone based on who they are. And that is in the record at Pet. App 11a.

JUSTICE SOTOMAYOR: Well, I don't see how that can be. They're saying, we'll exclude your children if their parents are homosexual.

MR. REAVES: Your Honor, the --

JUSTICE SOTOMAYOR: Because their parents are doing something we don't agree with. I thought that's -- you know, you have to accept all children, regardless of their religious -- regardless of their sex, race, national origin, whatever it might be.

MR. REAVES: Well, Your Honor, I guess, to address that in two ways, you know, one, all families, regardless of who they are, even if they're Catholic, have to agree to the

statement of community beliefs in good faith. That's the requirement. And the purpose --

JUSTICE SOTOMAYOR: I -- I'm not -- I mean, it may be that there are some homosexual parents who would sign that statement. But you're saying, I won't sign -- I won't agree to accept those children. And that's what Colorado is objecting to.

MR. REAVES: And, Your Honor, it is a case-by-case determination at the end of the -- the day. These families can come and -- I also think it's -- it's telling that, you know, since this program has began and even before this program, families who disagree with the Catholic Church's teachings are not banging down the door to try to enroll in Catholic preschools.

JUSTICE SOTOMAYOR: I agree with you. But you're -- you want an official statement by the State that I will subsidize you with public money even though -- because I have a right to reject children.

MR. REAVES: Well, Your Honor, at the end of --

JUSTICE SOTOMAYOR: That's what

they're saying. That's what the equal opportunity clause is requiring you to not do, which is to say, I will take all children with these characteristics.

MR. REAVES: And, Your Honor, at the end of the day, this is a benefit for families. This is not a benefit that goes to the school. This is a per capita benefit. And -- and the government itself is the one telling --

JUSTICE SOTOMAYOR: So why shouldn't the family have that choice --

MR. REAVES: Well, I -- I think --

JUSTICE SOTOMAYOR: -- of saying -- I mean, I'm -- I'm hard-pressed to think that given those teachings that any homosexual family is going to choose to go to one of these schools, but that should be their choice, not your choice to exclude them.

MR. REAVES: Well, Your Honor, I think --

JUSTICE SOTOMAYOR: That's what you're asking for.

MR. REAVES: Your Honor, I think we're asking for these Catholic schools to have the same access as others. And if we're talking

about who is being harmed here --

JUSTICE SOTOMAYOR: They do.

MR. REAVES: -- the harm is --

JUSTICE SOTOMAYOR: They just can't exclude children of homosexual parents.

JUSTICE BARRETT: Mr. Reaves, would it violate Colorado's policy for you to continue to employ the kind of statement Justice Sotomayor is referring to, the one that you have that requires families to say that they will abide by and support the church's teachings on matters of sexuality and gender?

MR. REAVES: My understanding is Colorado's interpreted it that way. That's been the policy. You know, Dawn Odean, who's the Respondent in this case, sat through the trial testimony, and we asked her on cross-examination -- this is at JA 333 -- what's the problem, why can't these Catholic schools participate?

And her answer was, the barrier is the mandate. So -- and she compared their religious practices to bullying and stigmatization. So it -- it's Colorado that's saying, you know, you are not providing --

JUSTICE BARRETT: But -- but I guess my question is even more specific. I -- I'm -- is the problem that the church is saying or that St. Mary's and the diocese is saying, we want affirmatively to turn away families, you know, same-sex couples, you know, whose children want to enroll or a child that's transgender -- may I, Chief Justice?

CHIEF JUSTICE ROBERTS: Certainly, yeah.

JUSTICE BARRETT: Or is it -- or is the problem with the statement?

Like, could you use just the statement? Would the statement kind of serve your end? Because, as Justice Sotomayor is saying, it's kind of hard to imagine that couples that disagree with the church's teaching will want to enroll their children in the diocesan schools.

MR. REAVES: So, in all instances, the family has to sign the statement. But the testimony from trial included testimony from the superintendent saying there would be some circumstances where enrollment would not be possible, and that might be some circumstances

involving a same-sex couple.

The -- the Diocese has issued guidance to address these situations. That's at Pet. App 242a. So it's not -- it's not a categorical rule. That's what the Tenth Circuit said. But there would be circumstances where they could not guarantee families an equal opportunity to enroll regardless of those protected characteristics.

I also do just want to briefly flag we're talking about religion as well. So the congregation exemption was removed, so now these Catholic schools cannot even say we want to prefer Catholics in our enrollment.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Just to follow up to make sure I followed the answer to the line of questioning there, if you had same-sex parents and they wanted their child to go to the school and they said, look, we're not going to contest the school's teachings, we're not going to bring it up, and so we -- would -- would they be eligible for participation, or is it simply the existence of the -- of the couple as opposed to

whether or not they would contest the church's teachings?

MR. REAVES: So, generally, it's the same requirement for everybody. And I think it's telling that this hasn't arisen. But, to answer --

CHIEF JUSTICE ROBERTS: I'm sorry. Why -- I'm not sure -- you mean the same requirement for all same-sex couples regardless of what their views on the --

MR. REAVES: It's --

CHIEF JUSTICE ROBERTS: What -- yeah.

MR. REAVES: I'm sorry. It's the same requirement for all families who seek to enroll. It's to affirm in good faith the statement of community beliefs. And these situations haven't really arisen, so it's a little bit hypothetical. This has never happened at St. Mary's.

But the process is the same for everybody. They meet with the principal. They meet with the pastor. They get to learn about the school. But I do think the testimony in the record is clear there are some instances where the Catholic school would have to say we

cannot enroll you. And it wouldn't -- you know, it would be because the school cannot affirm things like a same-sex marriage. It's the same policy at the end of the day as Catholic Social Services. They can't endorse or affirm a same-sex marriage. And that might be required in the classroom.

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas, anything further?

Justice Alito?

JUSTICE ALITO: Well, let me also return to the question of what exactly is required. Is the rule that couples must or parents must affirm certain beliefs about sex and sexuality and -- and that's it, they must sincerely affirm those beliefs, and in determining whether they have sincerely affirmed those beliefs, it would be taken into account whether they are openly living in violation of those beliefs? Is that a correct understanding of it?

MR. REAVES: I do think that is a correct understanding. It has to be affirmed in good faith. And that -- that could be a problem.

JUSTICE ALITO: Now, on the circumvention question, I take it there would be a problem if the Colorado law said we will not approve Catholic pre-K. That would be a problem, right?

MR. REAVES: Yes.

JUSTICE ALITO: And would it be a -- a problem if the law said we will not approve any pre-K school that requires affirmation of Catholic teaching on sex and sexuality, if it did that explicitly?

MR. REAVES: I think that would be a problem as well, yes.

JUSTICE ALITO: And if that's a problem, then could the State get around that by saying that every pre-K school must accept students whose parents reject the principle that marriage is between a man and a woman? That would make no explicit reference to religion.

MR. REAVES: I think, under the Tenth Circuit's understanding of Carson, that would be okay because it's not explicit.

JUSTICE ALITO: And in adopting such a rule, is it conceivable that the lawmakers

would not understand what the effect of this would be on Catholic pre-K and on pre-K schools affiliated with other religions that adhere to that traditional principle?

MR. REAVES: I -- I think they would have to know. And I do think they knew in this case. Just to point to one piece of testimony, I'd look at JA 233, and that's where -- where Ms. Cooke testified that the St. Mary's preschool director participated in the working group, and she knew exactly what the problems were when they were developing these preferences.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: Your bottom line is -- let's get to it -- your school can reject a child because their parents are homosexual?

MR. REAVES: I would say the bottom-line rule is Catholic --

JUSTICE SOTOMAYOR: Is that the bottom line?

MR. REAVES: The bottom line is, if it's a public benefit --

JUSTICE SOTOMAYOR: Your -- let's get to the bottom -- I'm asking you a direct question. Your Catholic schools will reject a child merely because their parents are homosexual?

MR. REAVES: I would say, if it's the sincere religious exercise of the Petitioner, then I think that would be permitted.

JUSTICE SOTOMAYOR: If it's a sincere religious exercise to exclude blacks, this principle would permit the exclusion of those black children?

MR. REAVES: No, Your Honor. And I -- I don't think that's the open --

JUSTICE SOTOMAYOR: Why? Because that belief would not be a genuine religious belief?

MR. REAVES: No, Your Honor. I think this Court --

JUSTICE SOTOMAYOR: How about national eth- -- national origin or ethnicity? There are some religions that are based on those protected characteristics.

MR. REAVES: Your Honor, I think, in all of these situations, you can compare what this Court said in Bob Jones to what this Court

said in Fulton. Both of those cases reached strict scrutiny, and the difference was that the government said there is an overriding government interest, not just a compelling interest, an overriding interest.

JUSTICE SOTOMAYOR: That goes back to general applicability. I'm not --

MR. REAVES: Well, Your Honor, strict scrutiny would still apply here. We're not -- we're not saying this is just straight to we get to participate in the program. If the government is -- is excluding someone from a public benefit solely on account of their religious exercise, that would trigger strict scrutiny.

And then the government can come forward and say we have a really good reason for this. And we just don't think they've done that in this case.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: You and Justice Alito just had a conversation about wouldn't the state legislature have to know that this was going to have an effect on Catholic schools. And that seems absolutely true, that they would

presumably know that some Catholic schools would not wish to go along with the State's antidiscrimination policy in the same way that a state legislature that was passing a law against peyote use would know that there was going to be some religions that were going to be adversely affected by that law.

So I think that that is not the question that our cases have suggested, that our decisions have suggested, whether you'd know. I mean, there are all kinds of generally applicable laws that you know adversely impact some group that disagrees with that law. I want to use peyote for religious purposes. The state says you can't.

And the question, again, is, why doesn't -- why isn't that this case, where the state has a general antidiscrimination policy. Nobody can doubt the bona fide of -- bona fides of that policy. It is -- you know, it is -- it is not like this is another way to get at Catholic people. It's like we believe in antidiscrimination principles as applied to sexual orientation.

And, you know, whatever we know about

the schools that that will affect, that there are schools that will find it impossible to abide by that policy, we're not going to provide a special accommodation, which is what you're asking for, as opposed to those three cases that really were very different, where the religious institutions were just being asked to be treated the same.

MR. REAVES: Your Honor, I think the question at the end of the day is should this Court apply the Smith line of cases, which looks at it from the perspective of the government, or should it apply what I think Carson applied, which is it cited back to Sherbert and Thomas? Those cases look at the burden on religion from the perspective of the religious believer.

So, in Thomas, the government defended its law in the same way. It said this is -- this law applies to everybody. In Sherbert, the government said everybody has to work on Saturday, whether you're religious or not. And Ms. Sherbert came back and said, well, my sabbath is the Saturday, and so I can't work on Saturday.

This Court credited the religious --

JUSTICE KAGAN: But, if I may say, Mr. Reaves, I mean, the -- the -- the Sherbert analysis -- and we distinguished Sherbert in various ways over the years, but the old pre-Smith analysis was, look, if it adversely affected a religious group, then strict scrutiny had to apply. And Smith got rid of that analysis.

And now you're saying, well, that analysis has to come back in full force because we once cited Sherbert in a case, you know, because Carson cited Sherbert in a case. But Carson upheld a very different principle, which was completely consistent with Smith, which was you can't treat religious institutions differently.

