

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.*,
Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit*

**BRIEF OF FIRST AMENDMENT SCHOLARS AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
PRAVEEN FERNANDES
DAVID H. GANS
JOSHUA D. BLECHER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1730 Rhode Island Ave. NW
Suite 1200
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

August 24, 2026

* Counsel of Record

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INTEREST OF *AMICI CURIAE*¹

Amici are law professors who have taught courses in constitutional law and devoted significant attention to studying the First Amendment. A full list of *amici* appears in the Appendix.

**INTRODUCTION AND
SUMMARY OF ARGUMENT**

Colorado administers a universal preschool program (UPK) that offers free preschool for four-year-olds statewide. Private preschools that participate in the voluntary program—whether secular or religious—receive taxpayer funds to cover the costs of educating these students. To participate, eligible preschools must abide by the UPK program’s nondiscrimination policy, which requires that preschools not discriminate against either children or parents based on, among other traits, sexual orientation or gender identity. This requirement applies to all preschools participating in Colorado’s UPK program, and there is no pathway for any preschool to be exempted from the program’s ban on discrimination based on sexual orientation or gender identity.

Petitioners are two Catholic parishes that each run (or ran) a preschool; the Archdiocese of Denver; and two parents with preschool-age children. They allege that the preschools cannot comply with the UPK program’s nondiscrimination policy because of their religious beliefs, and they argue that the

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

nondiscrimination requirement thus violates the Free Exercise Clause by excluding preschools and families from receiving state benefits because of their religion.

If accepted by this Court, Petitioners' claims would mark a sea change in longstanding First Amendment principles. The First Amendment states that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. Although the Clause does not permit the government to burden religious practice without justification, this Court has never held—in fact, has expressly declined to hold—that individuals' religious views can provide a justification for violating neutral, generally applicable nondiscrimination provisions. To now hold otherwise would hollow out such nondiscrimination provisions, making them protections in name only, and would force state governments to fund discriminatory acts carried out under their auspices.

As *amici* know, such an expansive interpretation of the Free Exercise Clause conflicts with Founding-era history, as well as decades of this Court's precedents. To begin, historical evidence shows that individuals cannot ignore neutral and generally applicable laws, notwithstanding their right to exercise their own religion. Several Founding-era state constitutions included provisions that protected the free exercise of religion, but also made clear that individuals could not violate the peace and safety of other citizens when exercising their religion. Some of those provisions expressly noted that free-exercise protections did not entitle individuals to violate civil laws. Moreover, during the First Congress, legislators debated whether to include provisions in the Second Amendment and the Militia Bill that would expressly exempt conscientious objectors, suggesting that those

legislators believed exemptions were something the *legislature* could provide as a policy matter but were not constitutionally required. In this vein, James Madison declared that Americans deserve “immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace.” Letter from James Madison to Edward Livingston (July 10, 1822), in *Selected Writings of James Madison* 304, 306 (Ralph Ketcham ed., 2006).

Reflecting that history, cases predating this Court’s decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), made clear that “activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare,” *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). As this Court put it, “[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.” *Gillette v. United States*, 401 U.S. 437, 461 (1971).

Thus, before *Smith*, this Court held that “[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.” *Bowen v. Roy*, 476 U.S. 693, 699 (1986). And also before *Smith*, this Court repeatedly held that antidiscrimination laws satisfy even strict scrutiny because eradicating discrimination is a compelling government interest that cannot be achieved without banning it outright. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (describing the government’s “fundamental, overriding interest in eradicating racial

discrimination in education”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 628 (1984) (noting that a law barring sex discrimination “plainly serves compelling state interests of the highest order,” “even if enforcement . . . causes some incidental abridgment of [a party’s] protected speech”).

