

No. 25-581

In the Supreme Court of the United States

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

v.

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

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

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTIONS PRESENTED

1. Whether proving a lack of general applicability under *Employment Division v. Smith*, 494 U.S. 872 (1990), requires showing unfettered discretion or categorical exemptions for identical secular conduct.

2. Whether *Carson v. Makin*, 596 U.S. 767 (2022), displaces the rule of *Employment Division v. Smith* only when the government explicitly excludes religious people and institutions.

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INTEREST OF THE UNITED STATES

This case concerns the Free Exercise Clause’s application to a state benefits program under which funding recipients can give preferential treatment to beneficiaries based on certain characteristics (income level and disability) and other individualized, state-approved criteria, but not religiously-motivated preferential treatment based on other characteristics. The United States has substantial interests in protecting religious exercise and in enforcing rules prohibiting discrimination by government funding recipients. The United States has participated as amicus curiae in many of this Court’s Free Exercise cases.

INTRODUCTION

Colorado has enacted a universal preschool benefits scheme whereby the state compensates all participating preschools for providing 15 hours of weekly preschool per child so long as preschools abide by various conditions—including agreeing to enroll students “regardless of” protected characteristics, including LGBT status. Colo. Rev. Stat. § 26.5-4-205(2)(b) (2022).

That equal-opportunity mandate substantially burdens petitioners’ religious exercise. Petitioners—the Archdiocese of Denver, two parochial preschools, and parents who seek to use the subsidy to send their children to Catholic preschool—adhere to Catholic teachings on gender and marriage. Educating children within the faith and ensuring that families abide by Catholic precepts are undisputedly part of petitioners’ religious exercise. Colorado’s scheme thus forces petitioners to choose: They can either adhere to their faith, which precludes enrolling families who refuse to adhere to Catholic teachings, and lose the subsidy, or obtain the subsidy but abandon their religious beliefs. The question animating this case is whether the Free Exercise Clause, U.S. Const. Amend. I, forbids Colorado from refusing to accommodate petitioners’ religious exercise.

Forty years ago, under the prevailing strict-scrutiny framework of *Sherbert v. Verner*, 374 U.S. 398 (1963), the answer would have been an unqualified yes. But *Employment Division v. Smith*, 494 U.S. 872 (1990), has complicated the analysis. *Smith* held that certain neutral, generally applicable restrictions—even those that severely burden religious exercise—comply with the Free Exercise Clause if they are rationally related to a legitimate government interest. Meanwhile, laws outside *Smith*’s ambit must still satisfy strict scrutiny.

See, e.g., *Mahmoud v. Taylor*, 606 U.S. 522 (2025); *Carson v. Makin*, 596 U.S. 767 (2022); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). Whether *Smith* applies—i.e., whether Free Exercise claims are subject to mere rational-basis review, rather than strict scrutiny—is the dispositive question in this case and many others.

The answer here is no, for multiple reasons, and those reasons underscore essential limits on *Smith*’s scope. To start, only neutral, generally applicable laws fall within *Smith*’s ambit. Colorado’s law is not generally applicable. Laws that “treat *any* comparable secular activity more favorably than religious exercise” “are not neutral and generally applicable, and therefore trigger strict scrutiny.” *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). Here, Colorado has authorized preschools to apply preferences for disabled or low-income children, even though Colorado’s equal-opportunity mandate identifies income and disability status as protected characteristics alongside LGBT status. Colorado cannot claim the mantle of general applicability when it allows schools to depart from uniform even-handedness for some characteristics, yet refuses faith-based preferences.

Further, Colorado’s law flunks general applicability because it allows for individualized exemptions, wherein preschools can apply to give preferences to certain desired types of students. “A law is not generally applicable if it ‘invites’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions.’” *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884) (brackets omitted). Here, allowing schools to create bespoke preferences is the antithesis of general applicability re-

ardless of whether those additional preferences comply with Colorado’s equal-opportunity mandate.

More fundamentally, this Court’s recent precedents make clear that *Smith* does not govern this type of case at all. This case involves a state’s attempt to condition a public benefit—preschool subsidies—on petitioners’ willingness to forgo lawful religious exercise (*i.e.*, confining enrollment in religious preschools to families who agree to follow basic precepts of their faith). Before *Smith*, such claims were subject to *Sherbert*’s strict-scrutiny test. *Smith* itself expressly distinguished the *Sherbert* line of cases as involving conduct that “was not prohibited by law,” while extending its new rule to “across-the-board criminal prohibition[s] on a particular form of conduct.” 494 U.S. at 876, 884. More recently, *Carson*, 596 U.S. 767, recognized that *Sherbert*’s strict-scrutiny framework still governs public benefits cases like this one. *Id.* at 778. This Court should not give *Smith* unwarranted breadth.

Reinforcing the point, this Court has held that certain types of burdens—like encroachments on parents’ religious exercise in overseeing their children’s education—fall outside the *Smith* framework and trigger strict scrutiny. *Mahmoud*, 606 U.S. at 561; *Mirabelli v. Bonta*, 607 U.S. 492, 496 (2026). Here, the burden is materially similar—a substantial burden on the ability to direct children’s religious education. It would be illogical and perverse to subject that claim to lesser review under *Smith* because religious institutions, not parents, are most directly shouldering that burden.

Therefore, for several overlapping reasons, Colorado’s law must survive strict scrutiny, not rational-basis review under *Smith*. Colorado cannot clear that high bar.

STATEMENT

A. Colorado’s Universal Preschool Program

Since 2022, Colorado has offered 15 weekly hours of free preschool to all Colorado children. Pet. App. 7a, 61a. The Colorado Department of Early Childhood (Department) provides this benefit to parents and schools. Parents can choose among eligible, participating public and private preschools, whether secular or religious. Colorado then reimburses preschools for the cost of 15 hours of weekly preschool for enrolled children. *Ibid.*

State law requires the Department to ensure that Colorado preschools meet the Department’s quality standards in order to participate. Colo. Rev. Stat. § 26.5-4-205(1)(b)(I) (2022). Those standards encompass classroom sizes, teacher qualifications, and the like. Pet. App. 6a. Relevant here, those quality standards—by statute, by regulation, and as a mandatory condition in contracts with preschools—also require that preschools abide by an equal-opportunity mandate. Colo. Rev. Stat. § 26.5-4-205(2)(b). That mandate requires participating preschools to provide children an “equal opportunity” to enroll “regardless of” the child’s or parents’ “race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.” *Ibid.*; see 8 Colo. Code Regs. § 1404-1:4.110(B) (2025); Pet. App. 9a n.3.¹

However, Colorado also allows preschools to apply various enrollment preferences. Preschools can use Department-preapproved preferences—including, as relevant here, reserving seats for disabled children with Individualized Education Programs or for low-income

¹ The mandate does not require that preschools enroll children “regardless of sex.” See Pet. App. 122a.

children who are enrolled in a Head Start program. 8 Colo. Code Regs. § 1404-1:4.109(A)(3) and (4). Other state-preapproved enrollment preferences include prioritizing children of the preschool operator’s employees or children who were previously enrolled in the same preschool. *Id.* § 1404-1:4.109(A)(5) and (6).