That's not the principle that's at issue here. The principle at issue here is, do you have to treat them better?

MR. REAVES: Well, Your Honor, I think, at the end of the day, the question is, are Sherbert and Thomas still good law in the public benefits space? Because I don't take Smith to be overturning those cases. They

distinguish those cases twice.

And so, when it comes to conduct that the state has made unlawful, that's covered by Smith. But there's no question these Catholic schools can continue their teachings if they don't take this benefit. We think this is a coercive benefit, you know, a 20 percent decline in enrollment in these Catholic preschools.

But my view is Sherbert and Thomas remain good law at least in the context of public benefits. And I think this Court's decision in Carson confirms that. And my -- my submission is I just don't see any difference between this case and those cases.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Yeah. If everything turned on express discrimination as opposed to being more careful with your words, what would be left of Sherbert and Thomas?

MR. REAVES: I don't think much would be, Your Honor.

JUSTICE GORSUCH: We'd have to

overturn those, I would think, wouldn't we?

MR. REAVES: I think that's probably right, yes.

JUSTICE GORSUCH: Yeah. And -- and can -- there's some amici that talk about what's happened in the wake of Carson. Can you talk about what your understanding is about how states have responded?

MR. REAVES: Absolutely. It's not just Colorado that's done this. In Maine itself, after this Court's decision in Carson, before the ink was even dry in Carson, Maine changed its laws to look more like the laws here, where they don't explicitly call out religion, but they still exclude the same families and the same schools.

So I think there's no question that if this Court doesn't address the Carson issue here, you're going to have other states trying to do the same thing, trying to exclude religious schools, just without using religious terminology. I think that is a serious problem.

JUSTICE GORSUCH: So Carson itself and Trinity Lutheran and Espinoza, we were just

wasting our time for the last 10 years on those cases and -- as well?

MR. REAVES: Well, you know, I'm not the one to -- to say that, Your Honor, but I -- I think, you know, the -- I think Maine seems to think that. They seem to think they could get around it. I -- I tend to think that's the -- the situation.

JUSTICE GORSUCH: The Constitution tends to deal in substances, not in shadows and procedures.

MR. REAVES: I -- I completely agree, Your Honor.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: My understanding is that the Catholic preschools here do not categorically exclude students with parents in same-sex marriages for that reason alone, correct?

MR. REAVES: That is correct, Your Honor.

JUSTICE KAVANAUGH: Okay. What -- and this may be outside the record, so say what you can. But Catholic schools around the country,

there are definitely lots of Catholic schools with children who have parents in same-sex marriages, gay teachers, gay coaches, gay athletic directors, gay students.

What -- of what relevance -- is that true? Of what relevance is that as we think about the issue here?

MR. REAVES: Your Honor, I don't doubt that that's true. At the end of the day, it's a question for the archbishop in -- in Denver to -- to decide on the religious teaching.

And I think every diocese can make their own decision about where exactly that line is. The requirement to affirm the statement of community beliefs has been in place in the Archdiocese long before this program started. And I think it's -- it's their thoughtful attempt to say, we're creating a Catholic community, so we want to ensure that everybody who participates in the school, whether it's a parent who volunteers or whatever the situation might be, is acting consistent with -- with the responsibility we've been given as parents to teach these kids the Catholic faith.

JUSTICE KAVANAUGH: Doctrinally now, you have two separate arguments as I see it. One is what you've called Carson/Sherbert/Thomers -- Thomas.

And your argument there, just picking up on Justice Kagan's question, as I understand your argument, it is that Sherbert, as to public benefits, survives Smith and that Smith was careful to actually carve out public benefits as different from an outright prohibition, and, therefore, the Sherbert principle that strict scrutiny is triggered when there's a substantial burden on religious exercise from a public benefit still exists as good law today?

MR. REAVES: That's correct.

JUSTICE KAVANAUGH: Okay. Now that creates an anomaly, though, and I just want to give you a chance to explain it, which is raised in the Respondents' brief and in some of the amicus briefs.

The anomaly is that you're imposing greater First Amendment scrutiny on a benefits program than you are on an outright ban on the religious conduct. And that seems inverted

because, in a funding condition, the religious entity has the ability to decline the funding and still engage in the activity.

In an outright ban, they don't have that ability, yet the doctrine as you set it up here would impose greater First Amendment scrutiny on the funding condition than the outright ban.

Do you want to respond to that? I mean, one answer might be you'd say, well, you should just overrule Smith entirely. But assume that's not on the table in this case. Then how do you deal with that anomaly?

MR. REAVES: Yeah, two responses, Your Honor, one practical, and, hopefully, the second one, doctrinal, is more satisfying.

The practical one is just that's what Smith did, as you described. And the concurrence in Smith makes exactly the same point. The concurrence says, why are we treating benefits better than direct prohibitions? And the majority doesn't respond to that.

But the doctrinal answer, which I think will hopefully be more satisfying, is

that if you look at it from the perspective of Smith, Smith is focused on the government's interest, and the government's interest is at its zenith when you're talking about criminal laws.

Smith was concerned about every man becoming a law unto himself. It was concerned about having to give these broad exemptions to criminal prohibitions. That interest is not as strong when it comes to public benefits when the underlying conduct is lawful.

One other way to just explain it is Smith looked at this from the government's perspective. Sherbert and Thomas looked at this from the religious believers' perspective. And I think that's one way to understand it.

I would also point to what this Court said in Carson. In Carson, this Court made clear that when it comes to public benefits, you have to be particularly strict and look carefully at how the program is set up because it's really easy for the government to try to tweak the way the program works to kind of subsume the challenged condition within the scope of the program.

You can't do that when it comes to criminal laws. There's the Rule of Lenity. There's other procedural protections that criminal defendants have.

Just to give one more example, you know, in this case, after we filed our complaint, you know, at that time, the catch-all exception wasn't written into the regulations. It was just an online form. Preschools could submit the form and ask for an exception.

There was no, you know, restrictions on it. This is in the record at JA 828. It was only on the second day of trial that Colorado introduced brand-new regulations trying to put restrictions on the catch-all exception to make it look more generally applicable.

That's what this is -- that's what Smith is encouraging governments to do.

JUSTICE KAVANAUGH: Right. And then you -- you're blending into this, but the whole second argument -- put aside Sherbert and Thomas and Carson -- is that even under Smith, it's not generally applicable because of all

the exceptions, two in particular, but the whole slew of exceptions.

Do you just want to spell that out as a distinct argument so that we -- succinctly?

MR. REAVES: Yeah. Succinctly, Your Honor, yes.

Yeah, there's two main points under general applicability. The first is kind of our -- our broadest argument. This is just not the type of across-the-board, generally applicable law that Smith envisioned.

This Court in Kennedy described what -- what it need -- what you need to have to have an across-the-board prohibition. And when you have, you know, all these different preschools getting to limit their enrollment in all these different ways, that's a problem.

But then, even if you zoom in on the mandate specifically, which is where Colorado focuses, and that's what they pointed to when they said these Catholic schools are not allowed to participate, there are some problems there as well.

So the one thing that Colorado has been consistent on throughout this case is that

their government interest is in the mandate, enforcing the mandate uniformly. It's a hard limit. Even in their brief before this Court, at pages 41 and 51, they state their government interest, and it's just in enforcing the mandate regardless of the protected characteristic.

At the same time, they let other preschools favor families based on those protected characteristics if there's a good or important reason. And I think it's telling that Colorado doesn't say, you know, we're not spending 10 pages of our brief kind of engaged in the work of statutory interpretation. They spend 10 pages explaining why it's really important to grant these secular accommodations.

JUSTICE KAVANAUGH: Then --

MR. REAVES: And just to be clear, we agree those are important. We just want the same treatment.

JUSTICE KAVANAUGH: Okay. So, even under Smith alone, you're saying strict scrutiny's triggered?

MR. REAVES: Yes, yes.

JUSTICE KAVANAUGH: I guess the last question. You're expert in this area. What's the history of why Catholic schools developed in America? Again, succinctly.

MR. REAVES: Yes, Your Honor. Essentially, it was push-back on this common schools movement. So, in the late 1800s and early 1900s, there was real discrimination against Catholics and against Catholic beliefs.

You had public schools, government-funded schools that were teaching the King James Bible and were not accommodating different Catholic beliefs. And -- and some of this is spelled out in the Barkley amicus brief as well.

But, essentially, these Catholic schools were a response to their exclusion from the common school system.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Mr. Reaves, I want to pick up on Justice Kavanaugh's point about the anomaly. Let's imagine that you win this case. So I guess the question is pressing you

on, is there something special about public benefits?

Let's imagine that you win this case, and so Colorado responds and says: Okay, now we're going to pass a law saying that all preschools, to have a license to operate, must comply with this EO kind of ban.

What's your response to that law?

MR. REAVES: We'd be making different arguments. I don't think that would be a Carson case because I do think that's what this Court was addressing to some extent in Smith. It said --

JUSTICE BARRETT: So what would your arguments be in that case?

MR. REAVES: Well, I think we'd have to look at how the -- how the restriction was described, what it covered --

JUSTICE BARRETT: No exemptions? So is -- is -- in that case then, is it just you have to overrule Smith?

MR. REAVES: Well, I think, Your Honor, we'd still have church autonomy, the right of these schools to continue to inculcate the faith without government interference.

There might be a parental rights Mahmoud argument. So I think there are other arguments we could make. I just don't think it would be a kind of Carson public benefits case.

JUSTICE BARRETT: Okay. Now my next question is about original meaning. We've been talking about this flowing from Carson, you know, this being a natural step from Carson.

And it is true that Carson and Espinoza and Trinity Lutheran, all of those cases, and Sherbert, certainly apply strict scrutiny. Is that what you think is required by the original meaning, strict scrutiny? How do you see the relationship between the Sherbert test and the original meaning?

MR. REAVES: I think Sherbert is much closer to the original meaning than Smith, for sure. I don't -- I don't think the original meaning of free exercise of religion would -- would kind of care how the government treats non-religious groups or how the law is written.

And I do think strict scrutiny in particular makes some sense if you look at these peace and safety provisos that lots of state constitutions had at the time. There was

some understanding that, you know, we're going to protect the free exercise of religion up and to a -- up until a particular point, and that's when the government can come in and say we have this really important interest.

I don't think peace and safety means anytime something's unlawful. It has to be -- you know, I think a close approximation is probably the strict scrutiny analysis this Court has adopted.

JUSTICE BARRETT: So you see it as an implementing doctrine that's close to how it would have been implemented at the time of the founding?

MR. REAVES: I think that's right, yes.

JUSTICE BARRETT: Okay. Last question is more of, I guess, a record question about how this developed. So you've gotten a number of questions about how it's hard to imagine that Colorado couldn't have seen this coming, I mean, especially given the history of disputes that have been in front of this Court between Colorado and religious entities, whether we're talking about bakers or web designers or -- or

therapists are all in this case of religious objections to this kind of non-discrimination mandate in the case of traditional religious beliefs about sexuality and gender.

But Colorado does say in its brief that the Archdiocese objections caught it by surprise, that they didn't see them coming. So I wondered -- which is, I guess, given the history that I just described, kind of surprising that they weren't caught -- that they say they weren't -- that they were caught by surprise. It's hard to see how this wasn't seen coming.