Smith built upon these earlier cases that balanced individuals’ interests in exercising their religious beliefs against the government’s interest in enforcing generally applicable laws. There, this Court held that if burdening religious exercise “is not the object of [a law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended,” *Smith*, 494 U.S. at 878, and permitted Oregon to enforce the consequences of violating state drug laws even when the drug use was religiously motivated, *see id.* at 890. As the Court has since elaborated, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Thus, as four members of the *Smith* Court recognized, the Free Exercise Clause “does not ‘require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development.’” *Smith*, 494 U.S. at 900 (O’Connor, J., concurring in the judgment) (quoting *Bowen*, 476 U.S. at 699; and then citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988)).

Nor do cases this Court decided after *Smith* compel a different approach. Those cases deal primarily with scenarios in which—unlike the neutral and generally applicable policy at issue in *Smith*—government

entities expressly targeted institutions or individuals for differential treatment based on religion, *see, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017); *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 476 (2020); *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 789 (2022), or seemed to betray anti-religion animus, *see, e.g., Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 634-35 (2018). Colorado’s UPK program is also not beset by the “myriad exceptions and accommodations for comparable activities” that this Court has found objectionable in other contexts that treat “secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 593 U.S. 61, 62, 64 (2021) (*per curiam*). And recent free-exercise cases upholding challenges to general government policies have arisen in contexts, like direct classroom instruction, in which this Court highlighted fact-specific concerns about state coercion. *See Mahmoud v. Taylor*, 606 U.S. 522, 554-55, 557 (2025). Moreover, well after *Smith*, this Court has continued to acknowledge that eradicating discrimination constitutes a “weighty” government interest. *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021).

Thus, under this Court’s precedents, when “followers of a particular sect enter into commercial activity as a matter of choice”—like running a preschool that seeks to join Colorado’s UPK program—“the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” *United States v. Lee*, 455 U.S. 252, 261 (1982). As a result, Petitioners do not have a First Amendment right to obtain an exemption from Colorado’s policy prohibiting publicly

funded preschools from discriminating against parents and children based on their sexual orientation or gender identity. Once Colorado has chosen to require the secular and religious preschools it funds to consider applications from families regardless of those protected traits, Petitioner preschools—like all other preschools—must comply with that requirement if they wish to participate in the UPK program. This Court has repeatedly stated that the least restrictive means of achieving the compelling governmental interest of eradicating discrimination is to prohibit discrimination across the board. And that is exactly what Colorado has done here.

ARGUMENT

I. Founding-Era History Does Not Support Petitioners’ Claim that the Free Exercise Clause Ordinarily Allows Individuals to Violate Neutral and Generally Applicable Laws.

The First Amendment states that “Congress shall make no law . . . prohibiting the free exercise” of religion. U.S. Const. amend. I. Historical evidence from the Founding era suggests that “late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws.” Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 916 (1992); cf. Mark Storslee, *Free Exercise and Funding*, 101 Notre Dame L. Rev. 101, 135 & n.164 (2026) (citing scholarly agreement that, at minimum, the Founding-era right barred “penalties based on religion”). As Thomas Jefferson explained, while individuals have “rights of conscience” under the

First Amendment, an individual “has no natural right in opposition to his social duties.” Letter from Thomas Jefferson to a Comm. of the Danbury Baptist Ass’n (Jan. 1, 1802).

First, by 1789, a number of state constitutions included provisions protecting the free exercise of religion, but most of those provisions included “caveats [that] reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions.” Hamburger, *supra*, at 918. Some constitutions did so explicitly: Maryland’s 1776 constitution provided that “no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the *good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights.*” Md. Declaration of Rts. of 1776, art. XXXIII (emphasis added). Thus, Maryland’s constitution specifically noted that a person’s religious beliefs could not be used to secure an exemption from laws protecting others’ civil rights.