Further, Colorado’s regulations contain a catchall provision allowing preschools to obtain state permission for new types of preferences. 8 Colo. Code Regs. § 1404-1:4.109(A)(9); Pet. App. 8a-9a. The Department grants or denies such requests case-by-case, although respondent Dawn Odean, the Director of Colorado’s Universal Preschool Program, testified that those exemptions could not violate the equal-opportunity mandate. Pet. App. 371a.

Colorado’s regulations provide six example uses of the catchall preference:

- Children with certain vaccinations;
- Children interested in a STEM-focused education;
- Families receiving a specific public benefit, like housing assistance;
- Children with a family member who works in a particular area;
- Families within a specific geographic area; and
- Children whose parents agree to volunteer a certain number of hours at the school.

8 Colo. Code Regs. § 1404-1:4.109(A)(9)(c).

Preferences are “not limited to” those examples, 8 Colo. Code Regs. § 1404-1:4.109(A)(9)(c). Odean testified that under the catchall system, Colorado might approve preferences for “gender-nonconforming chil-

dren” or “children of color from historically underserved areas.” Pet. App. 353a-354a. Colorado has authorized 17 preferences under the catchall, including:

- Children of teen parents;
- Children with dual-language needs who agree to eat a vegetarian diet;
- Fully vaccinated children;
- Children residing within a specific subdivision;
- Children willing to learn from both male and female teachers; and
- Children attending only half-day preschool.

Id. at 32a, 73a; C.A. Doc. 30-7, at 273-274 (Aug. 15, 2024).

The Department administers approved preferences through its algorithm that matches children with participating preschools. Pet. App. 7a-8a. Families sign up for preschool benefits through an online portal; they rank their top preschools and answer questions relevant to enrollment criteria. *Id.* at 64a, 69a. Participating preschools can express their enrollment preferences; preferences are displayed beneath the preschool’s name in the portal and may apply to prioritize certain types of students or to admit *only* children who meet preferred criteria. *Id.* at 7a, 69a; S.J.A. 2-8. The algorithm accounts for schools’ preferences and families’ rankings when matching children with preschools. Pet. App. 7a.

B. Procedural History

1. Petitioners are the Archdiocese of Denver, two associated parish preschools seeking to participate in the universal preschool program, and two parishioners

who wish to use the subsidy to enroll their children in Catholic preschool. Pet. App. 10a-11a.

Consistent with the teachings of the Catholic Church, petitioners believe that marriage is exclusively between a man and a woman; that there are two sexes, male and female, determined by biological sex and created by God; and that acting contrary to those teachings is sinful. Pet. App. 11a. They also believe that parish schools are vital to their Church's mission. Pet. 6.

To avoid conflicts with families who may disagree with these teachings and respect diverging views, the preschool petitioners consider families' sexual orientation and gender identity in making enrollment decisions. Pet. App. 10a-11a. The preschool petitioners do not categorically deny enrollment to children of same-sex or transgender-identifying parents. *Ibid.* But petitioners' religious beliefs require them to make clear "what the school[s] teach[] on matters of faith, and specifically on sexual orientation and gender identity," and to make admissions decisions consistent with "the Catholic Church's teachings regarding biological sex and marriage." Pet. 7 (brackets and citations omitted).

Accordingly, the petitioner preschools require parents to sign a "Community Beliefs and Commitments" statement, which states that signatories "understand and accept" precepts including "Catholic teachings on sexual identity, marriage, family, and parenting." Pet. App. 236a-237a. All families must agree to "refrain from public promotion or approval of any conduct or lifestyle that would discredit, disgrace, or bring scandal to the School, and the Church in the Archdiocese of Denver, or be considered a counter-witness to Catholic doctrine or morals." *Id.* at 240a.

2. The Archdiocese concluded that Colorado’s equal-opportunity mandate—specifically, its prohibition on considering LGBT status in enrollment decisions—would prevent Catholic preschools from aligning enrollment decisions with Church teachings. The Archdiocese thus directed its preschools not to participate in Colorado’s program. Pet. App. 80a.

The Archdiocese instead asked Colorado for “exemptions for faith-based religious providers,” like its preschools, “from aspects of the UPK Program that those providers believe run counter to their sincerely held beliefs.” Pet. App. 12a. Respondent Lisa Roy, the Department’s director, denied that request on the ground that “no provider may discriminate against children or families in violation of” the equal-opportunity mandate. *Id.* at 12a, 289a-290a.

3. Petitioners sued Roy and Odean (the program director). Pet. App. 13a. As relevant here, petitioners claimed that the equal-opportunity mandate violates their Free Exercise rights by forcing them to choose between receiving government benefits and adhering to their faith. *Ibid.* They sought to enjoin enforcement of the mandate against them so they could participate in Colorado’s universal preschool program. *Ibid.*

The district court ruled against petitioners.² The court rejected petitioners’ argument that strict scrutiny

² Below, petitioners also challenged the nondiscrimination provision’s ban on “religious affiliation” discrimination, citing a now-repealed regulatory preference for congregation members, Pet. App. 171a-172a; respondents did not seek further review of that issue, *id.* at 100a. The district court denied petitioners’ additional challenges to the equal-opportunity mandate on church-autonomy and Free Speech grounds, and petitioners did not seek further review. *Ibid.*

applies under *Carson v. Makin*, 596 U.S. 767 (2022), when the government denies educational benefits based on religious beliefs, and limited *Carson* to non-neutral laws. Pet. App. 105a-107a. Applying the *Smith* framework, the court held that the mandate is a neutral and generally applicable restriction subject to rational-basis review. *Id.* at 137a. The court added that even under strict scrutiny, the mandate was constitutional. *Id.* at 137a-138a. The court entered final judgment against petitioners. *Id.* at 184a-186a.