But can you respond to that? You said that the preschool director of St. Mary's was part of the working group. Just -- just what exactly -- how did this unfold?

MR. REAVES: Yes, Your Honor. There's a few points there. So back in February, before this program started -- so it launched in August -- in February, the Archdiocese, as part of a coalition with Jewish schools and Lutheran schools, sought an accommodation. They raised the mandate and said, you know, we think this infringes on our religious exercise.

They cited Trinity Lutheran and Espinoza. That's in the JA at 147 to 150.

Colorado quickly responds and says, no, the mandate's a hard limit, we cannot accommodate you. Tracy -- Tracy Seul, who's the -- who was the preschool director, did participate in this religious working group. That's in the record at JA 233. And she raised these concerns. She said, for Catholic schools to participate, we might need this religious accommodation. Ms. Cooke's testimony at trial was that she understood their concerns went specifically to sexual orientation and gender identity.

JUSTICE BARRETT: But this was all after the mandate was passed. This was about implementing UPK?

MR. REAVES: This was after the statute was passed, Your Honor.

JUSTICE BARRETT: After the statute was passed.

MR. REAVES: While Colorado was working on the exception. So they had all these enrollment criteria that they were developing at the time.

JUSTICE BARRETT: I see.

MR. REAVES: So, yes, all of this is implementing the way the program operated. And I think the way that Colorado tries to explain why they were caught by surprise is because Catholic schools had participated in prior programs with somewhat similar nondiscrimination requirements, but, I mean, the record is clear that they're different in that they don't cover enrollment; they don't cover certain protected characteristics.

So I think Colorado's argument is turning on the fact that there are some instances where Catholic schools have signed a nondiscrimination requirement. It's just not the same as this one. And I think it's even telling the district court in this case said it wasn't inconsistent for the Catholic schools to participate in those programs but to have a religious objection to UPK.

JUSTICE BARRETT: Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So, I guess, going back to Justice Kagan's points, as I understand

your Carson theory, it appears to threaten school funding programs, conditions, benefits, nationwide by giving religious entities and individuals a special preferred status.

And I think her point and mine too is that that sort of takes this out of, at least conceptually, the Carson line, where it was clear that the Court was concerned about treating religious entities worse. Everybody else got access to this benefit, but the religious entity did not. Yet, here, it seems like you are saying the religious entity has to be treated specially.

So let me give you a hypothetical. Suppose Colorado imposes certain educational standards on a school that receives state funding. As a benefit, you have to have certain educational marks; for example, the requirement that a student attains a particular level of proficiency in math. But a religious school might believe under its tenets that, say, female students aren't -- aren't allowed or shouldn't be allowed to learn math at all.

Wouldn't your Carson theory require the state to exempt that school on the basis of

their religious belief, even though that educational standard is being applied across the board and they're just -- they, the state, are just asking that condition of receiving this fund -- this funding is that this school, like every other school, teach math to all its students?

MR. REAVES: Your Honor, I think that would be a public benefit. So, under Carson, it would trigger strict scrutiny. The government could come forward and say we have a good reason and come forward.

JUSTICE JACKSON: But wouldn't it only strict -- wouldn't it only trigger strict scrutiny under Carson to the extent that it was treating the religious entity worse? That's my point. The strict scrutiny comes from the discrimination.

And what I worry about in the way that you're framing this, sort of as a big picture, is that we've got two lines of precedent here that seem relevant to your claim. One says that when the state is handing out public benefits, it can't discriminate or disfavor religious entities. And that's Carson,

Trinity, Espinoza. The other line says that if a state has a rule, but it's handing out exclusions, it's exempting people from that rule, then it can't refuse to do so for similar religious conduct.

I think that this actually doesn't fit in either of those buckets, and that's what I'm worried about. I think you're asking us to do something more.

In the first instance, this -- this religious entity would be treated better than everybody else who has to follow this rule. And in the second, the kinds of things you're talking about, the preferences that the -- Colorado has allowed is not similar. I mean, here, your schools want to discriminate by exclusion. Nobody else is allowed to do that. There's nothing in this record that shows that any other kind of school is allowed to discriminate by exclusion.

I know, in theory, you know, some people might have testified. But that's not actually happening. And, certainly, the preferences aren't operating to discriminate by -- by exclusion.

So why are you asking us to do something new and different in this case that certainly wasn't brought to the fore by these previous doctrines that, as I've described, are pretty narrow and make perfect sense?

MR. REAVES: Well, Your Honor, I wouldn't say what we're asking for is new and different. I think it's going back to Sherbert and Thomas, to what this Court has already said. The way you've described it is -- is similar. It's on all fours with Sherbert and Thomas. And I think that better reflects what the free exercise --

JUSTICE JACKSON: You disagree with -- with what Justice Kagan said and how some people have read the doctrine, which was that Smith actually displaced the Sherbert and Thomas concept of just because it burdens a religious activity, it gets strict scrutiny? You don't think that's right?

MR. REAVES: I don't think that's right when it comes to public benefits. And I think the language in Smith is telling. It says, you know, whether or not Sherbert and Thomas are limited, they at least have nothing

to do with an across-the-board criminal prohibition on a particular form --

JUSTICE JACKSON: One final question. Doesn't Smith's concern about individuals and entities becoming a law unto themself arise if we interpret what you're saying? I mean, I understand you're trying to move Smith to the side, but it had some really serious concerns about religious entities not having to follow the law that everybody else is just because they hold sincerely held religious beliefs. It was like, how are you going to have a society where all people live and work together?

And, here, we have a particular concern, as Justice Sotomayor pointed out, because what the religious entity would like to do is discriminate against a class of people. So we've got a conflict at some level between, like, the First Amendment right of the religious entity and potentially the Fourteenth Amendment right of certain individuals who would have the right not to be discriminated against.

And so your -- your rule is, like, not allowing our society to have all people live

together because it's preferencing the religious entity's ability to discriminate against others.

MR. REAVES: Well, Your Honor, our rule is the one that promotes pluralism. So these are private religious schools. They're not subject to the Fourteenth Amendment.

But it's Colorado that's denying Catholic families equal access to this benefit also based on a protected characteristic, their religious exercise. And in terms of the practicalities of this case, 41 jurisdictions, including the federal government, are already subject to heightened scrutiny for any substantial burden on religion.

And I think the federal government's probably the biggest provider of public benefits in the world, and they're functioning just fine.

JUSTICE JACKSON: Thank you.

MR. REAVES: You can also -- thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Harris.

ORAL ARGUMENT OF SARAH M. HARRIS
FOR THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE PETITIONERS

MS. HARRIS: Mr. Chief Justice, and may it please the Court:

There are two main paths to reversal. First, this Court could hold that public benefits programs that condition eligibility for benefits on foregoing otherwise lawful religious exercise trigger strict scrutiny. That's the rule Carson distilled from Sherbert, and that rule makes particular sense for educational benefits given the Court's longstanding recognition that religious education is vital to many faiths.

Second, this Court could hold that Colorado's pre -- pre-K benefits regime triggers strict scrutiny under any approach because it isn't generally applicable. Either way, Colorado can't satisfy strict scrutiny.

The better path in our view, though, would be to go with the first course, as Petitioner has emphasized. At this point, the doctrine is at a point where the Court should decide whether Sherbert survives. Carson puts

that in sharp relief.

And the Court's most recent decision in Mahmoud creates an especially untenable situation in the educational context because parents have strict scrutiny in this context and yet religious schools would not in many of the same claims.

I welcome the Court's questions.

JUSTICE THOMAS: Would we have to extend Carson if we applied it?

MS. HARRIS: I don't think you have to extend Carson for some of the reasons the Petitioner elucidated. While Carson itself emphasizes that it's an easy case in many ways because there is obvious discrimination on the -- on the face of the law for religious exercise, the reasoning, as was elucidated in some of Petitioners' answers to Justice Alito's questions in that colloquy, it's hard to separate out the reasoning of Carson saying that if you're sort of gerrymandering the law to be I'm not targeting religious exercise anymore, I'm saying anyone who subscribes to Catholic views of marriage gets excluded from benefits, you're kind of in the same boat.

And I think the prefatory part of Carson makes absolutely no sense where the Court is giving the sort of full distillation of Sherbert, saying the rule of Sherbert that applies to public benefits is, if you force someone to forego public benefits as the price of religious exercise, that's no good.

It's just hard to explain why the Court would have done that if that wasn't relevant to this context.

JUSTICE SOTOMAYOR: Counsel, your reasoning and Petitioners' reasoning would overrule Hastings College of Law versus Martinez, wouldn't it?

MS. HARRIS: I think the --

JUSTICE SOTOMAYOR: That was a public benefits case, students receiving recognition and funding. And there, in a footnote, we dispensed with the claim that they could exclude members who weren't practicing, saying that the student group was seeking preferential, not equal treatment, and, therefore, it could not find support in the Free Exercise Clause.

MS. HARRIS: So I think the Court --

there is absolutely tension with that footnote. I don't think it should bother the Court, and here is the reason. It was a drive-by ruling in a case that was mostly about free speech and associational issues, where the -- it was briefed in one page of the briefs, and the Court again dispensed with it in a footnote assuming and applying Smith without any examination of the threshold question, why is this a Smith case? I think it's very --

JUSTICE SOTOMAYOR: So we would have to overrule that footnote at least?

MS. HARRIS: That footnote, I think, is hard to square, but I don't think it should trouble --

JUSTICE SOTOMAYOR: It is very hard to square. And we would have to overrule the limiting principle that Smith announced with respect to the Sherbert rule, correct?

MS. HARRIS: I think the Court, in reciting a very different take on Sherbert and Carson, has already strongly suggested that, no, Sherbert cannot be cabined to the context of unemployment benefits where you look at the good cause exception.

And, again, I think it's a little strange to suggest that that part of Smith has something for --

JUSTICE SOTOMAYOR: So let's go along with -- continue to go along with your logic. Your logic would suggest that a rule that said don't discriminate on the basis of ethnicity or national origin, if a religion requires a certain ethnicity, that group would have to be accommodated?

MS. HARRIS: In -- no. That is not what we're saying. What we're saying is, in the public benefits context --

JUSTICE SOTOMAYOR: That -- this is a public benefits issue.

MS. HARRIS: Right. I under -- but, again, in the public benefits context -- here's the limiting -- but here's how the analysis would run. You would ask, is there a substantial burden on religious exercise? And then, if there was, you would subject the rule to strict scrutiny. I think --

JUSTICE SOTOMAYOR: And under all circumstances, even though this rule says you have to accept everyone?

MS. HARRIS: Yeah --

JUSTICE SOTOMAYOR: No exceptions, let's -- no exceptions, general applicability, you would say it's always subject to strict scrutiny?

MS. HARRIS: In the context of this case, yes, our argument is no, the rule of Smith does not apply.

JUSTICE SOTOMAYOR: So that would be the same whether it's race, national origin, ethnicity, any protected characteristic? Sex seems to create the greatest difficulty because of the transgender and same-sex parents issue, but let's take it out of that.