Similarly, both New York’s 1777 constitution and South Carolina’s 1790 constitution provided that “free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed . . . : *Provided*, That the liberty of conscience . . . shall not be so construed as to excuse *acts of licentiousness*, or justify practices inconsistent with the peace or safety of this State.” N.Y. Const. of 1777, art. XXXVIII; S.C. Const. of 1790, art. VIII, § 1 (second emphasis added). An act of licentiousness meant an act in “contempt of the just

restraints of law, morality and decorum.” *Licentiousness*, 2 *An American Dictionary of the English Language* (Noah Webster ed., 1st ed. 1828). These state provisions thus did not permit religious adherents to gain exemptions from “just restraints of law.” See R.I. & Providence Plantations Charter of 1663 (providing religious freedom so long as religious adherents do not “use[] this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbance of others”).

Other constitutions emphasized that rights to religious freedom could not be used to disturb public peace or safety. See, e.g., N.H. Const. of 1784, pt. I, art. V (“Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason” and may not be “hurt, molested, or restrained in his person” for doing so, “provided he doth not *disturb the public peace*, or disturb others, in their religious worship.” (emphasis added)).² Though some commentators have suggested that these provisions only prevented individuals from violating “a narrower subcategory of the general laws,” such as “breach[ing] public peace or safety,” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1462 (1990), that

² See also Ga. Const. of 1777, art. LVI (“All persons whatever shall have the free exercise of their religion; provided it *be not repugnant to the peace and safety of the State*.” (emphasis added)); Del. Declaration of Rts. & Fundamental Rules of 1776, § 3 (providing freedom of religion “unless, under colour of religion, any man *disturb the peace, the happiness or safety of society*” (emphasis added)); Northwest Ordinance of 1787, art. I (“No person, *demeaning himself in a peaceable and orderly manner*, shall ever be molested on account of his mode of worship or religious sentiments in the said territory.” (emphasis added)).

interpretation does not accord with the definition of “peace” at the time. In the legal context, “peace” meant “[p]ublic tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the *peace*; to break the *peace*.” *Peace*, 2 *An American Dictionary of the English Language*, *supra*; see *Hamburger*, *supra*, at 918 (“[E]very breach of law is against the peace.” (quoting *R v. Lane* (1704) 87 Eng. Rep. 884, 885 (QB))). As one commentator has pointed out, “the criminal offenses over which common law courts had jurisdiction were said to be ‘*contra pacem*,’” so “the phrase ‘*contra pacem*’ became associated with the notion of violation of law.” *Id.* By referencing “peace,” then, these caveats effectively prevented individuals from using religious beliefs to gain exemptions from civil laws.

In addition, many of the caveats to state free-exercise provisions made explicit that religious adherents should be treated exactly the same as others, provided that they did not disturb public peace or safety. New Jersey’s 1776 constitution, for instance, provided that “all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, . . . shall fully and freely enjoy every privilege and immunity, *enjoyed by others their fellow subjects*.” N.J. Const. of 1776, art. XIX (emphasis added). And Delaware’s 1776 constitution provided that Christians shall “enjoy *equal rights and privileges* in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society.” Del. Declaration of Rts. & Fundamental Rules of 1776, § 3 (emphasis added). These constitutions did not provide that religious adherents were entitled to special exemptions from neutral and

generally applicable laws. *See* McConnell, *supra*, at 1464 (explaining that references to “the government’s right to protect public peace and safety” in state constitutions showed “that a believer ha[d] no license to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side”).

To be sure, not all state constitutions addressed the limits of religious freedom. *See, e.g.*, Va. Bill of Rts. of 1776, § 16. However, the vast majority of state constitutions included some caveat making clear that religious adherents must comply with at least some generally applicable laws. Thus, to the extent it is “reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses,” *City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O’Connor, J., dissenting); *see* McConnell, *supra*, at 1456 (“[S]tate constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term ‘free exercise of religion’ meant what it had meant in their states.”), these provisions indicate that the First Amendment does not allow individuals to invoke religious beliefs to avoid complying with civil laws.