4. The Tenth Circuit affirmed.

The court of appeals agreed that *Smith*'s framework applied. The court distinguished *Carson* and other educational-benefits cases as “address[ing] laws that targeted ‘religious status’ and ‘religious use’ on the explicit basis that they were religious and not secular.” Pet. App. 21a. By contrast, the court reasoned, the equal-opportunity mandate is not “a targeted burden on religious use.” *Id.* at 19a, 22a.

Applying *Smith*, the court of appeals deemed the equal-opportunity mandate neutral and generally applicable. The court found that the mandate was enacted and enforced in a neutral way. Pet. App. 28a.

On general applicability, the court of appeals held that categorical exemptions allowing preschools to prioritize disabled and low-income children did not undermine general applicability. While recognizing that Colorado enacted the equal-opportunity mandate to ensure “equal access to preschools,” Pet. App. 39a, the court reasoned that “the barriers to equal access” are “completely different” for disabled and low-income children than for children from LGBT families, *id.* at 40a. The court concluded that the income and disability exemp-

tions were thus not valid comparators and found the law generally applicable. *Id.* at 38a.

As to individualized exemptions, the court of appeals conceded that the Department’s authority to approve preferences under the catchall “looks a bit like a system of individual exemptions.” Pet. App. 29a. But, the court reasoned, allowing additional preferences did not undermine general applicability because those preferences “‘must still comply with’ the nondiscrimination provision.” *Ibid.* (citation omitted).

Finally, the court of appeals held that Colorado’s law survived rational-basis review because the equal-opportunity mandate was rationally related to Colorado’s goal of “protecting equal access to preschool education for Colorado children.” Pet. App. 47a. It did not address whether the provision could survive strict scrutiny. See *ibid.*

SUMMARY OF ARGUMENT

Laws that fall within *Employment Division v. Smith*, 494 U.S. 872 (1990), must survive only rational-basis review, even if they substantially burden religious exercise. That rule does not apply to Colorado’s law. Strict scrutiny instead governs.

A. *Smith*’s relaxed standard applies only to neutral and generally applicable laws, and Colorado’s law is not generally applicable. A law is not generally applicable if it treats “*any* comparable secular activity more favorably than religious exercise,” *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam), or “‘invites’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions,’” *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (quoting *Smith*, 494 U.S. at 884) (brackets omitted). Colorado’s law fails on both fronts.

1. Colorado’s law treats comparable secular conduct better than religious exercise by carving out two categorical exemptions from the equal-opportunity mandate for secular conduct, while refusing to accommodate religious conduct. Colorado allows preschools to restrict enrollment based on a student’s disabilities or her family’s income level, but will not allow petitioners to restrict enrollment based on their sincere religious beliefs. Those secular exemptions undermine Colorado’s stated interest in equal access in the same way that a religious exemption for petitioners would. And when the government allows exemptions for secular reasons—however well-intentioned—it must also permit religious exercise. *Tandon*, 593 U.S. at 62.

2. Colorado has also fashioned a system of individualized exemptions. The Department’s “catchall preference,” a system in which preschools can ask to prioritize particular types of students, requires Colorado to engage in an “individualized governmental assessment of the reasons for the relevant conduct” in deciding whether to grant requests. *Smith*, 494 U.S. at 884. The mere existence of such a mechanism for individualized consideration undermines general applicability.

B. *Smith* separately does not govern because it does not apply to laws that restrict access to public benefits—like school funding—based on lawful religious exercise. See *Carson v. Makin*, 596 U.S. 767, 789 (2022); *Mahmoud v. Taylor*, 606 U.S. 522, 561 (2025). Those laws are governed by the same strict-scrutiny test, set out in *Sherbert v. Verner*, 374 U.S. 398 (1963), that this Court applied pre-*Smith*. *Sherbert* held that laws that force religious adherents to choose between following their religious beliefs and forgoing public benefits, or abandoning their religious beliefs to receive public ben-

efits, substantially burden religion and are subject to strict scrutiny. *Id.* at 403-407. *Smith*, which involved an across-the-board criminal prohibition, did not displace that rule; its framework instead covered cases that implicate “a generally applicable criminal law.” 494 U.S. at 884. As this Court recently confirmed in *Carson*, the *Sherbert* test still applies in public-educational-benefits cases. 596 U.S. at 778.

Reinforcing that strict scrutiny applies, Colorado’s law—like the laws in *Mahmoud*, 606 U.S. at 561, and *Mirabelli v. Bonta*, 607 U.S. 492, 496 (2026)—encroaches on parents’ ability to direct their children’s religious education. That Colorado imposes a materially similar burden by restricting religious institutions’ participation in a public benefits program should not subject Colorado’s scheme to less stringent review under *Smith*.

ARGUMENT

I. COLORADO’S EQUAL-OPPORTUNITY MANDATE IS NOT GENERALLY APPLICABLE

Because Colorado’s law is not generally applicable, it falls outside of *Employment Division v. Smith*, 494 U.S. 872 (1990), and triggers strict scrutiny. First, Colorado’s law is not generally applicable because Colorado treats “comparable secular activity more favorably than religious exercise.” See *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). Colorado categorically permits secular preferences that undermine its asserted interest in equal access—yet treats religious exercise worse by prohibiting petitioners’ religiously motivated preferences. Second, Colorado’s scheme allows individualized consideration of schools’ requests for additional preferences.

A. Colorado’s Law Is Not Generally Applicable Because It Exempts Comparable Secular Conduct

1. “[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62; see *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17 (2020); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). Put another way, if the government “‘prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way,’” general applicability is lacking. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022) (quoting *Fulton*, 593 U.S. at 534). To determine “whether two activities are comparable,” this Court examines “the asserted government interest that justifies the regulation at issue,” because “[c]omparability is concerned with the risks various activities pose, not the reasons why people” engage in them. *Tandon*, 593 U.S. at 62.

Those comparability principles track broader Free Exercise precepts. A law that treats religious exercise worse than comparable secular activity is not generally applicable due to its non-uniformity. More significantly, when the government treats “conduct with a religious motivation” worse than comparable secular conduct, the government “of necessity devalues religious reasons for [the conduct] by judging them to be of lesser import than nonreligious reasons.” *Lukumi*, 508 U.S. at 537-538, 543. Likewise, “failing to prohibit nonreligious conduct that endangers” the government’s asserted interest “in a similar or greater degree” than re-

ligious conduct demonstrates underinclusivity that triggers strict scrutiny. *Id.* at 543. By failing to regulate secular conduct that similarly undermines its interests, the government impermissibly treats that secular conduct as more important than religious exercise.