MS. HARRIS: Again, the Court crossed this same questioning in Fulton. The Court dealt with the same issue in Mahmoud. And I think the answer is there are certain areas where the burden on free exercise rights are such that yes --

JUSTICE SOTOMAYOR: Well, but we're not talking about changing what you teach, changing or requiring a changing of philosophy or belief. This is merely requiring people to accept anyone into their membership.

What you're basically saying is we can exclude people merely because of exposure to them --

MS. HARRIS: No.

JUSTICE SOTOMAYOR: -- would cause us harm. That's really what you're saying.

MS. HARRIS: Respectfully, no. That elides --

JUSTICE SOTOMAYOR: That is completely what you're saying. We can exclude children of same-sex marriage. We can exclude children who are trans -- who might have transgender feelings or beliefs because exposing other children to them creates a problem.

MS. HARRIS: No. The position in this case is that the religious exercise involved, as Petitioners spelled out, is requiring parents to agree with a school that they're going to adhere to tenets of the Catholic faith and act consistently with them to -- as a core part of performing --

JUSTICE SOTOMAYOR: The parents, not the child. You can still teach the child what you want.

JUSTICE BARRETT: Ms. Harris, can I --

oh, sorry.

JUSTICE SOTOMAYOR: No, go ahead.

JUSTICE BARRETT: I was just going to ask you to step back for a minute. You've been asked some questions about how this might play out with every person becoming a law unto himself or herself.

So I just want to ask you as a practical matter, what other areas do you see in the public benefits context people seeking exemptions on the basis of faith and triggering strict scrutiny? And, of course, you don't necessarily survive the strict scrutiny. You didn't in Bob Jones. That religious entity did not.

But what other exemptions do you anticipate or that you think you would see that would cause this, you know, we're going to devolve into everyone becoming a law unto himself?

MS. HARRIS: I don't think there's a law unto themselves problem. And the experience of the federal government under RFRA and the 40 states that have RFRA equivalents, I think, is illuminating on this both in terms of

understanding what a substantial burden on religious exercise looks like and in running the analysis under heightened or strict scrutiny.

JUSTICE GORSUCH: Yeah.

MS. HARRIS: And so --

JUSTICE GORSUCH: As a matter -- as a matter of statute, the federal government in provision of its many public benefits already has to meet strict scrutiny in a case like this, right?

MS. HARRIS: That's right. And I think there's additional comfort from the pre-Smith line of cases. There's no law-unto-yourself problem. There is a refinement of the doctrine.

So, again, the answers in those cases turned out both ways. Some laws flunked strict scrutiny, cases like Lee were accommodating religious exercise, for the Amish faith not paying taxes, for instance, would take the whole tax system down, and the Court reasoned you can't essentially say you have to modify the entire provision of the federal program in order to accommodate that.

So I think the analysis really trains on what is the accommodation that's being sought, and would it compromise the government program at large?

JUSTICE JACKSON: But these --

JUSTICE KAGAN: Are public schools public benefits?

MS. HARRIS: Yes, public schools are both public benefits. This Court said that in Mahmoud. There's also a compulsory --

JUSTICE KAGAN: So is the next case parents in a public school saying it's really important to my religious beliefs that my child not be educated with children of same-sex parents?

MS. HARRIS: And we dealt with some of those hypotheticals in Mahmoud just in the argument. And I think the answer to that is similar to the answer I just gave Justice Barrett on how the inquiry runs on Lee. At the point when the accommodation proceeding --

JUSTICE KAGAN: And how -- the answer to that is basically that will be dealt with in the strict scrutiny part of the analysis, is that correct?

MS. HARRIS: Yeah, and not only that, that's what the Court held in Mahmoud. Again, the claim you're envisioning --

JUSTICE KAGAN: I'm just trying to figure out what the answer. It's --

MS. HARRIS: Yeah.

JUSTICE KAGAN: Right? I mean, it puts an enormous amount of pressure on that part of the inquiry, right? Everything becomes: Well, is this going to pass or is this going to fail strict scrutiny, which is a kind of balancing test, which is like how important is the state interest? How important is the religious belief? How do we compare the one to the other? Are they kind of apples and oranges and incomparables?

I mean, I thought that in -- in some aspects of our jurisprudence, this Court has been trying to get away from that. And now you're saying, with respect to at -- with respect to religion, at least in public benefits cases, which include public school cases, everything is going to be about weighing religious beliefs against state interests in things like nondiscrimination but not limited

to that state interest.

MS. HARRIS: So a couple responses to that. One is just a conceptual response. I do think the threshold question of what constitutes a substantial burden is actually a really key sort of filtering part.

And we talked about this in the Mahmoud argument a little bit. But there are questions that I think are harder than this one about whether -- in cases where you're not being forced to forgo a public benefit as the price of your religious exercise and there's sort of direct coercion involved, what does constitute a substantial burden?

JUSTICE KAGAN: Yeah, I mean, forgive me, Ms. Harris, but I think, given what we -- given the fact that this Court is never going to really question anybody's -- the sincerity of anybody's beliefs, it's going to be pretty easy for religious groups or religious individuals to come forward and say this would be a substantial burden on my religious belief or on my religious practice. That seems like, yeah, maybe, in once in a blue moon, you're going to have somebody fail that but not very

often.

So then, again, everything's going to be about how important is this religious belief to you versus how important is this interest here in nondiscrimination law to the state? And, again, that seems like an inquiry that the Court, like, ought to be thinking why would we put ourselves in the middle of that in -- in all these cases? With respect to public schools alone, these inquiries could go on forever.

MS. HARRIS: So a couple responses. One, just to attack the strict scrutiny piece of it, a hundred percent. I think O Centro rightly recognized strict scrutiny. Even when people say it's tough, it is a very manageable standard for courts. It's a familiar standard for courts. It is a heck of a lot better than this situation with Smith, where you are going to be in an endless sort of whack-a-mole game of what's the state's asserted about interest? Can they reframe the asserted interest? What's a real secular comparator? How does that work? That is a much less stable jurisprudence.

The jurisprudence of strict scrutiny,

I think, has workable guideposts from the pre-Smith era. I think Lee on the one hand and Sherbert on the other hand are useful guides. And the idea that -- again, you're already in the thick of this with Mahmoud.

And so I think it is truly perverse, especially in the public context, to have a situation where parents get strict scrutiny for their free exercise rights for many of the same laws that are at issue here, and yet schools are somehow subject to only rational basis review when they're subject to the same restrictions and might be co-plaintiffs in the same case. So I do think the Court should address that just stark disparity.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: The Amish case might have been easy because they didn't want to pay taxes. But how about the Bowen case, 1986? We rejected a free exercise challenge to

a plaintiff who objected to using a Social Security number to receive welfare benefits.

So is mere in -- administrative inconvenience a compelling state interest that supersedes the individual? Or will now every public welfare program have to accommodate every religion who doesn't want to use a Social Security number?

MS. HARRIS: So I'm glad you brought up Bowen because I think there's two pieces of Bowen that are important. One is the holding that attracted a majority of the Court, which is you can't say that the government internally can't use Social Security numbers for its administration. You can't force a change in the way in which the government itself manages internal operations. The Court has said --

JUSTICE SOTOMAYOR: No. But they were forcing her to use a number she didn't want to give.

MS. HARRIS: So the second part of Bowen is the part that fractured the Court. There's only a plurality of justices -- the -- the line-up ultimately was, were the case not full of jurisdictional defects on that question

which got remanded, five -- at least five justices thought that if you are forcing someone to use a Social Security number in the actual application for benefits, that would trigger strict scrutiny under Sherbert.

And, again, Bowen had the debate presaging Smith and talked about what does it mean under Sherbert. And a majority of the justices at that point said, no, the Free Exercise Clause is absolutely not limited to nondiscrimination. It -- it covers --

JUSTICE SOTOMAYOR: All you've done is prove the point that, no matter what line of cases we follow, there will be tremendous problems and a great cost to someone.

MS. HARRIS: Respectfully, I disagree with the idea that there is no way out of this. I think the Court's cases point -- the timeline --

JUSTICE SOTOMAYOR: There is -- there is no way out of it because there's always balancing that goes on with these issues. But we have a clear line now, and you want us to just upend it in one particular area of all.

MS. HARRIS: No. I think the Court

currently has a mess. It is a Swiss hole doctrinal setup in which it is -- it's hard to describe Smith as a default, and it's even harder to describe Smith as a workable default in this particular context, not only because of the upshot of the Carson line but also because of what I just discussed about Mahmoud in the benefits context.

JUSTICE SOTOMAYOR: Because we created it.

MS. HARRIS: Because the Constitution requires accommodation in this context.

CHIEF JUSTICE ROBERTS: Justice Kagan, anything?

Justice Gorsuch?

JUSTICE GORSUCH: I guess I'm struggling to see how it would be the end of the world or a sea change to just go straight to strict scrutiny here when the federal government has to anyway as a matter of statutory law under RFRA. That abrogated Smith for purposes of the federal government, and there are 40 states that already have to do this.

That -- that seems to me to -- to be

problematic to suggest, oh, my goodness, it would be a sea change to -- to do what -- what we do in almost every case.

MS. HARRIS: I strongly agree with that and think that is a -- a very strong refutation to the idea that every person would be a law unto themselves. The law that is prevalent in so many contexts is already this.

JUSTICE GORSUCH: I -- I think Senator Kennedy and Senator Hatch would be quite surprised to think that RFRA created laws unto themselves in every American.

MS. HARRIS: No dispute.

JUSTICE GORSUCH: Yeah. And then, in terms of strict scrutiny being a balancing test, that's -- that's not how I've understood it. The way I've understood it is we assess whether the government has a compelling interest and whether it's narrowly tailored to that interest without balancing against the interest on the other side. That's taken care of by saying the Constitution applies. There's a substantial burden once that hurdle's cleared. We don't go balancing the two.

Is that right?

MS. HARRIS: Yes. And I would just offer one refinement. Again, it is not just sort of balancing, is there a compelling interest on the one hand and a burden on religion on the other? The question, as this Court reiterated most recently in Fulton, is does the government have a compelling interest in denying the particular religious exception requested?

And so that's what you're turning your analysis on for narrow tailoring and the governmental interest.

JUSTICE GORSUCH: Right. We're focused on the government's interest once we're in strict scrutiny land and only the government's interest.

MS. HARRIS: Yes.

JUSTICE GORSUCH: Yeah. And then -- and then, just to follow up on Justice Barrett's question, do you think strict scrutiny as announced in Sherbert by Justice Brennan and -- and Thomas and then again in our series of public benefit cases more recently is -- is a reasonable construction of -- of the original meaning?

MS. HARRIS: Yes. And I think just -- you know, I don't -- I don't need to tell this Court, but I think Justice Alito's distillation of many of the founding-era principles building on the backs of previous writings on the topic of the debates over Smith correctly captures the meaning of the public safety exception as something it can do strict scrutiny and helps explain the trajectory from the founding-era practice and the understanding that the Free Exercise Clause was not an outlier and the First Amendment was not the only thing limited to a mere nondiscrimination rule, all the way to when the Court started incorporating the Free Exercise Clause against the states, cases like Murdock, very early cases in incorporation, distill that very same principle, all the way through to Sherbert.

And so, yes, I think that is a very faithful trajectory and applies with special force in the public benefits context. And that's why even Smith itself said the Court's not overturning Sherbert; it's keeping Sherbert, it's trying to cabin Sherbert, but it's not overturning that line of cases.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: So just to pick up on that, as a matter of original meaning, you're saying that the Free Exercise Clause is more than simply a protection against explicit discrimination --

MS. HARRIS: Yes.