Second, debates during the First Congress demonstrate that while some legislators believed that accommodations for religious adherents might be good policy, they did not understand the Free Exercise Clause to require such accommodations. *See* Vincent Phillip Muñoz, *Religious Liberty and the American Founding* 231 (2022) (noting that the Free Exercise

Clause barred only “regulating, punishing, prohibiting or mandating religious beliefs or exercises *on account of their religious character or for religious reasons*” rather than also requiring exemptions from general laws (emphasis added in part)). For instance, when Congress was considering the federal Bill of Rights, it considered including a clause in the Second Amendment specifying that “no person, religiously scrupulous, shall be compelled to bear arms.” *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 182 (Helen E. Veit et al. eds., 1991). This proposal generated considerable debate: some argued that religious objectors must pay money to avoid being required to bear arms in a militia, *id.* at 183, while others suggested that any exemptions should be crafted by the legislature, not baked into the constitutional text, *id.* at 184. Rep. Egbert Benson urged that a religious exemption “is no natural right” and would thrust the courts into “every regulation you make with respect to the organization of the militia,” such that any exemptions “ought to be left to the [legislature’s] discretion.” 1 *Annals of Cong.* 780 (1789) (Joseph Gales ed., 1834). In the end, the Senate rejected the religious-exemption clause. See Steven J. Heyman, *Reason and Conviction: Natural Rights, Natural Religion, and the Origins of the Free Exercise Clause*, 23 U. Pa. J. Const. L. 1, 111 (2021).

Similarly, when the First Congress considered a bill to organize the militia, there was robust debate over whether religious minorities should be granted the right to conscientiously object to military service. See *id.* at 110-15. Framers like James Madison believed that the bill should include a clause exempting “persons conscientiously scrupulous of bearing arms.” James Madison, *Speech in Congress*

(Dec. 22, 1790), in *Selected Writings of James Madison* 193, 193 (Ralph Ketcham ed., 2006). As Madison argued, an important American value was “secur[ing] the rights of conscience.” *Id.* His proposed amendment drew criticism from several colleagues who believed that conscientious objectors should not be given any exemption from military service and, in the end, it was rejected by an overwhelming margin. See Heyman, *supra*, at 112-15.

Notably, across both constitutional drafting and congressional debates, no one “suggest[ed] that the Free Exercise Clause itself would require” a religious exemption, *id.* at 115—let alone that some type of strict scrutiny would apply to generally applicable laws that impinged on religious practice. To the Founding generation that drafted the First Amendment, religious exemptions were within the discretion of lawmaking bodies to grant but were not constitutionally required.

In short, Founding-era history provides no support for Petitioners’ claim that religious adherents must receive exemptions from generally applicable laws that conflict with their religious practice.³ Nor do this Court’s precedents, as the next Section discusses.

³ Although Founding-era sources may support a claim that government action that targeted religion was viewed as impermissible, those sources do not support the distinct claim that there is a constitutional right to be exempt from generally applicable laws protecting the welfare of the citizenry.

II. This Court Has Long Recognized that Individuals' Free-Exercise Rights Must Be Balanced Against Government Interests in Protecting Public Health, Safety, and Welfare.

Though the Free Exercise Clause “protects religious observers against unequal treatment’ and against ‘laws that impose special disabilities on the basis of religious status,” *Espinoza*, 591 U.S. at 475 (quoting *Trinity Lutheran*, 582 U.S. at 458, 461), this Court has repeatedly explained—in *Smith* and in cases both before and after it—that the government has substantial latitude to regulate conduct in a neutral fashion, even if doing so may indirectly burden religious practice.

1. For over a century, this Court has explained that although the First Amendment does not permit the government to burden religious practice without justification, it also does not grant individuals an exemption from every law that indirectly burdens religious activity. Rather, again and again in the decades preceding *Smith*, this Court held that religious beliefs must sometimes give way to generally applicable laws when those laws further valid government interests.

For instance, in *Prince v. Massachusetts*, this Court held that the First Amendment does not grant individuals who wish their children to sell religious magazines on the street an exemption from child-labor laws. 321 U.S. 158, 168-69 (1944). The Court acknowledged the “obviously earnest claim for freedom of conscience and religious practice,” *id.* at 165, but explained that the “rights of religion” are not “beyond limitation” and “regulation in the public interest,” *id.*

at 166. With regard to child-labor laws, the Court concluded that “[i]t is too late now to doubt that legislation appropriately designed to reach [that] evil[] is within the state’s police power,” even against a parent’s claim “that religious scruples dictate contrary action.” *Id.* at 168-69.