Applying those principles, *Tandon* held that a California COVID-19 law limiting in-home gatherings, including religious gatherings, to three households was not generally applicable and failed strict scrutiny. 593 U.S. at 63-64. Other provisions of California’s law allowed more than three households to gather at “hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants.” *Id.* at 63. *Tandon* considered those out-of-home commercial secular gatherings—not just in-home secular gatherings—to be comparable to in-home religious gatherings because all of those activities posed similar risks to California’s asserted interest in combatting the spread of COVID-19. *Ibid.* And *Tandon* deemed it irrelevant whether the government “treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.” *Ibid.* Rather, whenever the government creates a “favored class,” it “must justify why houses of worship” (or other religious entities) “are excluded from that favored class.” *Cuomo*, 592 U.S. at 29 (Kavanaugh, J., concurring).

Similarly, *Kennedy* held that a school district policy requiring coaches to supervise students post-game was not generally applicable and could not satisfy strict scrutiny. 597 U.S. at 526-527. The district allowed coaches to “visit with friends or take personal phone calls” after games—thereby permitting secular conduct that undermined its interest in adequate supervision—

yet restricted the petitioner’s ability to pray on the field. *Ibid.* No one suggested that those secular activities might be different insofar as it might be easier to supervise students while on the phone than while absorbed in prayer. This Court simply contrasted the district’s general interest in student supervision with the secular exceptions and the religious exercise. See *id.* at 527.

So too, *Lukumi* held that city and state public-health and animal-cruelty laws were not generally applicable and flunked strict scrutiny. See 508 U.S. at 526-528, 543. There, the city allowed “[m]any types of animal deaths or kills for nonreligious reasons,” including fishing, hunting, “[e]xtermination of mice and rats within a home,” and “euthanasia” of stray animals, plus certain small animal slaughter operations for nonreligious reasons. *Id.* at 543-545. Yet the city punished the Santeria faith’s ritual animal sacrifices. *Lukumi* did not parse whether the same animals were used in the prohibited religious rituals and the permitted secular animal killings, or whether the animals would experience comparable levels of suffering. The Court simply rejected the city’s assertion that “animal sacrifice is ‘different’ from the animal killings that [we]re permitted by law,” and deemed the ordinances so “underinclusive” with respect to the city’s asserted interests as to reveal unconstitutional animus. *Id.* at 544-545.

2. Applying those principles here, the secular preferences that Colorado allows are alone enough to show that its equal-opportunity mandate is not generally applicable. Colorado requires that preschools participating in its preschool subsidy program “provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious

affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.” Colo. Rev. Stat. § 26.5-4-205(2)(b) (2022). But Colorado allows some secular preferences involving those protected characteristics—preschools can prefer low-income students to higher-income ones, or prefer disabled over non-disabled students. Pet. App. 8a; 8 Colo. Code Regs. § 1404-1:4.110 (2025). Meanwhile, Colorado requires participating religious preschools to refrain from using enrollment preferences based on families’ willingness to adhere to the schools’ religious tenets (for petitioners, admitting only families who will respect Catholic teachings on sex and gender).

Colorado’s secular preferences are comparable to petitioners’ religious exercise. Again, comparability turns upon the state’s stated objectives. *Tandon*, 593 U.S. at 62; *Kennedy*, 597 U.S. at 526. Here, that is ensuring that children have across-the-board, “equal access” to state-funded preschools and “equal opportunity, regardless of protected-class status” to receive state-funded preschool services. Resp. C.A. Br. 44-45; see *id.* at 1, 13, 59; see also Colo. Rev. Stat. § 26.5-4-204(1)(a) and (d); 8 Colo. Code Regs. § 1404-1:4.104(A)(4). As the court of appeals acknowledged, “the record indicates the Colorado General Assembly passed, and the Department implemented, the nondiscrimination requirement to prevent discrimination on *any* grounds, secular or religious.” Pet. App. 28a (emphasis added); see also *id.* at 47a.

But granting preferences based on income and disability undermines the law’s otherwise universal aim of even-handedness. An exemption that denies equal access on *any* ground covered by the equal-opportunity mandate—whether it is a preference for families of a

particular faith, race, ethnicity, etc.—necessarily undermines the stated purpose of uniform, equal opportunity for all. Cf. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023). Having departed from universal even-handedness when it comes to some protected characteristics (income and disability), Colorado cannot claim that allowing Catholic preschools to apply a religious preference that may exclude families based on LGBT status would uniquely undermine its interests.

3. Respondents’ and the court of appeals’ contrary view lacks merit.

Respondents contend that preferences for low-income families or disabled students are not comparable because those preferences “do not deny equal opportunity in violation of the statute.” See Br. in Opp. 20 n.4; see also Pet. App. 38a-40a. That is a strained statutory interpretation given that Colorado requires preschools to admit students “regardless of” *all* the identified characteristics. Colo. Rev. Stat. § 26.5-4-205(2)(b).

Regardless, the Free Exercise Clause’s guarantee of equal treatment “transcends the bounds between particular ordinances, statutes, and decrees,” and a “myopic focus solely on the provision that regulates religious conduct” would “allow for easy evasion” of that guarantee. *Monclova Christian Academy v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477, 481 (6th Cir. 2020). What matters is whether secular conduct is treated better than comparable religious conduct—regardless of whether that favorable treatment results from falling outside the scope of a requirement or being expressly exempt. See *Kennedy*, 597 U.S. at 526; *Cuomo*, 592 U.S. at 29 (Kavanaugh, J., concurring). Otherwise, states could use “clever drafting” to “divvy up [their] exemp-

tion regimes” and avoid strict scrutiny, *Smith v. City of Atlantic City*, 138 F.4th 759, 772 (3d Cir. 2025).

Thus, it was immaterial in *Tandon* that California restricted at-home gatherings (including religious gatherings) under one provision, while another provision allowed secular businesses to reopen on a larger scale. Although secular businesses were not subject to the at-home restrictions, allowing people to congregate at secular businesses still undermined California’s asserted interest in preventing the spread of COVID-19 in a similar way. Likewise, a hypothetical law prohibiting differential treatment based on LGBT status only in school admissions would not be generally applicable if schools were still permitted to apply preferences for LGBT students in extracurricular activities.