JUSTICE KAVANAUGH: -- against religious groups?

On Sherbert, your view, I think -- I just want to make sure as a matter of doctrine and precedent -- is that Smith preserved Sherbert as to public benefits cases. Is that your -- your understanding?

MS. HARRIS: Yes. I think that's how you have to read it or otherwise, as Justice Souter put it in his Lukumi concurrence, you have just a completely nonsensical understanding of what Smith was doing and overturning Sherbert without any analysis of stare decisis or what it was throwing overboard.

Textually, it's also consistent with

what Smith is saying about the critical importance in that case of the underlying criminal prohibition and how that "distinction" was critical for purposes of distinguishing the Sherbert line. So yes.

JUSTICE KAVANAUGH: On strict scrutiny and when the government can win on strict scrutiny, in the oral argument in Fulton, the question about racial discrimination came up, and both the attorney for the religious group and the attorney for the United States said that the government has a compelling interest in eradicating racial discrimination going back to Loving and other -- many other cases and, therefore, would satisfy strict scrutiny in that case if a religious group tried to do that.

Do you agree with that still?

MS. HARRIS: I agree with that, and Pe a-Rodriguez, as -- as the government mentioned in Fulton, is a particularly good distillation of the particularly compelling interest in that context.

JUSTICE KAVANAUGH: Back to Sherbert, any concerns or anything you want to add to

your friend on the seeming disparity of greater scrutiny on a funding condition as compared to an outright ban?

MS. HARRIS: I agree with both responses, that one, it's what Smith itself says and the only move that Smith could make to avoid overturning Sherbert entirely, and so I would point the Court to the -- the language about, you know, how many times criminal conduct is emphasized, the procedural posture of Smith itself. There's no sort of other way to read it.

But I also agree with Petitioner, the more satisfying explanation is, why would you treat criminal prohibitions differently? It is because Smith was looking at it through the lens of the greater state interest in what Smith described as general applicable prohibitions of "socially harmful conduct."

So the thinking is, when the government is trying to have a criminal law, the kind of conduct involved is in the government's judgment particularly pernicious for society, can't tolerate exceptions across the board is the thinking of Smith.

And I think, if the Court wants to preserve that distinction, the Court doesn't have to say this is a great distinction, but it is certainly a distinction embedded in Smith itself and a line that is workable to draw.

JUSTICE KAVANAUGH: And then last question. There's been some discussion of is this a favor or is this treating them equally or providing an accommodation, I guess another way to say it.

So, if a Jewish service member is given Saturdays off, is that giving that service member a favor, or is that ensuring equal opportunity for that service member?

MS. HARRIS: I think that is ensuring vindication of free exercise rights and something that that person is compelled to do. So I don't think it's like a special favor to people to respect a First Amendment right.

I -- I disagree with the framing that there is some sort of impermissible thumb on the scale involved.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Ms. Harris, I just want to have you say, let's imagine the federal government made it a condition of tax-exempt status to have the kind of nondiscrimination policy that Colorado has here, and the Catholic Church didn't want to sign on.

Would you describe what would happen as a matter of RFRA?

MS. HARRIS: Sure. As a matter of RFRA, the government would have to show -- again, it's just -- the question is, is there a substantial burden on religious exercise.

JUSTICE BARRETT: Mm-hmm.

MS. HARRIS: And can the government -- and what's the government's compelling interest in -- in ensuring a uniform application of the tax code? And in denying that exception, I imagine we would rely on the Lee case quite a bit because it's on -- you know, very similar to that.

JUSTICE BARRETT: Sure.

MS. HARRIS: And then the question is, is the government -- does the government have a compelling interest in not giving an exception in that context. So --

JUSTICE BARRETT: But it's the kind of law -- I guess my point here is it's the analysis that would apply in the federal government context.

MS. HARRIS: Yes.

JUSTICE BARRETT: As Justice Gorsuch said, it's the analysis that would apply in 40 states.

MS. HARRIS: Yes.

JUSTICE BARRETT: So it's something that's done in these other contexts and wouldn't be all that unusual.

MS. HARRIS: No. It would be commonplace.

JUSTICE BARRETT: In fact, it would be the majority approach.

MS. HARRIS: It's commonplace.

JUSTICE BARRETT: Yes. Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: But, of course, RFRA is a statute. You're talking here about what the Constitution requires with respect to the standards, right?

MS. HARRIS: Absolutely. But, to the

extent there are concerns about how workable is the standard, I think the Court should take great comfort from the fact that when you look about what the default rule is, it's not Smith in many, many, many contexts. It is the rule captured in RFRA.

JUSTICE JACKSON: Yes, workability. But there's also a concern about consistency with respect to what we've said about standards.

I mean, it -- it seems to me that you're saying that regardless of whether a law facially targets religion or effectively singles out religion, strict scrutiny applies anytime it disproportionately burdens or unduly burdens a particular person's religious exercise. That's the test that you seem to endorse here, which sounds basically like a disparate impact rule for religious claimants.

But we don't have that same standard operating under the Constitution in other First Amendment contexts. In the free speech context or equal protection cases, a law's disparate impact on the protected class this Court has said is not enough to trigger strict scrutiny.

So I'm wondering again why it seems like in this religious context we have different standards operating?

MS. HARRIS: I guess I would say a couple of things. One is with respect to disparate impact being a bit of a misnomer. I think the best way of looking at this is on almost an as-applied basis. The law that's applied to me is forcing me, coercing me to give up my free exercise rights.

I am not allowed to engage in the free exercise religion in a very direct way. I am Adell Sherbert. I'm not allowed to hold my job.

JUSTICE JACKSON: No, but the law -- excuse me. The -- you can't have that operating, that concept operating consistent with the public benefits voluntary nature of this. I mean, I thought the entire thing was in the context of public benefits.

The school itself does not have to admit anybody it doesn't want to admit. It can absolutely as a private entity discriminate and say we're not accepting these students, but if they're accepting public benefits voluntarily,

these are the conditions that apply.

So why is that forced to do anything?

MS. HARRIS: Because, under the Court's line of cases, I mean, certainly, Carson reaffirms the idea, like, this is directly the framework I'm saying. When you are forced to forego public benefits as a price of engaging in a religious exercise, that is 100 percent a form of coercion of your religious beliefs. The courts recognize --

JUSTICE JACKSON: And you're saying that's not a disparate -- it doesn't operate in the same way as disparate impact?

MS. HARRIS: It does not operate in the same way as disparate impact. And if you want to look at the other constitutional doctrines, I think Smith is the anomaly in the context of public benefits or in any other context, where other rights do not have this so long as a law is generally applicable rational basis review.

JUSTICE JACKSON: Let me ask you about -- let me -- let me -- let me just -- my time is short. Let me shift to the concern about the conflict here that when we're talking

about the particular religious exercise that is at issue being one that potentially raises constitutional concerns on the other side.

Here, the religious entity -- I understand there's something about making a statement with respect to it, but the bottom line is that the religious entity does not want to have to commit to opening its schools to students, children of LGBTQ couples.

Couldn't that same logic support a religious entity who says we don't want to open our schools to students of races that we disagree with or ethnicities that we disagree with? Why wouldn't the same logic from the standpoint of the First Amendment claim be the -- be the same?

MS. HARRIS: So a couple points on this. One is this goes back to the colloquy I just had with Justice Kavanaugh. In certain contexts, and this is already true in the RFRA context or in the Mahmoud context, where parents rights were involved, you can have the same kinds of claims, hypothetical sort of religious exercise involving race, involving other things. It will trigger strict scrutiny.

And the answer I gave to Justice Kavanaugh is I think it is very possible, indeed likely, that the answer may well come out differently for strict scrutiny.

JUSTICE JACKSON: But that's just arbitrary. That's just because the Court would say race is different, right? I mean, that's -- there's no principled basis, I think, to distinguish between a entity that says my religious faith says my children can't go to school with the children of gay people from a religious entity that says my religion says my children can't go to school with the children of black people.

And so what I'm trying to understand is, if we say that's different, it would just be because we've decided that race is different than LGBTQ status. But, from the standpoint of rational reasoning, understanding how the Constitution works, I'm not sure those are different.

MS. HARRIS: So let me just back up. One -- just like go through the steps of the inquiry. One is, is there the same kind of substantial burden on religious exercise?

JUSTICE JACKSON: Yes.

MS. HARRIS: Maybe if I'm --

JUSTICE JACKSON: Both of them sincerely believe that their children should not be in school with people of that character.

MS. HARRIS: Right. So I think the intuition is at that level, perhaps you could survive that -- that -- in that hypothetical while the substantial burden part. But then you have to pivot to the strict scrutiny analysis.

And I don't think it's just sort of a made-up doctrine in which you're asking which one is more important. I think it's --

JUSTICE JACKSON: And it's strict scrutiny just because they're a religious group and they sincerely -- that's what -- I'm just getting at that point.

You say regardless, just because a religious group says I don't want to have to do whatever this standard is, we automatically pivot to strict scrutiny. That's where we are?

MS. HARRIS: No. I think, in your hypothetical, you outlined, again, one -- a hypothetical that is not seen anywhere in the

case law of these cases but a legitimate hypothetical with respect to assume that a particular religious faith says that I have you as a race that mean that, you know, I need to employ racially discriminatory admissions criteria.

JUSTICE JACKSON: Not so far-fetched. This was, in fact, a lot of what was said in the '40s and '50s. But go for it.

MS. HARRIS: Absolutely.

JUSTICE JACKSON: Right.

MS. HARRIS: But, as a -- as a modern-day issue, I think those cases the Court recognized -- Bob Jones is a great example of what that -- what that ultimately resulted in, which is a case in which the strict scrutiny applied and the law -- and the law --

JUSTICE JACKSON: But you're -- finally, you're saying Bob Jones doesn't -- wouldn't mean that these religious entities lose?

MS. HARRIS: I'm saying the same thing I said to Justice Kavanaugh, which is, under the race hypothetical, I think that race -- under the compelling interest test would very

likely come out differently.

And the second thing I'm saying is I think just taking a step backwards, the idea that the answer to the race hypothetical should be preserve Smith in the maximum number of contexts is already refuted by other contexts. In the RFRA context, I don't think it's result -- again, the practical results issue of what has happened is not rampant racial discrimination or rampant numbers of groups claiming religious exceptions based on racial views. It is quite the contrary.

And, again, the Mahmoud case raises the same sorts of questions with respect to parents' substantial burden on religious exercise.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Norton.

ORAL ARGUMENT OF HELEN NORTON

ON BEHALF OF THE RESPONDENTS

MS. NORTON: Mr. Chief Justice, and may it please the Court:

Colorado welcomes religious preschools

to UPK. The only thing Colorado asks is that they comply with the same conditions that every publicly funded preschool must meet, religious and secular alike. UPK is neutral towards religion.

Well before this Court's decision in Carson, Colorado made three key choices. First, it expanded free high-quality preschool to every four-year-old in the state, when before its predecessor program focused only on low-income and disabled children.

Second, it replaced its public school-only approach with a public/private partnership that welcomes private schools, including religious schools that teach religious education.