This Court reiterated that principle in *Braunfeld v. Brown*. There, a plurality upheld a Pennsylvania ban on Sunday labor even though the law economically disadvantaged people whose religious day of rest fell on Saturday. 366 U.S. 599, 609 (1961) (plurality opinion). The plurality explained that “if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State’s secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.” *Id.* at 607. This rule made sense, in the Court’s view, because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” so it “cannot be expected . . . that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others.” *Id.* at 606.

In *Gillette v. United States*, this Court upheld the military draft as applied to individuals with religious objections to certain wars, explaining that “[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.” 401 U.S. at 461. The Court explained that conscription laws “are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position.” *Id.* at 462.

Any “incidental burdens” on religion are “justified by substantial governmental interests that relate directly to the very impacts questioned.” *Id.*; see *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (recognizing that someone “may be compelled, by force if need be, against his will and without regard to his . . . religious or political convictions, to take his place in the ranks of the army of his country”).

And this Court in *United States v. Lee* held that the government could require Amish people to pay Social Security taxes even though the payment of those taxes conflicted with their religious beliefs. 455 U.S. at 254. The Court explained that “[n]ot all burdens on religion are unconstitutional” and that “[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.” *Id.* at 257, 259; see *id.* at 261 (“[E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.”). Although the Court suggested a searching standard of review, see *id.* at 257-58 (requiring the government to “justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest”), it readily upheld the law, reasoning that “[t]he tax system could not function” if it were challengeable “because tax payments were spent in a manner that violates . . . religious belief,” *id.* at 260. Thus, “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” *Id.* at 261.

The principle that individuals' free-exercise rights must be balanced against countervailing governmental interests explains why this Court repeatedly recognized prior to *Smith* that the government retains substantial latitude to administer its own public programs without having to accommodate all individual beliefs. That is, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen*, 476 U.S. at 699. In *Bowen v. Roy*, the Court thus upheld the government's use of Social Security numbers to provide state benefits to individuals even if assigning them a number violated their religious beliefs. *Id.* at 701. As *Bowen* explained, "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate . . . the Government's internal procedures." *Id.* at 700; see *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").

Similarly, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court held that the Free Exercise Clause does not bar the government from permitting timber harvesting on federal land traditionally used for American Indian religious purposes. See 485 U.S. at 441-42. The Court explained that a "broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious

beliefs,” even as “[o]thers will find the same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion.” *Id.* at 452. For that reason, “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” *Id.* Rather, “[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.” *Id.*

Even when this Court has upheld challenges to government policies, it has reaffirmed the principle that not all laws must give way to religious beliefs. For example, in *West Virginia State Board of Education v. Barnette*, the Court held that Jehovah’s Witnesses could not be required to salute the American flag in school. 319 U.S. 624, 631, 642 (1943). Notably, the Court emphasized that “[t]he freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual” and that, if it did, such conflict would require a more careful analysis about “where the rights of one end and those of another begin.” *Id.* at 630.

And in *Wisconsin v. Yoder*, the Court held that the First Amendment required an exemption from compulsory-attendance laws where Amish religious beliefs dictated that children attend at-home vocational training rather than public high school. 406 U.S. at 234. Importantly, the Court acknowledged that “activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare.” *Id.* at 220. But in that case, “an additional one or two years of formal high school for Amish children in place of their long-

established program of informal vocational education would do little to serve th[e] interests” of the state to “prepare citizens to participate effectively and intelligently in our open political system.” *Id.* at 221-22.

Significantly, well before *Smith*, this Court repeatedly declared that, even under strict scrutiny, eradicating discrimination constitutes a paramount government concern—and that barring discrimination outright is the least restrictive method to achieve that goal.