The court of appeals similarly erred in concluding that Colorado’s income- and disability-based preferences were not “comparable” to petitioners’ faith-based preferences because each protected characteristic in Colorado’s equal-opportunity mandate purportedly addresses different “barriers to equal access,” with income and disability status being particularly “unique.” Pet. App. 38a-40a. The court of appeals instead viewed Colorado’s mandate that preschools offer equal access regardless of sexual orientation and transgender identification as aimed at “eras[ing] barriers to equal access caused by social stigma”—an interest that preferences for low-income and disabled students “simply do not” undermine. *Id.* at 39a.

That approach improperly cabins comparability. Any exemption from an equal-opportunity requirement—whether “based on gender, race, or faith”—poses an “identical risk” when the government’s stated interest is ensuring equal access. *Fellowship of Christian Ath-*

letes v. San Jose Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 689 (9th Cir. 2023) (en banc) (*FCA*). In this context, there is “no meaningful constitutionally acceptable distinction” between different forms of preferential treatment that can distinguish one form of preferential treatment from others. *Ibid.* Even accepting the notion that certain forms of differential treatment are acceptable because they serve the secular objective of overcoming “barriers to equal access,” Colorado cannot permit departures from its equal-opportunity principle to serve that secular goal while rejecting faith-based departures.

The court of appeals’ approach also improperly substitutes fine-grained, post hoc distinctions among preferences for Colorado’s stated interest in its law. “[T]his Court has made plain that only the government’s *actually asserted* interests as applied to the parties before it count—not *post-hoc* reimaginings of those interests expanded to some society-wide level of generality.” *Does 1-3 v. Mills*, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief).

B. The Case-By-Case Catchall Preference Independently Defeats General Applicability

1. Colorado’s law is also not generally applicable because its case-by-case preference scheme “‘invites’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions.’” *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884) (brackets omitted). “[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Smith*, 494

U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

That principle again tracks broader Free Exercise concepts. A “mechanism for granting exemptions” inherently undermines general applicability, “because it ‘invites’ the government to decide which reasons for not complying with the policy are worthy of solicitude.” *Fulton*, 593 U.S. at 537 (quoting *Smith*, 494 U.S. at 884) (brackets omitted). Discretionary exemptions of course fall within this category—but any “individualized governmental assessment of the reasons for the relevant conduct,” *Smith*, 494 U.S. at 884, discretionary or not, would suffice, *Fulton*, 593 U.S. at 537; see *FCA*, 82 F.4th at 687 (rejecting a focus on only “‘unfettered’ discretion” as “overly narrow”). That is because, in undertaking individualized consideration, the government may not “devalue[] religious reasons” as inferior to “nonreligious reasons.” *Lukumi*, 508 U.S. at 537-538.

Applying these principles, *Fulton* held that Philadelphia’s rule prohibiting foster care agencies from refusing services to prospective foster or adoptive parents based on various protected characteristics was not generally applicable. 593 U.S. at 535. That prohibition purported to apply “unless an exception is granted by [the relevant official] * * * in his/her sole discretion.” *Ibid.* Because the provision “incorporates a system of individual exemptions,” the city could not “‘refuse to extend’” that system to allow petitioners’ religious exercise absent “‘compelling reason.’” *Ibid.* (citation omitted).

Likewise, *Lukumi* held that Florida’s animal-cruelty statute was not generally applicable for the additional reason that it involved “a system of ‘individualized governmental assessment of the reasons for the relevant conduct,’” 508 U.S. at 537 (quoting *Smith*, 494 U.S. at

884)—whether a person had “‘unnecessarily * * * kill[ed] any animal,’” *ibid.* (quoting Fla. Stat. § 828.12 (1987)) (emphasis added). “[B]ecause [the statute] requires an evaluation of the particular justification for the killing”—that is, whether the killing was “necessary”—the statute invited “individualized exemptions” from its “general requirement.” *Ibid.* Having done so, religious exemptions had to be available too. *Ibid.* Critically, it did not matter whether religious sacrifice was “necessary” under Florida law. Florida’s assessment that some types of killings were necessary, while religious sacrifice was not, triggered strict scrutiny.

Similarly, *Smith* itself emphasized that the unemployment-benefits schemes in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), called for individualized consideration of applicants’ reasons for unemployment. See *Smith*, 484 U.S. at 884. Those laws “provided that a person was not eligible for unemployment compensation benefits if, without good cause, he had quit work or refused available work.” *Ibid.* (citation omitted). “The ‘good cause’ standard,” *Smith* explained, “created a mechanism for individualized exemptions.” *Ibid.* Because the states “refuse[d] to extend that system to cases of ‘religious hardship,’” their laws were subject to strict scrutiny. *Ibid.* Again, those cases did not assess whether religious exercise met a state-law definition of “good cause,” or whether the causes the states accepted resembled the religious exercise at issue. The mere *existence* of individualized consideration undermined general applicability.

2. Here, Colorado’s preschool benefits program prohibits preferences based on specified characteristics as

a condition of participation—but it also creates a case-by-case mechanism for Colorado to recognize individual preschools’ requests for all sorts of other preferences. See pp. 6-7, *supra*.

That catchall preference constitutes a “system of individualized exemptions” that defeats general applicability. *Smith*, 494 U.S. at 884. The catchall preference allows preschools to request “an individualized addition to the list of preferences” that Colorado uses to match eligible preschools and families. Pet. App. 29a. The Department then decides case-by-case whether to allow the addition. That “‘mechanism for individualized exemptions’” thus “‘invites’ the government to consider the particular reasons for a person’s conduct,” taking the law outside *Smith*’s ambit. *Fulton*, 593 U.S. at 533 (brackets and citation omitted).

Colorado’s implementation of the catchall provision underscores that it operates as “a system of ‘individualized governmental assessment of the reasons for the relevant conduct.’” *Lukumi*, 508 U.S. at 537. Besides suggesting six preferences, including for “[f]amilies who receive a specific public benefit, such as housing assistance” or “[c]hildren interested in a STEM-focused education,” Colorado has also approved preschools’ hand-designed preferences 17 times. See p. 7, *supra*.

Assessing preschools’ requests necessarily involves individualized consideration of why the school seeks the preference; preschools must explain the basis for their requests. And one common reason Colorado invokes when declining requests is that the desired preference was “Not UPK[’s] intent”—demonstrating the Department’s discretion in considering additional preferences. C.A. Doc. 30-7, at 275, 277-278 (Aug. 15, 2024).

That sort of “individualized government assessment” empowers Colorado to “devalue[]” religious preferences as compared to nonreligious preferences, contrary to free exercise principles. *Lukumi*, 508 U.S. at 537-538. Colorado could approve or disapprove preferences consistent with a school’s vegetarian principles, socialist principles, or Flat Earth principles, at the expense of carnivorous, capitalist, or scientifically-oriented families. Having embarked on individualized consideration of preschools’ reasons for other exemptions, Colorado cannot deny a religiously grounded preference—even if that preference would not otherwise fall within the catchall provision.