And, third, it holds all participating preschools to the same standards, including student-teacher ratios, class sizes, teacher training obligations, and equal opportunity.

Under this program, faith-based preschools remain free to teach their religious beliefs, including their beliefs about sex or gender or marriage. Free to teach them while receiving public funding.

Under this program, publicly funded preschools choose their curriculum. And families, regardless of their protected class status, choose what schools to attend. But families have no right to change a school's curriculum.

Finally, UPK's equal opportunity requirements are generally applicable. The statute requires that disabled and low-income children receive additional and specialized services because having a disability or living in poverty directly interferes with those children's ability to benefit from preschool at all. UPK does not devalue religion by allowing preschools to remove these barriers.

The judgment below should be affirmed.

I welcome this Court's questions.

JUSTICE THOMAS: You ask us to employ the -- Smith in analyzing or addressing this case, but in our last two benefits cases, Espinoza and Carson, we did not use, even cite, Smith. Why would we do that in this case?

MS. NORTON: Your Honor, I understand every case in the Carson trilogy to be an application of Smith and not a displacement of

Smith. In each of those cases, the Court interrogated whether or not the state had engaged in religious discrimination, thus triggering strict scrutiny.

I see that as an application of Smith and not its displacement.

JUSTICE BARRETT: Counsel, you agree -- I'm sorry, Justice Thomas. Were you finished?

You agree, don't you, that Colorado could not say that Catholic schools or evangelical schools or orthodox Jewish schools were excluded from participation in the UPK program?

MS. NORTON: Absolutely. They are welcome.

JUSTICE BARRETT: So explain -- you heard some questions along these lines a moment ago. Then explain what the difference is between that and then choosing to impose a condition that you know that those schools will be unable to agree to?

MS. NORTON: Your Honor, there is no evidence of any animus or hostility in this case. Neither lower court found any such

evidence. And, in fact, they held completely to the contrary, that UPK welcomes religious providers.

Again, it chose to move to a program that included religious providers and treat them alike.

JUSTICE BARRETT: Well, does it have to be animus? I guess I'm not assuming animus or animus against religion, but if you know that the effect of choosing that requirement will push out those with a contrary belief, how is that different? Just as a logical matter. I mean, I see differences. I mean, I'm not -- I'm not saying that there's not a difference between calling religion out expressly on the text of the statute and imposing indirectly this independent kind of condition.

But we do have, you know, this oped in the New York Times by Aaron Tang saying, hey, don't worry, there's this way that, after Carson, Maine and other states can achieve the same result, impose these non-discrimination requirements because all these religions that hold these traditional beliefs will then be unable to participate in these programs.

So I think even if it's not what Colorado did here, don't we have to think about that in deciding this case and how it will affect other programs?

MS. NORTON: Your Honor, it's -- it's absolutely true that states engage in religious discrimination and trigger strict scrutiny when they have the intent to disfavor religion, regardless of whether that intent is transparent or hidden.

And here there is zero evidence of Colorado's intent. It started this program well before Carson, a program to welcome religious providers, while requiring equal opportunity. Well before Carson, it chose to include religious providers. Pretty much the first thing this brand-new agency did was convene a working group of faith-based providers that included St. Mary to solicit their input, to welcome their inclusion, and to try to respond to their feedback.

JUSTICE JACKSON: Do you know if, as a matter of fact, the equality mandate predated the opening to religious schools or was it done concomitantly, or where did -- when did the

quality mandate come into play?

MS. NORTON: Yes, Your Honor. The testimony at the trial, just looking at JA 20 -- 224 to 225, tells the story of UPK from the voters' approval of the initiative in 2020 and then two years of outreach to stakeholders and to the creation of a mixed delivery program with equal opportunity requirements.

And that legislation was then finalized and introduced in January of 2022 and enacted into law in April of --

JUSTICE JACKSON: That was the opening, but in the previous iteration, you said this -- this existed originally just for public schools. Right? Before the opening?

MS. NORTON: Public schools serving low-income kids and disabled --

JUSTICE JACKSON: Was there an equality mandate in place at that point, do you know?

MS. NORTON: Yes. And, of course, they're constitutional actors, so --

JUSTICE JACKSON: Right. So the quality mandate predated the inclusion of these religious schools. It's not as though they

chose that to preclude religious schools. At the time they chose it, religious schools weren't even in -- on the -- on the table, correct?

MS. NORTON: You're -- you're absolutely right. Colorado has long been committed to equal opportunity in the educational setting of -- of all educational settings.

JUSTICE ALITO: Is there any --

CHIEF JUSTICE ROBERTS: Counsel --

JUSTICE ALITO: Go ahead, chief.

CHIEF JUSTICE ROBERTS: The effect of a law on religious schools and parents, I think the effect of the law in Carson is pretty much the same as the effect of the law here. And we said in Carson that it turned on the substance of free exercise protections.

And I wonder in what way you think this is different than Carson.

MS. NORTON: Yes, Your Honor. Carson is a religious discrimination case. It uses the terms "religious discrimination" 11 times. And if this -- if Carson stood for the proposition that Petitioners claim it did, this

Court would have had no occasion to take the time and care that it did to explain that Maine was discriminating against religion when it excluded schools precisely because they taught religious things.

In Carson, a state agency official examined the curriculum of applying schools, and if they found that curriculum to be religious in content, the school was excluded. That is religious discrimination. And that is not UPK.

JUSTICE ALITO: Do you think that Carson was in essence a Smith case? A Smith decision?

MS. NORTON: I think it's an application of Smith's commitment to neutrality, yes.

JUSTICE ALITO: Did it cite Smith?

MS. NORTON: It -- it did not cite it, but it did Smith's work. And I believe that any judicial decision when it is interrogating neutrality and when it's interrogating general applicability is doing Smith's work.

JUSTICE ALITO: Is there any evidence in the record of LGB -- LGBTQ couples wishing

to enroll their children in Catholic pre-K schools?

MS. NORTON: Yes, Your Honor. I'll start with the expert testimony, which was unrebutted and unchallenged and credited by the district court, which explained that same-sex parents, like religious parents, like all parents, often seek to place their children in schools that work best for their lives, regardless of the curriculum.

In the record is the fact that one of the plaintiff preschools turned away a family of a fifth grader because the parents were same-sex. A number of the amicus briefs, by Colage and the National Women's Law Center, details the --

JUSTICE ALITO: And how many instances of this have there been?

MS. NORTON: In -- sorry. I'm sorry. I didn't hear your question.

JUSTICE ALITO: How many times has this happened?

MS. NORTON: So if we -- if we look at this particular situation, I want to remind us why we're here. We are here because the

Petitioners declined to participate in the program and filed a pre-enforcement action asking for a blanket exception from the equal opportunity requirements. This in a program that was created because Colorado wanted to make certain preschools, all preschools, available to children that couldn't previously afford them.

The fact that there aren't any complaints in the record is a feature of the fact that Petitioners have chosen not to participate and that -- and that -- the program's newness.

JUSTICE ALITO: Well --

CHIEF JUSTICE ROBERTS: How is -- I'm sorry.

JUSTICE ALITO: No.

CHIEF JUSTICE ROBERTS: I was just going to say, how is any of that different than what happened in -- in Sherbert? The same background, it seems to me, applies in that case. And -- I -- I -- if you step back, it seems to me that you're quite anxious to bury Sherbert, perhaps as anxious as the other side is to bury Smith. And I'm just trying to be --

figure out the extent to which your problem is not the same as the problem that was in Sherbert, because nothing in our precedent has backed away from Sherbert.

And I want to know exactly what -- how you fit under the analysis in Sherbert.

MS. NORTON: Your Honor, Smith, which of course itself was a public benefits case, took care to explain Sherbert as a failure of general applicability, because there, in that case, the state had devalued religion by crediting secular and not religious reasons for refusing suitable work.

I'll note that actually the Court in Sherbert also described it as religious discrimination because there the state had expressly protected workers that observed a Sunday Sabbath from having to work on that day even in times of emergency, but provided no such protection to workers who observed a Saturday Sabbath.

This Court in Fulton, again, like in Smith, described Sherbert as a failure of general applicability, as devaluing religion by preferring secular but not religious reasons

for the same choices.

JUSTICE ALITO: Do you disagree with the proposition that Justice Gorsuch mentioned that the Constitution generally does not allow a government entity to do indirectly what it is prohibited from doing directly?

MS. NORTON: I agree that it is completely clear that the government impermissibly discriminates when it does so by stealth as opposed to doing so transparently. And, again, neither happened here.

JUSTICE ALITO: So when a state imposes a tradition -- a condition that it knows certain religions cannot accept that -- the only question that is presented is whether that was done with the -- with the intent to discriminate against those religions?

MS. NORTON: Your Honor, this Court has never held that knowing the effect of an action establishes without more the government's intent to single out religion for disfavor, and such a holding would discourage government from the sorts of public/private --

JUSTICE ALITO: Well --

MS. NORTON: -- partnerships we have

--

JUSTICE ALITO: -- suppose -- well, there are lots of hypotheticals in the briefs. I will just mention one.

Suppose you imposed a requirement that all preschools must ban teachers from wearing head covering. Would that be permissible?

MS. NORTON: All teachers cannot wear head coverings?

JUSTICE ALITO: Yes.

MS. NORTON: So we would interrogate it under Smith for neutrality. We would need to know the background circumstances. And we would interrogate for general applicability. And we would need to know the government's asserted interest to assess those things.

JUSTICE ALITO: Well, let's -- let's say the government's asserted interest is a belief in gender equality, and it does not want women to wear head coverings because that is a symbol of unequal status.

MS. NORTON: If it is neutral and generally applicable, then we go to rationality. And under some limited circumstances, it might fail rationality.

But if it is neutral, and if it is generally applicable, it does not trigger strict scrutiny under the Free Exercise Clause.

JUSTICE ALITO: So we have here a -- a requirement that has a very severe impact on certain religions and that was something that everybody could have anticipated, and almost must have anticipated, when this requirement was imposed.

And we have little evidence of a practical problem, little evidence, if any evidence -- you'll tell me if I'm wrong -- that there are LGBTQ couples who cannot find other preschools to send their children to. And we have your state's record in recent First Amendment cases to which Justice Barrett referred, Chiles versus Salazar last term, violating -- violation of the free -- First Amendment rights of the Christian counselor; 303 Creative in 2021, violation of the First Amendment rights of a Christian website designer; Masterpiece Cakeshop in 2015, violation of the First Amendment rights of the Christian baker.

What should we make of all of this?

MS. NORTON: Your Honor, there is no evidence of any sort of any religious hostility or animus in the UPK program. Neither lower court found any such evidence. And, in fact, they found exactly to the contrary.

Colorado here has made several choices, choices they didn't need to make that were all about opening this program to religious people and religious providers.

JUSTICE KAVANAUGH: Why not seek the win/win? I mean, I raised this in the full oral argument where there's a clash of rights, obviously, the free exercise right on the one hand, and same-sex marriage right recognized in Obergefell on the other, but there are 2,000 schools. There are only 34 Catholic schools.

There are plenty of opportunities to respect the rights of the religious believers and respect the ability of LGBT parents to find among the 2,000 schools appropriate fit for their children, which could, in fact, be at one of the Catholic preschools, depending on their own beliefs about that, and you avoid the clash.