In *Bob Jones University v. United States*, for instance, this Court held that religious schools could be denied tax-exempt status if they discriminated against racial minorities, even if they believed such discrimination was required by their religious beliefs. 461 U.S. at 604. The Court applied a heightened standard of review, *id.* at 603 (“[A] state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.” (quoting *Lee*, 455 U.S. at 257-58)), but concluded that “[t]he governmental interest at stake . . . is compelling” even under that exacting standard, *id.* at 604. “[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history”—that “substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.” *Id.*

The Court concluded that “[t]he interests asserted by [the religious schools] cannot be accommodated with that compelling governmental interest . . . and no

‘less restrictive means’ . . . are available to achieve the governmental interest.” *Id.* (citing *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)); see *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (treating as “patently frivolous” the claim that a nondiscrimination law is “invalid because it contravenes the will of God and constitutes an interference with the free exercise of the Defendant’s religion” (internal quotation marks omitted)).

Beyond the Free Exercise Clause, too, this Court has insisted that eradicating discrimination is a compelling government interest that can be accomplished only by prohibiting it outright.

This Court has thus held that the government can deny benefits to schools if they engage in discrimination. In *Runyon v. McCrary*, this Court held that a federal law prohibiting racial discrimination in contracting constitutionally barred private schools from choosing students on the basis of race. 427 U.S. 160, 176-77 (1976). *Runyon* acknowledged that “it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions,” but declared that “it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.” *Id.* at 176; see *id.* (noting that the Constitution “places no value on discrimination” (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973))).

And this Court has upheld laws that prohibit sex discrimination, rejecting arguments that private clubs have a First Amendment right to exclude women. In

Roberts v. U.S. Jaycees, this Court emphasized that a state law banning public accommodations from discriminating based on sex was constitutional as a content-neutral regulation that “eliminat[es] discrimination and assur[es] . . . citizens equal access to publicly available goods and services.” 468 U.S. at 624. “That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.” *Id.* Even if enforcing antidiscrimination laws “causes some incidental abridgment of [an organization’s] protected speech, that effect is no greater than is necessary to accomplish the State’s legitimate purposes.” *Id.* at 628. Thus, “Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to [an organization] may have on the male members’ associational freedoms.” *Id.* at 623; see *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (explaining that a “slight infringement” on plaintiffs’ “right of expressive association . . . is justified because it serves the State’s compelling interest in eliminating discrimination against women”); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that Title VII’s bar on sex discrimination in hiring did not “infringe” a law firm’s “constitutional rights of expression or association”).

Notably, in none of these cases did the Court ever suggest that, although the government may lawfully restrict freedom of expression and freedom of association when applying viewpoint-neutral antidiscrimination laws, the cases would have been decided differently if the plaintiffs had included a free-exercise claim as well.

2. In 1990, this Court decided *Employment Division v. Smith* and held that if prohibiting or burdening the free exercise of religion “is not the object of [a law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” 494 U.S. at 878. In that case, the Court held that the Free Exercise Clause did not bar Oregon from “deny[ing] respondents unemployment compensation” under state law “when their dismissal results from use of [an illegal] drug” in accordance with their religious beliefs. *Id.* at 890.

The Court subsequently explained that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Lukumi Babalu Aye*, 508 U.S. at 531; see *Fulton*, 593 U.S. at 533 (“*Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.”). This Court has further elaborated that a “law is not generally applicable if it ‘invite[s]’ 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 (alteration in original) (quoting *Smith*, 494 U.S. at 884). In addition, a law “lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Id.* at 534.

Smith also made clear that the Constitution does not ordinarily empower reviewing courts to read religious exemptions into duly enacted state laws.

Indeed, “to say that a nondiscriminatory religious-practice exemption . . . is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.” *Smith*, 494 U.S. at 890. Echoing earlier cases discussed above, four members of the *Smith* Court emphasized that the Free Exercise Clause “does not ‘require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development.’” *Id.* at 900 (O’Connor, J., concurring in the judgment) (quoting *Bowen*, 476 U.S. at 699; and then citing *Lyng*, 485 U.S. at 449).