3. Respondents and the court of appeals contend that Colorado has not yet used the provision to authorize preferences that would violate the equal-opportunity mandate and that the hypotheticals posed at trial were “unexpected[]” and unlikely. Pet. App. 31a-32a.

This Court in *Fulton* already rejected the argument that the availability of individualized exceptions is irrelevant unless the state has already granted some. There, Philadelphia disclaimed granting any discretionary exceptions to date. 593 U.S. at 537. No matter, this Court held: “The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it ‘invites’ the government to decide which reasons for not complying with the policy are worthy of solicitude.” *Ibid.* (brackets and citation omitted). And here, the catchall preference is hardly ripe for desuetude; Colorado has already approved 17 additional preferences. See p. 7, *supra*.

Respondents and the court of appeals suggest that because the catchall preference “cannot be used as an

exception to the nondiscrimination requirement,” there is no system of individualized consideration. Pet. App. 30a; Br. in Opp. 22-25; see 8 Colo. Code Regs. § 1404-1:4.109(A)(9)(b) and (B). But it is the *existence* of “individualized government assessment of the reasons for the relevant conduct” that undermines general applicability—not whether the assessment would actually consider religious grounds. *Smith*, 494 U.S. at 884; see *Fulton*, 593 U.S. at 537. Hence, *Sherbert*, *Thomas*, and *Lukumi* did not assess whether the state-law terms at issue (“good cause” and “necessity”) would have encompassed the plaintiffs’ religious exercise.

Regardless, the Department names a group defined by a protected characteristic—income—as an “example[] of approved preferences” under the catchall. 8 Colo. Code Regs. § 1404-1:4.109(A)(9)(c) (“families who are receiving a specific public assistance benefit(s) such as housing assistance”). Colorado responds that preferences *favoring* low-income or disabled children do not violate the equal-opportunity mandate. Br. in Opp. 17-21. But as explained, Colorado cannot claim general applicability when its law operates to treat protected characteristics differently, even if Colorado creatively interprets its law to authorize certain preferences for favored groups. See pp. 18-19, *supra*.

II. REGARDLESS, *SMITH* DOES NOT APPLY TO LAWS THAT RESTRICT PUBLIC BENEFITS BASED ON OTHERWISE LAWFUL RELIGIOUS EXERCISE

Colorado’s law triggers strict scrutiny for an additional, more fundamental reason: Laws that restrict access to generally available public benefits based on religious exercise fall outside the *Smith* framework. That was the rule before *Smith*, and this Court’s more recent cases make clear that strict scrutiny remains the appro-

priate standard in this context. Respondents and the court of appeals instead treat *Smith* as a near-universal default rule—an understanding at odds with *Smith* itself and with today’s Swiss-cheese-like panoply of *Smith* exceptions. Pet. Br. 22-26.

1. Before *Smith*, this Court applied strict scrutiny to assess whether various benefits programs violated plaintiffs’ Free Exercise rights. This Court’s landmark decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), distilled several basic principles:

First, laws that “force” religious adherents “to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to [receive benefits],” on the other, substantially burden religious exercise. *Sherbert*, 374 U.S. at 403-404.

Second, whether the operative restriction is facially neutral or singles out religious exercise for disfavor is immaterial. Cognizable burdens include “direct” prohibitions on religious practice and “indirect” measures that “impede the observance” of one’s faith. *Sherbert*, 374 U.S. at 405.

Third, benefits programs that effectively make foregoing religious exercise the price of obtaining public benefits must be “justified by a ‘compelling state interest’” and the government must show that “no alternative forms of regulation” would suffice. *Sherbert*, 374 U.S. at 403, 406, 407. *Sherbert* thus prescribed strict scrutiny as the governing rule: “[A] law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest.” *Fulton*, 593 U.S. at 556 (Alito, J., concurring in the judgment).

Before *Smith*, the Court applied this strict-scrutiny test to various public benefits programs—all of which burdened religious exercise indirectly rather than through express discrimination. See *Fulton*, 593 U.S. at 555-558 (Alito, J., concurring in the judgment) (canvassing cases). For instance, *Sherbert* held that South Carolina burdened religious exercise by putting Adell Sherbert to the choice of working on Saturdays—the Sabbath for Seventh-day Adventists—or forgoing unemployment benefits. 374 U.S. at 399, 402. Likewise, this Court held that Indiana unconstitutionally burdened Eddie Thomas’s religious exercise by forcing him to choose between working on armament production—something he believed his faith as a Jehovah’s Witness prohibited—or losing unemployment benefits. *Thomas*, 450 U.S. at 714-718.

Although *Smith* wrought a significant change in Free Exercise jurisprudence, *Smith* distinguished those cases rather than repudiating them. *Smith* held, in assessing an across-the-board criminal prohibition, that a “generally applicable and otherwise valid” rule does not violate the Free Exercise Clause “if prohibiting the exercise of religion * * * is not [its] object * * * but merely the incidental effect of” its operation. 494 U.S. at 878. Because Oregon had enacted a blanket criminal prohibition on using peyote—even for religious reasons—Oregon could use that neutral, generally applicable criminal prohibition as grounds for denying unemployment benefits to individuals who had violated that prohibition by smoking peyote during a religious ceremony. *Id.* at 878-879, 890.

Central to *Smith*’s reasoning was that Oregon restricted benefits based on underlying *conduct* that Oregon categorically criminalized. Indeed, when the Court

first granted review, it vacated and remanded the state court's decision due to "uncertain[ty]" about whether Oregon criminalized "religious use of peyote," and only accepted the case for further review when the state court clarified that this conduct was criminal. 494 U.S. at 875-876. *Smith* treated Oregon's criminalization of peyote use as pivotal. See *id.* at 878, 884. "Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional," *Smith* reasoned, "Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation." *Id.* at 890.