It seems like this is a -- you know, a

would-be solution in search of a problem that is unnecessary to create this clash. And I'm just trying to figure out why -- why we're here, why this problem has risen all the way -- I had the same question in Fulton. Why -- why has this been provoked when there's an ability for everyone to go to the school, a good school that's a fit for them and respect religious rights? Maybe I'm wrong in my premises. You can tackle that, as you wish.

MS. NORTON: Thank you, Your Honor.

One distinction I will draw -- there is several distinctions between this case and Fulton. One distinction that I will draw is that it is clear in this case, based on the unrebutted expert testimony, that preschools are not interchangeable to families. That was not the case in -- in Fulton. There wasn't any evidence of the different placement agencies were different.

So Colorado's interest is ensuring that it's public funds go to schools that ensure equal opportunity, not some opportunity, that ensure equal opportunity to public-funded options, regardless of protected class status.

Families are harmed when they're turned away from the publicly-funded schools that makes their lives work because of the protected class status. Think of the parent who needs a school that opens at 7:00 a.m. so she can get the bus that takes her to work. Think of the parent who needs a school that will take all three of her kids, so she doesn't have to shuttle them among three different schools. Think of the parent who needs the neighborhood school so that her neighbor can pick up her school -- her kids when she can't get home in time.

For that parent to be turned away from those schools that make preschool possible for her family because of her protected status -- class status, harms families and undermines --

JUSTICE KAVANAUGH: What do you --

MS. NORTON: -- Colorado's interest.

JUSTICE KAVANAUGH: -- do with all the other preferences that are in Colorado law? There are dozens and dozens of applications of preferences.

For example, I notice one preference that's allowed, schools are allowed to have a

preference for parents who will be more involved in the school.

MS. NORTON: Yes.

JUSTICE KAVANAUGH: That almost inherently discriminates against single-parent families, inherently discriminates against families with two-income parents in the real world.

You know, don't you have the same problem with something like that? Or you have the STEM school that, you know, someone is interested in something else, they are not going to -- they are going to be going to a different school or the vegetarian school, you can have a vegetarian school, but you can't have a Catholic school, you can't have a Jewish school.

What do you -- how do you respond to those concerns, which you have seen in the briefs? I just want to give you an opportunity.

MS. NORTON: Thank you, Your Honor.

UPK does not regulate schools' enrollment criteria, so long as they don't violate the equal opportunity requirements.

And none of the preferences that you -- or have been discussed so far, none of them departs from the equal opportunity requirements. This is a very familiar feature of equal opportunity law in the educational setting.

So, for example, Title VI, which regulates federally-funded schools, it takes three characteristics off the table; race, color, national origin, and it literally leaves federally-funded schools thousands of other enrollment criteria that they can -- they can continue to -- to use and implement.

UPK allows no exceptions from its equal opportunity requirements.

CHIEF JUSTICE ROBERTS: Could the preschools spend 80 percent of their time teaching religion?

MS. NORTON: Yes.

JUSTICE BARRETT: I just want to go back to Justice Alito's question about whether there was any record of any LGBTQ parents being turned away. I understand that this is a preenforcement challenge, and so the Catholic preschools haven't participated in the UPK program.

But -- and maybe I'm misremembering. I guess my question here is, is there any record -- I mean, these preschools preexisted the program.

So is there any record of those -- of same-sex parents, say, trying to attend these Catholic preschools and being turned away?

MS. NORTON: There's -- I gave you the example of the fifth-grader.

JUSTICE BARRETT: Well, a fifth-grader is not pre-K, right?

MS. NORTON: But it was by a plaintiff school with a -- with a preschool.

JUSTICE BARRETT: So turned away. That was the fifth-grader, was that St. Mary's?

MS. NORTON: St. Bernadette.

JUSTICE BARRETT: St. Bernadette. Who is not in the case anymore, right?

MS. NORTON: Correct.

JUSTICE BARRETT: And is there any other entity -- I guess this kind of goes to Justice Kavanaugh's point about why are we here. Is there any entity, other than the religious entities, who sought an exemption from the equal opportunity mandate?

MS. NORTON: No, Your Honor. But I want to go back to your earlier question, which I also understand to be related to some of the other questions about -- about why are we here? And I sense folks -- perhaps their puzzlement about whether or not same sex parents would even want to send their children here.

And I -- I've talked earlier about the expert testimony that says that same -- same-sex parents often rely on location and hours more than curriculum in making their choices. And we can see other examples of this sort of behavior. For example, in Bob Jones that you mentioned earlier, Black students -- some Black students attended Bob Jones despite their religious teaching on race. If you go to Zelman versus -- to the Zelman case here, the religious preschools that were participating in that voucher program, the -- the record made clear that most of the students that attended those religious schools did not agree with those schools' teaching but, nevertheless, sent their kids there because of the quality of the education.

The bottom line is allowing the

Petitioners a blanket exemption to turn families away because of protected class status limits the publicly funded options for those parents. And they experience harm when they don't have the full range of choices as other families.

JUSTICE BARRETT: I can understand that. I think the thing that I'm struggling with -- and, again, this kind of goes to Justice Kavanaugh's point -- is in the racial discrimination cases -- and again, Bob Jones triggered strict scrutiny and then it failed. I mean, the school wasn't allowed to continue to maintain the interracial dating ban.

But I guess what I'm struggling with here is those -- those cases, there was a problem that they -- the laws were responding to about racial discrimination in these institutions. So I guess what the question was getting at is, is Colorado trying to eradicate that kind of problem in the schools, does that problem exist anywhere, except among the religiously committed schools that are plaintiffs in this case? What -- what is it responding to? It's just hard for me to

imagine that this is -- this kind of discrimination is -- is a problem in Colorado and that you could be responding to anything else, other than the religious schools.

MS. NORTON: Your Honor, with respect to any protected characteristic, certainly sexual orientation, but also race or sex, there might be religious reasons for turning families away on those bases, but often there are instead secular reasons.

Unfounded stereotypes about membership in that group. Fear of folks who are perceived as different. And with respect to same-sex parents, maybe unfounded fears of HIV trans- -- transmission. Maybe secular beliefs, personal beliefs, political beliefs about the appropriate structure of the family.

Drawing lines on the basis of protected class status is by no means motivated only by religious reasons. And UPK's requirements regulate the conduct of denying equal opportunity regardless of the religious or sexual motivation for that.

JUSTICE KAVANAUGH: Does Colorado --

JUSTICE KAGAN: I think one aspect of

the questions that you've been getting just now is to ask you to comment on why Colorado has an exceptionally important interest in the uniform application of antidiscrimination law. You know, is there anything about antidiscrimination law that makes it particularly wrong to begin to make exceptions here or another place or another place and say that, you know, some people in our society don't really have to follow its strictures?

MS. NORTON: Yes. Yes, Your Honor, and especially so in the context of public funding, when a state is making decisions about how to spend the public's funds. And, again, it goes back to Colorado's interest, which is in equal opportunity, not some opportunity.

And I want to talk a little bit about this and -- and what the Petitioners' approach to strict scrutiny would mean with respect to other types of -- of protected class status, including interracial parents. Religious beliefs that are very, very different from Petitioners' belief but absolutely whatever approach that you adopt here will apply to religious beliefs very different from

Petitioners'.

Petitioners say that even if a state has a compelling interest, the state fails narrow tailoring if it refuses to grant the exception, so long as some school somewhere will take those parents. That would be true of same-sex parents here. That would be true under that logic of interracial parents as well.

CHIEF JUSTICE ROBERTS: Well, it's --

JUSTICE KAVANAUGH: Are single --

CHIEF JUSTICE ROBERTS: I was just going to say, your answer there, it seems to me to be a question of the application of strict scrutiny. And we've heard today there are situations where, historically, in recent times, strict scrutiny has been found to be satisfied.

MS. NORTON: Thank you -- thank you, Your Honor. And my point is that under Petitioners' application of strict scrutiny, it would not be.

JUSTICE KAVANAUGH: Are -- are -- does Colorado allow single-sex preschools?

MS. NORTON: Yes.

JUSTICE KAVANAUGH: And why?

MS. NORTON: Sex is not one of the characteristics enumerated in the UPK law. It's not unlike Title II or Title VI, which lists some characteristics and not others. States frequently focus on some characteristics in their equal opportunity laws, and they have the constitutional latitude to do so, so long as they take care to make sure their law is neutral and generally applicable as is assuredly the case here, where Colorado protects religion among its characteristics.

JUSTICE KAVANAUGH: Wouldn't -- wouldn't Colorado exemption for single-sex preschools have some of the effects on parents' geographical location, hours, et cetera, that you mentioned before?

MS. NORTON: Your Honor, there's nothing in the record about why sex wasn't included, but the free exercise inquiry, again, focuses on those requirements and whether or not they --

JUSTICE KAVANAUGH: My -- my -- I'm sorry to interrupt. My question was, wouldn't some of the impacts on parents' that you

described earlier be true as well if -- given Colorado's allowance of single-sex preschools? If you have daughters and the closest preschool is all boys, you know, that's going to be a hindrance. Why does Colorado allow that?

MS. NORTON: So I know of no equal opportunity law that takes every possible decision-making criteria off the table. Colorado also doesn't identify parents' age as a protected characteristic or their veterans status. You could -- you could certainly -- you're not wrong, Your Honor, but my point is that legislatures frequently have to decide. They don't want to --

JUSTICE KAVANAUGH: They have to draw lines. On -- on the -- different question now, just -- and this is a clash of rights and strong beliefs and strong interests. And I get -- I completely understand that.

One of the things that Obergefell and Masterpiece were very careful to say, though, that in recognizing a constitutional right to same-sex marriage, that the Court was also respecting the rights of people, particularly religious people who had religious beliefs that

were different, and that it was important going forward as a country to make sure both rights were respected.

MS. NORTON: Yes, Your Honor. Absolutely.

And Colorado funds Catholic schools. Colorado funds Catholic schools that teach Catholic precepts. Colorado does not interfere and, in fact, funds teaching Catholic views on family and sex and marriage.

The next sentence in Obergefell, Your Honor, goes on to say that however well intentioned those beliefs, the dangers of -- of law that demeans or stigmatizes or includes -- excludes some folks based on protected characteristics.

JUSTICE JACKSON: So it sounds like you're -- you're sort of making a distinction in response to Justice Kavanaugh, that is we have this clash of rights and we're trying to accommodate both, but to the extent that -- sorry -- and to the extent that a state is doing things that discriminate against a religious entity on the basis of their religion, then we're on the line, we're on the

line of the -- the state can't do that.

But we have a little bit of an odd scenario here when the religious belief at issue is compelling the exclusion of others, and the others have a concomitant, one would say, right to be included.

And so I'm just a little concerned about the state being in a very precarious position here, because it, it seems to me, has this well-established interest in making sure that all low-income students have access to pre-K regardless of these -- the characteristics that it -- it has identified. That seems pretty unobjectionable in -- in -- you know, on its face.

And the question is why wouldn't, Judge -- Judge Kavanaugh -- Justice Kavanaugh asks, the state yield that concern in a situation in which a religious group says but we don't want to include certain people?