3. Even in post-*Smith* cases where this Court has limited government action on free-exercise grounds, the disputes have—unlike this case—most often involved overt discrimination against religion or a conclusion that government officials displayed anti-religion animus.

Several of this Court’s more recent free-exercise cases involved challenges to government programs that singled out religious individuals or institutions for differential treatment. In *Trinity Lutheran*, for example, the Missouri Department of Natural Resources enforced a policy that “expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” 582 U.S. at 462. In *Espinoza*, Montana’s “no-aid provision bar[red] religious schools from public benefits solely because of the religious character of the schools” and prohibited “parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school.” 591 U.S. at 476. And in *Carson*, Maine’s program of tuition-assistance payments “identif[ied] and exclude[d]

otherwise eligible schools on the basis of their religious exercise.” 596 U.S. at 789. The policies in those cases do not resemble Colorado’s nondiscrimination requirement, which applies to all schools that seek to join its public UPK program and is entirely neutral as between secular and religious preschools—both of which can receive funding under the scheme challenged here. Indeed, neither *Espinoza* nor *Carson* even mentioned *Smith*, let alone had occasion to conduct a general-applicability inquiry of the sort relevant here.

Nor does Colorado’s requirement reveal the sort of anti-religion animus this Court has found objectionable in other free-exercise cases. In *Masterpiece Cakeshop*, the Court concluded based on a hearing record that a state commission’s treatment of a complainant’s case bore “elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.” 584 U.S. at 634. And unlike the California scheme in *Tandon*, which restricted gatherings for “at-home religious exercise” while permitting commercial events of similar scale, Colorado’s UPK program does not contain “myriad exceptions and accommodations for comparable activities” that treat “secular activity more favorably than religious exercise.” 593 U.S. at 62-64. Rather, *all* preschools seeking to participate in Colorado’s UPK program must agree not to discriminate against applicant families based on gender identity or sexual orientation. That sort of general policy does not “treat[] some . . . secular [preschools] more favorably than . . . religious [preschools].” *Id.* at 63.

More broadly, well after *Smith*, this Court has continued to recognize the gravity of the government’s interest in eradicating discrimination to ensure

equality. See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (noting that provisions barring discrimination are “well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”). Recently, in *Fulton*, this Court confirmed explicitly that Philadelphia’s interest in ensuring “the equal treatment” of same-sex couples was a “weighty one, for [o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” 593 U.S. at 542 (alteration in original) (quoting *Masterpiece Cakeshop*, 584 U.S. at 631); see *Masterpiece Cakeshop*, 584 U.S. at 632 (“It is unexceptional that [a state] law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (“The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”).

Finally, Petitioners cite this Court’s decision in *Mahmoud*, arguing that it invokes a general “rule against religious-exercise-based benefits exclusions.” Pet’rs Br. 34. But *Mahmoud*, which concerned a challenge to a school board’s “no-opt-out policy” for classroom instruction on certain books, cannot be stretched that far. 606 U.S. at 563. There, this Court distinguished cases like *Bowen* and *Lyng* based on

careful attention to the specific factual scenario in which *Mahmoud* arose, emphasizing that the “operation of the public schools is not a matter of ‘internal affairs’” because it “implicates direct, coercive interactions between the State and its young residents.” *Id.* at 557 (citing *Bowen*, 476 U.S. at 699); *see id.* at 554-55 (recognizing the “potentially coercive nature of classroom instruction,” where the government “exerts great authority and coercive power” (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987))).⁴ Unlike regulations like Colorado’s that concern student enrollment and admissions, the direct classroom-instruction context involves schools’ “power to discipline [students] for misconduct.” *Id.* at 557; *see id.* (emphasizing that “questions of public school curriculum” are not “purely a matter of internal affairs” because they implicate freedom of speech and the Establishment Clause). This Court thus recognized that the “special character of the burden” in *Mahmoud* (and *Yoder*), which both concerned compulsory public-school instruction, required it to bypass *Smith*’s analysis and apply strict scrutiny. *See id.* at 564-65. Colorado’s UPK program, which provides benefits to secular and religious preschools alike, imposes no such burden.