That facet was also essential to how *Smith* distinguished the *Sherbert* line of cases. *Smith* explained that in those benefits cases, "the conduct at issue * * * was not prohibited by law," and the Court "held that distinction to be critical." 494 U.S. at 876. While reserving whether *Sherbert* and its progeny could truly be "limited" to the unemployment-benefits context, *Smith* insisted that those cases "at least have nothing to do with an across-the-board *criminal* prohibition on a particular form of conduct," and "conclude[d]" that the "sounder approach" was to "hold the [*Sherbert*] test inapplicable to *such* challenges." *Id.* at 884 (emphases added). Where cases involve "the government's ability to enforce generally applicable prohibitions of socially harmful conduct," *Smith* reasoned, government policy "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Ibid.* *Smith* thus limited its holding to "generally applicable criminal laws," while purporting to leave the *Sherbert* line of cases undisturbed: "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it

to require exemptions from a generally applicable criminal law.” *Ibid.*³

Thereafter, lower courts expanded *Smith* into a near-universal default standard—including in the very public-benefits contexts that *Smith* had distinguished. See, e.g., *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-473 (8th Cir. 1991) (“In *Smith*, the Court held that a neutral law of general applicability that incidentally impinges on religious practice will not be subject to attack under the free exercise clause.”); Pet. Br. 26-27. The conventional understanding of *Smith* became that “the First Amendment’s Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice.” *Fulton*, 593 U.S. at 545 (Alito, J., concurring in the judgment); see *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025).⁴

³ Indeed, *Smith* distinguished between unlawful and lawful conduct 19 times and framed the case as a dispute about whether “the illegality of respondents’ peyote consumption was relevant to their constitutional claim.” 494 U.S. at 875. See, e.g., *id.* at 874 (“This case requires us to decide whether the Free Exercise Clause * * * permits the State of Oregon to include religiously inspired peyote use within the reach of its *general criminal prohibition*.”) (emphasis added); *id.* at 884-885 (“[w]e conclude today that * * * the [*Sherbert*] test [is] inapplicable” to “an *across-the-board criminal prohibition*”) (emphasis added); *id.* at 878-879 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law *prohibiting conduct* that the State is free to regulate.”) (emphasis added).

⁴ This Court has at times applied *Smith*’s framework to laws other than across-the-board criminal prohibitions—almost invariably finding that the challenged laws fail either general applicability or neutrality. E.g., *Fulton*, 593 U.S. at 533; *Kennedy*, 597 U.S. at 525; cf. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 363-364 (3d Cir.) (Alito, J.), cert. denied, 528 U.S. 817 (1999). But the

This Court’s more recent precedents repudiate that overbroad reading. Regardless of whether *Smith* retains any vitality, *Smith* has no force in the public-benefits context, when the government restricts benefits based on lawful religious exercise and not on already-criminal conduct. There, *Sherbert* continues to supply the operative framework of strict scrutiny.

This Court confirmed as much in *Carson*, which drew directly from *Sherbert* to identify the relevant “principles” applicable to public-benefits rules that burden religious exercise. *Carson* invoked *Sherbert* for the proposition that “a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits,” including “by the denial of or placing of conditions upon a benefit or privilege.” 596 U.S. at 778. *Carson* showcased *Sherbert*’s facts: “A State may not withhold unemployment benefits, for instance, on the ground that an individual lost his job for refusing to abandon the dictates of his faith”—there, the “Seventh-day Adventist who refused to work on the Sabbath,” and in *Thomas*, 450 U.S. 707, the “Jehovah’s Witness who refused to participate in the production of armaments.” *Carson*, 596 U.S. at 778.

Carson thus makes clear that when laws force someone to choose between obtaining a generally available public benefit and engaging in otherwise lawful religious exercise, *Sherbert*—not *Smith*—applies. Hence, the Maine tuition assistance program in *Carson* was “subject to the free exercise principles governing *any such public benefit program*.” 596 U.S. at 785 (emphasis added).

Court has not expressly held that *Smith* applies outside its stated context nor justified doctrinal expansions to disparate contexts.

Other recent precedents reinforce that “when the government chooses to provide public benefits, it may not ‘condition the availability of those benefits’” on “parents’ willingness to accept a burden on their religious exercise.” *Mahmoud*, 606 U.S. at 561 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)). That is because “[t]he Free Exercise Clause protects against even ‘indirect coercion,’ and a State ‘punishes the free exercise of religion’ by disqualifying the religious from government aid.” *Espinoza v. Mont. Dep’t of Rev.*, 591 U.S. 464, 478 (2020) (citation omitted).

Those principles dictate that strict scrutiny, not *Smith*, applies here. Like Maine’s tuition assistance program and Indiana’s and South Carolina’s unemployment-benefits programs, Colorado has created a public-benefits program—here, a universal preschool subsidy program. And, as in *Sherbert* itself, though facially neutral, Colorado’s program substantially burdens religious exercise by forcing Catholic preschools to choose between violating their faith (by admitting families who do not adhere to core religious tenets) or forgoing a subsidy.

Finally, as in prior benefits cases, Colorado is penalizing underlying religious conduct that is not itself illegal. Religious preschools in Colorado can lawfully exclude families whose beliefs are incompatible with the Catholic faith, including beliefs about same-sex marriage or transgender identity—and doing so unquestionably qualifies as religious exercise. See p. 8, *supra*. Religious preschools in Colorado just cannot engage in that religious exercise if they want to obtain Colorado’s universal preschool subsidy. This case thus falls squarely within *Smith*’s own distinction between public-benefits cases involving backdoor penalties for lawful

religious exercise and an “across-the-board criminal prohibition on a particular form of conduct.” 494 U.S. at 884.

2. Further buttressing the case for strict scrutiny, this Court has long recognized “there are areas of conduct protected by the Free Exercise Clause * * * and thus beyond the power of the State to control, even under regulations of general applicability,” and “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.” *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

One such area is parents’ religious exercise in shaping their children’s religious upbringing. “[F]or many people of faith * * * there are few religious acts more important than the religious education of their children.” *Mahmoud*, 606 U.S. at 547. This Court thus recently held that *Smith* does not apply “when a law imposes a burden” on religious exercise “of the same character as that in *Yoder*.” *Id.* at 564. If a law “substantially interfer[es] with the religious development of the child” or “pose[s] ‘a very real threat of undermining’ the religious beliefs and practices the parent wishes to instill,” then strict scrutiny applies. *Id.* at 556 (citation omitted).

This Court accordingly applied strict scrutiny to hold unconstitutional Wisconsin’s denial of Amish parents’ request for an exemption from a mandate that all children attend school until age 16, citing the severe burden on their ability to instill their faith in their children. *Yoder*, 406 U.S. at 211-212. This Court likewise applied strict scrutiny to hold that Montgomery County’s refusal to provide notice and opt-outs from its “LGBTQ+

inclusive” storybook curriculum in public schools violated religious parents’ Free Exercise rights. *Mahmoud*, 606 U.S. at 550. And this Court has explained that California policies promoting the “unconsented facilitation of a child’s gender transition” “likely trigger strict scrutiny * * * because they substantially interfere with the ‘right of parents to guide the religious development of their children.’” *Mirabelli v. Bonta*, 607 U.S. 492, 496 (2026) (citation omitted).