MS. NORTON: Your Honor, I think that choice is -- is particularly acute in the public funding context. The Smith framework, the yield of the Smith framework is that when states take the care to design their programs

in a neutral and generally applicable way, then they have the constitutional latitude to choose whether and when to exempt religious actors and to choose whether and when those requirements, those neutral and generally applicable requirements, brook no departure.

And, here, Colorado has chosen that -- that -- the idea that it's going to invest the public's funds, the people's funds, to provide services to the people only in schools that ensure equal opportunity regardless of these characteristics.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

JUSTICE ALITO: In answer to Justice Kagan, I recall your saying that there is a greater need to allow no exceptions based on religious beliefs in -- in antidiscrimination laws than in other laws. Is that correct? Do you want to say that? That's an area where Smith applies most emphatically?

MS. NORTON: Yeah, what -- what I intended to say, Your Honor, that it is -- it

is a longstanding and commonplace and strong interest of states to ensure that they invest their public funds in entities that do not deny equal opportunity. And that's been recognized in Lau versus Nichols and Gebser and Bob Jones and --

JUSTICE ALITO: I'm just trying to understand you. So -- and you also seem to say that there's a greater interest in applying Smith in public benefits cases than in other cases. Is that what you just said?

MS. NORTON: No. I just think that there's -- there's -- it's particularly appropriate to apply Smith. I don't think it's limited to public benefits cases.

JUSTICE ALITO: And antidiscrimination cases, there's a stronger need to do it there than, let's say, in the criminal law?

MS. NORTON: No, I don't think so, Your Honor. I -- I was answering a question about whether or not this was -- that why Colorado was choosing, because Smith gives it the right to choose so long as it is neutral and generally applicable, choose not to exempt religious actors from this requirement. And

it's because, among other things, a commitment to equal opportunity should mean equal opportunity and not some opportunity.

JUSTICE ALITO: We've heard a lot of praise for a blanket rule limiting free exercise to nondiscrimination. Is it not the case that the application of that rule across the board would itself have consequences that are pretty hard to accept?

MS. NORTON: Tell me more.

(Laughter.)

JUSTICE ALITO: Well, I mean, I'm not going to argue here today that Smith should be overruled. That was an issue in Fulton, and the Court did not choose to go down that route.

But I did outline in that concurrence the consequences of saying Smith applies in all circumstances. Do you -- do you recall that, or do you want me to refresh your memory?

One of the things it would allow is our imposition of a rule that says nobody could stand where you stand now with his or her head covered. So Orthodox Jewish men and many Muslim women's -- women would not be allowed to argue here. It would allow a rule that says

that every slaughterhouse must render the animal unconscious before being killed, which would outlaw kosher and halal slaughterhouses, which is done in some European countries. It would mean that an -- a governmental entity could prohibit circumcision, which is also done in some European countries.

MS. NORTON: Your Honor, I want to -- thank you, Your Honor. I want to make one point about the work that Smith does, and I want to make one point about the dangers of adopting a rule like Petitioner proposes, which would be an enormous inroads on Smith.

Over the 36 years since this Court decided Smith, this Court has carefully developed both its neutrality inquiry from Lukumi through the Carson trilogy and also its general applicability inquiry, again, from Lukumi through Fulton. These now provide robust protections for religious exercise. These are serious screens for the government's religious discrimination. These are serious screens for the government's devaluing of religion.

As a result, in the time since Smith,

religious challengers prevail much more often than they lose before this Court when, in the period from Sherbert up until Smith, religious challengers lost considerably more than they won.

Second, to adopt Petitioners' proposed gaping exception in Smith --

JUSTICE ALITO: Thank -- thank you, counsel. Thank you. You've answered my question. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: Finish your answer.

(Laughter.)

MS. NORTON: Thank -- thank you, Your Honor.

To adopt Petitioners' proposed rules would subject -- would require -- create a standing entitlement of claimant-specific strict scrutiny to every neutral and generally -- generally applicable condition to public funding. This not only discourages public and private partnerships of the sort like UPK; it also introduces unfairness as some

providers will be entitled to funding on terms unavailable to anyone else, and children in this case will be denied participation because of their parents' protected class status.

It's divorced from precedent and it's unnecessary because Smith provides the -- the tools you need to decide this case.

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: One factual question. Under -- and I'm familiar with the record and how this transpired in the district court and what happened in the -- in the wake of that, but, under current Colorado law as it stands today, am I right that a religious school, preschool, can't prefer members of the same religion?

MS. NORTON: Under UPK, a publicly funded preschool would violate the UPK statute if they turned folks away because of their religious affiliation, and Petitioners seek an exemption from that.

JUSTICE KAVANAUGH: Right, but the --

the current law on even co-religionists, so a Jewish preschool, under current law as it stands today in Colorado, couldn't say we want to have a Jewish preschool and for predominantly Jewish children? You can't do that right now as a Jewish preschool or a Muslim preschool or a Catholic preschool, is that correct?

MS. NORTON: If you receive UPK funding.

JUSTICE KAVANAUGH: Okay. And then, second and last -- and I appreciate the program and the importance of the program and -- and what it does for children in Colorado -- I have one question.

The director of the program, by all accounts, a dutiful public servant, but was asked at -- at the trial, are you aware that Catholics have historically been discriminated against, and she answered no.

I was surprised by that answer and curious if that's Colorado's position.

MS. NORTON: Not at all, Your Honor. And it's Colorado's position that the equal opportunity requirements help religious

families. They ensure that Catholic families are not turned away from the UPK school that best meets their needs because of their faith or because of any other protected characteristic. And a history of discrimination against Catholics is among the reasons that requirement is so important.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Ms. Norton, I just have one question and it's a clarification of how this law works. I had been asking Mr. Reaves this, and I'm not sure that I quite have it pinned down.

What if St. Mary's participated in the UPK program and committed to not turning away any families based on parents' protected status but said any parents that enroll their child in this program must sign a statement agreeing to support in every way the church's teachings on same-sex marriage, including that means not both attending events so that we don't have to explain to the other children the nature, you can come one at a time, but you can't both

come, and in every respect support and never criticize the teachings of the church on faith?

I kind of understood and I might have misunderstood Mr. Reaves to say that Colorado's program would permit that so long as the school didn't turn away children of same-sex couples, but I -- I'm not sure that that's right. Is that --

MS. NORTON: I'm not sure either, Your Honor, and this is -- this is why. We're -- we're here, of course, because Petitioners filed a pre-enforcement lawsuit seeking a blanket exemption. They didn't ask us to say --

JUSTICE BARRETT: Well, would you allow what I just said? Would that be okay?

MS. NORTON: This is what we would need to know. It's -- for sure, for sure, any school could ask parents to agree we are -- we are receiving -- we understand we're receiving Catholic teaching. We're taking -- we're sending our kids to a Catholic school.

That -- that is an easy question for me. It's harder for me to figure out how that policy works without facts on the ground, and,

in fact, CDEC wouldn't try to figure that out unless and until they got a complaint from a family and they could interrogate the effects on the ground to figure out how is this working, is it intentionally include -- excluding folks based on religious affiliation or some other protected characteristic? And, if so, does it rise to denying equal opportunity? That's the sort of inquiry Title IX and Title VI do all the time.

JUSTICE BARRETT: That makes sense. I -- I didn't quite understand how that worked. And your answer makes sense. Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: Very quickly, I just wanted to touch on the Tandon line of argument here.

Does Colorado's preference program undermine the equal opportunity mandate or discriminate in a similar way as what these preschools would like to do?

MS. NORTON: Could you tell me -- I didn't hear the first part of your question.

JUSTICE JACKSON: I'm sorry. I was

just saying, I'm -- I'm trying to understand if -- if the preferences that they point to as a -- as something that Colorado allows, is that similar to what they want to do such that they have a valid Tandon argument here?

MS. NORTON: Thank you, Your Honor.

First, Colorado allows no departures from the equal opportunity requirements. To the extent that the Petitioners have argued that allowing Head Start providers to provide specialized services to low-income children or allowing school districts to provide specialized services to kids with disabilities, to the extent that they argue that the departure of equal opportunity requirements, they are wrong.

Schools advance equal opportunity when they recognize that a child with a visual impairment needs different treatment in order to learn. Schools advance equal opportunity when they understand that kids in poverty can't learn if they're hungry or because they're in pain because their parents can't afford dental care to treat their cavities.

Colorado advances equal opportunity

when it allows these schools to bring -- give those children specialized services because they have a protected characteristic that impairs their ability to benefit from preschool.

And this understanding of equal opportunity is consistent also, not only with the text, but also with 50 years of legislative and judicial precedent, as we explain in III.A of our brief.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Reaves?

ORAL ARGUMENT OF HELEN NORTON
ON BEHALF OF THE RESPONDENTS

MR. REAVES: Thank you, Mr. Chief Justice.

First, a few factual points. There were a few questions about the record and the history of this case. I would first direct the Court to 306a in the Petition Appendix. That's where it talks about the fact that these Catholic schools were licensed for decades and there was not a single complaint of -- of

anyone being excluded or turned away based on LGBTQ status at all.

In addition, if we're talking about access to these preschools, I actually think the fifth grade example, which my friend on the other side pointed, to supports our position. The testimony at trial in that case was that this family came to the school, they met with the principal, they learned about the school's beliefs, and at the end of the day, it was a mutual decision that this was not the right fit for that family. That's the only example that's in the record.

We also looked into it. And there are two UPK preschools currently in the program today within three miles of every single Catholic preschool in the Archdiocese. This is just not really a problem in real life. And -- and Colorado's own expert said any harm was speculative. That's at JA 419.

And in terms of, you know, what actually happened in this case, this case went to trial. This is not a -- a PI rushed up to this Court. We had a trial. Our witnesses testified to what the Catholic church believes.

Our witnesses testified, the preschool directors testified, the principal testified. So Colorado knows the facts.

On JA 147, there's testimony that we submitted a -- an application. One of the Catholic preschools submitted an application to the program explaining what the religious beliefs are, and Colorado did not respond. So we've tried to participate in this program.

A couple additional points. You know, when the state violates the Constitution, there might be multiple problems with what the state is doing. And I think that's what you see in Carson. In Carson, there's certainly a neutrality analysis, but I don't take that to be the only problem. And I think the first half of this Court's opinion makes that clear.

In addition, Colorado cannot co-opt a religious school just because they think they provide a good education or an education that might be a good fit for certain families. That's this Court's decision in 303 Creative. In terms of the strict scrutiny analysis, I don't think you need to say anything more than you already said in Fulton. This is an even

easier case than Fulton in terms of the strict scrutiny analysis.

At the end of the day. I also think what Sherbert said about neutrality is right. When talking about the preference or the accommodation that was given in Sherbert, this Court didn't say it was -- this Court disclaimed the fact that it was -- the idea that it was establishing a religion. It said, instead, this is an obligation of neutrality in the face of religious differences. That's how you should think about accommodating religion. If someone is -- is -- is different, differently situated because of their religion, an accommodation is neutrality.

In terms of, you know, what this case is about at the end of the day, I also think it's important to keep in mind that this is an as-applied challenge seeking to protect the religious beliefs that this Court called decent and honorable. And the people actually being excluded or being denied are families. It's -- it's Dan and Lisa Sheley, who are out $18,000 because of their religious exercise.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:09 p.m., the case was submitted.)

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