If preschools can participate in Colorado’s voluntary funding program while opting out of any

⁴ Here, as in *Bowen*, “the objecting [parties] were not faced with penalties or ‘coerced by the Governmen[t] into violating their religious beliefs.’” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 692 n.5 (2020) (Alito, J., concurring) (alteration in original) (quoting *Lyng*, 485 U.S. at 449). Petitioners simply may not join the government’s voluntary program without complying with the nondiscrimination policy that program applies to all participating preschools.

contractual term that burdens their religious beliefs, the floodgates will open, as states could be required to set aside all manner of nondiscrimination and other policies they develop for their own programs. That would mark a significant step beyond *303 Creative LLC v. Elenis*, in which this Court held that a state antidiscrimination law could not compel a private business owner providing “expressive services” to fulfill orders “express[ing] views with which she disagrees.” 600 U.S. 570, 580, 597 (2023). This Court has never permitted private applicants seeking state funding to redesign the rules of government programs à la carte.

4. Colorado’s nondiscrimination requirement applies to all preschools seeking public UPK funding. As the district court found, that requirement does not admit of exceptions: “the Department has not created a formal mechanism for exceptions to the sexual-orientation and gender-identity aspects of the equal-opportunity requirement.” Pet. App. 144a; *cf. Fulton*, 593 U.S. at 537 (“The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given.”).

This program is thus markedly different from the government scheme at issue in *Fulton*, which expressly permitted carveouts to a Philadelphia nondiscrimination policy if “an exception is granted by the Commissioner . . . in his/her *sole discretion*.” *Id.* at 535 (emphasis added) (citation omitted); *cf. Pet. App.* 31a n.14 (“The real question . . . is whether the Department has created a system of individual . . . exemptions to the prohibition on discriminating based on sexual orientation and gender identity. It has not, and thus the law is still generally applicable.”); *id.* at 123a (“Here, there is no mechanism of individualized

exemptions to the equal-opportunity requirement.”); *id.* at 127a (“[N]o universal discretion has been authorized or exercised.”). The UPK program is thus a far cry from programs this Court has considered where “the inclusion of a formal system of entirely discretionary exceptions . . . renders [a] contractual non-discrimination requirement not generally applicable.” *Fulton*, 593 U.S. at 536. And it bears even less resemblance to other programs that built significant discretionary power into their core institutional design. *See Sherbert*, 374 U.S. at 400-01 (discussing a statutory “good cause” exception to South Carolina’s unemployment-compensation scheme).

* * *

In short, Petitioners’ claim that they must receive an exemption from this neutral and generally applicable nondiscrimination policy is supported by neither Founding-era sources nor this Court’s case law. This Court has never suggested, let alone held, that the First Amendment’s Free Exercise Clause allows individuals to avoid complying with a generally applicable nondiscrimination policy that is imposed equally on all participants. It should not start now.

CONCLUSION

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

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
PRAVEEN FERNANDES
DAVID H. GANS
JOSHUA D. BLECHER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1730 Rhode Island Ave. NW
Suite 1200
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

August 24, 2026

* Counsel of Record

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LIST OF *AMICI CURIAE*

Carlos A. Ball

Distinguished Professor of Law and Judge Frederick
Lacey Scholar,
Rutgers Law School

Katie Eyer

Vice Dean, Distinguished Professor of Law, and Judge
Guido Calabresi Scholar,
Rutgers Law School

Kent Greenfield

Professor of Law and Thomas F. Carney Distinguished
Scholar,
Boston College Law School

Gregory P. Magarian

Thomas and Karole Green Professor of Law,
Washington University in St. Louis School of Law

Kermit Roosevelt

David Berger Professor for the Administration of
Justice,
University of Pennsylvania Carey Law School