That principle—that strict scrutiny applies whenever a law seriously burdens parents’ religious exercise in guiding their children’s religious upbringing—should equally extend to religious schools and institutions here. The “burden” on religious exercise here is “of the same character as that in *Yoder*,” *Mahmoud*, and *Mirabelli*. *Mahmoud*, 606 U.S. at 564. Indeed, Colorado’s law burdens religious groups’ religious exercise in directing children’s religious upbringing in ways that are indistinguishable from burdens on parents’ religious exercise. “Religious education is vital to many faiths practiced in the United States.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 754 (2020). For Catholics like petitioners, “religious education is ‘intimately bound up with the whole of the Church’s life;’” the same is true of many other faith traditions. *Ibid.* (quoting *Catechism of the Catholic Church* 8 (1994)).

Here, Colorado’s program “operates to identify and exclude otherwise eligible schools” like the petitioner preschools “on the basis of their religious exercise.” *Carson*, 596 U.S. at 789. Disqualifying petitioners from a public benefit due to their “religious practices of ensuring that all enrolling families are supportive of the Catholic Church’s teachings on sex and marriage and of treating enrolled four-year-olds in accordance with

their biological sex,” Pet. Br. 29-30, penalizes those religious practices. That burden is particularly severe because, to participate in Colorado’s program, religious schools would have to compromise their ability to ensure that their preschool community adheres to their faith and would instead be forced to enroll students at odds with that faith. *Id.* 30-31. Neither history nor precedent offers any sound reason to treat religious institutions’ religious exercise in educating children in a faith as any less deserving of solicitude than parents’ similar religious exercise.

Treating religious institutions as second-class citizens subject to *Smith*’s lax standard is also unworkable and illogical. Laws restricting religious schools from accessing public benefits “burden[] not only religious schools but also the families whose children attend or hope to attend them.” *Espinoza*, 591 U.S. at 486. And if a state required all schools—secular and religious—to teach an “LGBTQ+ inclusive” curriculum like the one in *Mahmoud*, it would be nonsensical to apply strict scrutiny to public-school parents’ Free Exercise claims, yet apply *Smith* to religious schools’ claims.

3. Respondents and the court of appeals would instead extend *Smith* whenever the law at issue does not “‘target[] religious status and religious use on the explicit basis that they were religious.’” Br. in Opp. 37-38 (quoting Pet. App. 19a-22a).

That capacious reading of *Smith* is irreconcilable with *Carson*, which continued to apply the *Sherbert* line of public-benefits cases without limiting them to restrictions that explicitly exclude religious people or institutions. That is why *Carson* described its general framework as flowing from *Sherbert* and its progeny. See pp. 30-31, *supra*. And that is why, in rejecting the

possibility that states could exclude religious schools by funding only the “‘rough equivalent’” of a public-school education, *Carson* emphasized that its holdings “turn[] on the substance of free exercise protections, not on the presence or absence of magic words.” 596 U.S. at 785 (citation omitted).

True, the laws at issue in *Carson*, *Espinoza*, and *Trinity Lutheran* facially excluded at least some religious entities. See *Carson*, 596 U.S. at 774-775 (tuition assistance only for “nonsectarian” schools); *Espinoza*, 591 U.S. at 470 (prohibition on scholarships at schools “owned or controlled * * * by any church, religious sect, or denomination”); *Trinity Lutheran*, 582 U.S. at 455 (“strict and express policy of denying grants to any applicant owned or controlled by” any “religious entity”). But the Court’s reasoning did not begin and end with express religious discrimination. Rather, the Court repeatedly invoked general principles—foremost, that the Constitution’s prohibition on barring religious entities from participating in public benefits programs “applies fully whether the prohibited discrimination is in an express provision * * * or in a party’s reconceptualization of the public benefit.” *Carson*, 596 U.S. at 785. Regardless, respondents’ and the court of appeals’ approach cannot explain this Court’s application of strict scrutiny in *Mahmoud*, where Montgomery County’s requirement that schools teach its “LGBTQ+ curriculum” did not expressly single out religious students. 606 U.S. at 550.

If the *Carson* line of cases covered only “laws that target[] ‘religious status’ and ‘religious use’ on the explicit basis that they were religious and not secular,” Pet. App. 21a, Free Exercise protections would be “reduced to a simple semantic exercise.” *Carson*, 596 U.S.

at 784 (quoting *Agency for Int’l Dev. v. Alliance for Open Society Int’l, Inc.*, 570 U.S. 205, 215 (2013)). Laws mandating that schools receive tuition assistance payments only if they held classes on Saturdays would face only rational-basis review, no matter how many religious schools would be excluded if they were unwilling to violate the Sabbath. So too for laws requiring schools to serve pork or beef as a condition of receiving school-lunch benefits.

Those hypothetical laws could be characterized as neutral and generally applicable—yet would put religious schools to impossible choices, forcing them to give up core religious exercise as the price of participating in benefits programs available to everyone else. Those laws would “operate[] to identify and exclude otherwise eligible schools on the basis of their religious exercise.” *Carson*, 596 U.S. at 789. That they would do so indirectly, by prohibiting particular religious conduct, rather than by broadcasting that religious entities need not apply, would not eliminate the free exercise problem.

Finally, this Court has already rejected respondents’ suggestion (Br. in Opp. 37-38) that burdens on religious exercise do not qualify unless they require schools to “surrender their religious character.” Montgomery County made a similar argument in *Mahmoud*, contending that because using the “LGBTQ+ inclusive” storybooks did not “*compel* children to depart from the religious practices of their parents,” strict scrutiny was inapplicable. 606 U.S. at 548. This Court rejected that watering down of Free Exercise protections: “[T]he Free Exercise Clause protects against policies that impose more subtle forms of interference with the religious upbringing of children.” *Ibid.*

* * *

For multiple independent reasons, Colorado's law is subject to strict scrutiny, not *Smith's* lesser standard, and cannot pass muster. See Pet. Br. 48-52. The substantial burden on religious schools' ability to engage in core religious exercise is patent. The law's myriad exceptions belie any compelling state interest in uniform, even-handed admissions criteria. And Colorado's failure to accommodate religious preschools undermines, not promotes, its stated interest in "equal access."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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